

## THIRD DIVISION

[ G.R. No. 158271, April 08, 2008 ]

### CHINA BANKING CORPORATION, PETITIONER, VS. ASIAN CONSTRUCTION AND DEVELOPMENT CORPORATION, RESPONDENT.

#### D E C I S I O N

##### AUSTRIA-MARTINEZ, J.:

Before the Court is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court filed by petitioner China Banking Corporation (China Bank) seeking to annul the Resolution<sup>[1]</sup> dated October 14, 2002 and the Resolution<sup>[2]</sup> dated May 16, 2003 of the Court of Appeals (CA) in CA-G.R. CV No. 72175.

The facts of the case:

On July 24, 1996, China Bank granted respondent Asian Construction and Development Corporation (ACDC) an Omnibus Credit Line in the amount of P90,000,000.00.<sup>[3]</sup>

On April 12, 1999, alleging that ACDC failed to comply with its obligations under the Omnibus Credit Line, China Bank filed a Complaint<sup>[4]</sup> for recovery of sum of money and damages with prayer for the issuance of writ of preliminary attachment before the Regional Trial Court (RTC) of Makati, Branch 138, docketed as Civil Case No. 99-796. In the Complaint, China Bank claimed that ACDC, after collecting and receiving the proceeds or receivables from the various construction contracts and purportedly holding them in trust for China Bank under several Deeds of Assignment, misappropriated, converted, and used the funds for its own purpose and benefit, instead of remitting or delivering them to China Bank.<sup>[5]</sup>

On April 22, 1999, the RTC issued an Order<sup>[6]</sup> granting China Bank's prayer for writ of preliminary attachment. Consequently, as shown in the Sheriff's Report<sup>[7]</sup> dated June 14, 1999, the writ of preliminary attachment was implemented levying personal properties of ACDC, i.e., vans, dump trucks, cement mixers, cargo trucks, utility vehicles, machinery, equipment and office machines and fixtures.

On March 27, 2000, upon motion of China Bank, the RTC issued a Summary Judgment<sup>[8]</sup> in favor of China Bank. ACDC filed its Notice of Appeal<sup>[9]</sup> dated April 24, 2000.

On June 15, 2000, China Bank filed a Motion to Take Custody of Attached Properties with Motion for Grant of Authority to Sell to the Branch Sheriff<sup>[10]</sup> with the RTC, praying that it be allowed to take custody of ACDC's properties for the purpose of selling them in an auction.<sup>[11]</sup> On June 20, 2000, ACDC filed its Opposition<sup>[12]</sup> to

the June 15, 2000 Motion arguing that there can be no sale of the latter's attached properties in the absence of a final and executory judgment against ACDC.

On August 25, 2000, China Bank partially appealed the Summary Judgment for not awarding interest on one of its promissory notes.<sup>[13]</sup> Records of the case were elevated to the CA.<sup>[14]</sup>

On April 18, 2002, China Bank filed a Motion for Leave for Grant of Authority to Sell Attached Properties<sup>[15]</sup> which the CA denied in the herein assailed Resolution dated October 14, 2002.

According to the CA, selling the attached properties prior to final judgment of the appealed case is premature and contrary to the intent and purpose of preliminary attachment for the following reasons: *first*, the records reveal that the attached properties subject of the motion are not perishable in nature; and *second*, while the sale of the attached properties may serve the interest of China Bank, it will not be so for ACDC. The CA recognized China Bank's apprehension that by the time a final judgment is rendered, the attached properties would be worthless. However, the CA also acknowledged that since ACDC is a corporation engaged in a construction business, the preservation of the properties is of paramount importance; and that in the event that the decision of the lower court is reversed and a final judgment rendered in favor ACDC, great prejudice will result if the attached properties were already sold.

China Bank filed a Motion for Reconsideration<sup>[16]</sup> which was denied in the herein assailed CA Resolution<sup>[17]</sup> dated May 16, 2003.

Hence, the present petition for review on *certiorari*, on the following ground:

THE HONORABLE COURT OF APPEALS RENDERED THE QUESTIONED RESOLUTIONS (*ANNEXES "A" and "B"*) IN A MANNER NOT IN ACCORD WITH THE PROVISIONS OF SECTION 11, RULE 57 OF THE RULES OF CIVIL PROCEDURE, AS IT SHELVED THE DEMANDS OF EQUITY BY ARBITRARILY DISALLOWING THE SALE OF THE ATTACHED PROPERTIES, UPHOLDING ONLY THE INTEREST OF RESPONDENT, IN UTTER PARTIALITY.<sup>[18]</sup>

Considering that the herein assailed CA Resolutions are interlocutory in nature as they do not dispose of the case completely but leave something to be done upon the merits,<sup>[19]</sup> the proper remedy should have been by way of petition for *certiorari* under Rule 65, as provided for in Section 1 (b), Rule 41 of the Rules of Court, as amended by A.M. No. 07-7-12-SC,<sup>[20]</sup> which provides:

Section 1. *Subject of appeal.* - An appeal may be taken from a judgment or final order that completely disposes of the case, or of a particular matter therein when declared by these Rules to be appealable.

No appeal may be taken from:

x x x x

(b) An interlocutory order;

x x x x

In any of the foregoing instances, the aggrieved party may file an **appropriate special civil action as provided in Rule 65**. (Emphasis supplied).

