

THIRD DIVISION

[G.R. No. 136805, January 28, 2000]

**DIESEL CONSTRUCTION COMPANY, INC., PETITIONER, VS.
JOLLIBEE FOODS CORPORATION, RESPONDENT.**

DECISION

PANGANIBAN, J.:

The execution of a judgment pending appeal is an *exception* to the general rule that only a final judgment may be executed. An exceptional execution must be founded on "good reason," which rests on sound judicial discretion. The alleged financial distress of the prevailing juridical entity is not, by itself, a "good reason."

The Case

Before us is a Petition for Review under Rule 45 of the Rules of Court, assailing the September 21, 1998^[1] and the December 22, 1998^[2] Resolutions of the Court of Appeals in CA-GR CV No. 59486. The first Resolution disposed as follows:^[3]

"WHEREFORE, premises considered, the court *a quo* is hereby directed to issue the corresponding writ of execution upon the posting by [petitioner] and its approval of a bond in the sum of P10,000,000.00 which writ of execution shall however be stayed upon x x x filing [by the respondent] of a supersedeas bond in the amount of P15,000,000.00 conditioned upon the performance of the judgment in case it shall be finally sustained in whole or in part."

The second assailed Resolution denied petitioner's Motion for Reconsideration.^[4]

The Facts

On December 18, 1991, Petitioner Diesel Construction Company, Inc. (DCCI) instituted before the Regional Trial Court (RTC) of Makati City, Branch 61,^[5] an action^[6] for the recovery of escalated construction costs in the aggregate sum of P4.3 million, which it had allegedly incurred in the construction of buildings located in Batangas City and in the Municipality of Calamba, Laguna, owned by Respondent Jollibee Food Corporation (JFC). For the alleged failure of petitioner to complete these projects on time, JFC counterclaimed, in its Answer, recovery of damages and attorney's fees in the sum of P2.7 million.

At the pretrial, the parties agreed to reduce the issues to (1) whether DCCI had completed the Calamba and the Batangas City projects on time, and (2) whether DCCI was entitled to escalated construction costs.

After trial, the RTC rendered its judgment dated May 13, 1997, ruling that DCCI had

completed both projects on time and was entitled to escalated construction costs. The dispositive portion of the judgment reads:

"WHEREFORE, premises considered, judgment is hereby rendered for [petitioner] as against [respondent which] x x x is hereby ORDERED, as follows:

- 1) For the Calamba project, to pay [petitioner] the amount of P899,940.45 with interest of twelve (12%) per centum per annum computed from the time of the filing of the case;
- 2) For [the] Batangas City project, the amount of P3,000,677.28 with interest at the rate of twelve (12%) per centum per annum computed from the time of filing of this case;
- 3) To pay x x x the sum of P400,000.00 as and by way of attorney's fees; and,
- 4) To pay the cost of suit."^[7]

Contending that the RTC failed to order payment of extra work done, DCCI filed on July 14, 1997, a Notice of Appeal; and on July 7, 1997, a Motion for Execution Pending Appeal. In said Motion, it cited as "good reasons" its financial distress as a small business and -- to answer for damages JFC might sustain by reason of the grant of the Motion -- the posting of a bond equivalent to 20 percent of the total amount due. Respondent likewise filed its own Notice of Appeal on July 31, 1997, and actively opposed petitioner's prayer for execution pending appeal.

In a Special Order dated December 4, 1997, the trial court nevertheless allowed execution pending appeal on the finding that (1) DCCI was, as a matter of right, entitled to the payment of escalation cost; (2) JFC's appeal was interposed only to delay payment; and (3) petitioner would post a bond equivalent to 150 percent of the total amount of the judgment.^[8]

On January 16, 1998, JFC filed a Motion for Reconsideration with an alternative prayer that it be permitted to post a supersedeas bond pursuant to Section 3, Rule 39 of the Rules of Court. In its Order dated March 19, 1998, the RTC denied the Motion for Reconsideration on the ground that the filing of a counterbond was premature, as DCCI had yet to file its own bond.^[9] In view of both parties' appeals, the trial court forwarded the original records of the case to the appellate court for further proceedings.^[10]

On August 12, 1998, DCCI filed with the Court of Appeals a "Motion for Issuance of Premature Writ of Execution"^[11] grounded on the arguments that (1) the Special Order of December 5, 1997 had become final and executory for failure of JFC to seasonably question its propriety; and (2) DCCI was ready to file the required bond. In petitioner's own words, it was "[r]eady, willing and able to post a surety bond to be issued by Development Surety and Insurance Company, Incorporated in favor of [respondent] in the sum of P10.6 million or equivalent to 150% of the judgment award amounting to P7,079,038.07 