The present petition for review on *certiorari* should have been dismissed outright. However, in many instances, the Court has treated a petition for review on *certiorari* under Rule 45 as a petition for *certiorari* under Rule 65 of the Rules of Court, such as in cases where the subject of the recourse was one of jurisdiction, or the act complained of was perpetrated by a court with grave abuse of discretion amounting to lack or excess of jurisdiction.<sup>[21]</sup> The present petition does not involve any issue on jurisdiction, neither does it show that the CA committed grave abuse of discretion in denying the motion to sell the attached property.

Section 11, Rule 57 of the Rules of Court provides:

**Sec. 11.** *When attached property may be sold after levy on attachment and before entry of judgment.*- Whenever it shall be made to appear to the court in which the action is pending, upon hearing with notice to both parties, that the property attached is perishable, **or that the interests of all the parties to the action** will be subserved by the sale thereof, the court may order such property to be sold at public auction in such manner as it may direct, and the proceeds of such sale to be deposited in court to abide the judgment in the action. (Emphasis supplied)

Thus, an attached property may be sold after levy on attachment and before entry of judgment whenever it shall be made to appear to the court in which the action is pending, upon hearing with notice to both parties, that **the attached property is perishable or that the interests of all the parties to the action will be subserved by the sale of the attached property.**

In its Memorandum,<sup>[22]</sup> China Bank argues that the CA's notion of perishable property, which pertains only to those goods which rot and decay and lose their value if not speedily put to their intended use,<sup>[23]</sup> is a strict and stringent interpretation that would betray the purpose for which the preliminary attachment was engrafted.<sup>[24]</sup> Citing *Witherspoon v. Cross*,<sup>[25]</sup> China Bank invokes the definition of "perishable property" laid down by the Supreme Court of California as goods which decay and lose their value if not speedily put to their intended use; but where the time contemplated is necessarily long, the term may embrace property liable merely to material depreciation in value from other causes than such decay.

As stated in the Sheriff's Report<sup>[26]</sup> and Notices of Levy on Properties,<sup>[27]</sup> all of ACDC's properties which were levied are personal properties consisting of used vehicles, *i.e.*, vans, dump trucks, cement mixers, cargo trucks, utility vehicles, machinery, equipment and office machines and fixtures. China Bank insists that the attached properties, all placed inside ACDC's stockyard located at Silang, Cavite and the branch office in Mayamot, Antipolo City, are totally exposed to natural elements and adverse weather conditions.<sup>[28]</sup> Thus, China Bank argues, that should the

attached properties be allowed to depreciate, perish or rot while the main case is pending, the attached properties will continue losing their worth thereby rendering the rules on preliminary attachment nugatory.

The issue hinges on the determination whether the vehicles, office machines and fixtures are "perishable property" under Section 11, Rules 57 of the Rules of Court, which is actually one of first impression. No local jurisprudence or authoritative work has touched upon this matter. This being so, an examination of foreign laws and jurisprudence, particularly those of the United States where some of our laws and rules were patterned after, is in order.<sup>[29]</sup>

In *Mossler Acceptance Co. v. Denmark*,<sup>[30]</sup> an order of the lower court in directing the sale of attached properties, consisting of 20 automobiles and 2 airplanes, was reversed by the Supreme Court of Louisiana. In support of its contention that automobiles are perishable, *Mossler* offered testimony to the effect that automobile tires tend to dry-rot in storage, batteries to deteriorate, crankcases to become damaged, paint and upholstery to fade, that generally automobiles tend to depreciate while in storage.<sup>[31]</sup> Rejecting these arguments, the Supreme Court of Louisiana held that while there might be a depreciation in the value of a car during storage, depending largely on existing economic conditions, there would be no material deterioration of the car itself or any of its appurtenances if the car was properly cared for, and therefore it could not be said that automobiles were of a perishable nature within the intendment of the statute, which could only be invoked when the property attached and seized was of a perishable nature.<sup>[32]</sup>

With respect to the determination of the question on whether the attached office furniture, office equipment, accessories and supplies are perishable properties, the Supreme Court of Alabama in *McCreery v. Berney National Bank*<sup>[33]</sup> discussed the "perishable" nature of the attached properties, consisting of shelving, stock of drygoods and a complete set of store fixtures, consisting of counters iron safe, desk and showcases, to be within the meaning of "perishable" property under the Alabama Code which authorizes a court, on motion of either party, to order the sale, in advance of judgment, of perishable property which had been levied on by a writ of attachment.<sup>[34]</sup>

In *McCreery*, the Supreme Court of Alabama rejected the argument that the sale of the attached property was void because the term "perishable" property, as used in the statute, meant only such property as contained in itself the elements of speedy decay, such as fruits, fish, fresh meats, etc.<sup>[35]</sup> The Supreme Court of Alabama held that whatever may be the character of the property, if the court is satisfied that, either by reason of its perishable nature, or because of the expense of keeping it until the termination of the litigation, it will prove, or be likely to prove, fruitless to the creditor, and that the purpose of its original seizure will probably be frustrated, the sale of the attached property is justified.

*McCreery* applied the doctrine in *Millard's Adms. v. Hall*<sup>[36]</sup> where the Supreme Court of Alabama held that an attached property is perishable "if it is shown that, by keeping the article, it will necessarily become, or is likely to become, worthless to the creditor, and by consequence to the debtor, then it is embraced by the statute. It matters not, in our opinion, what the subject matter is. It may be cotton bales,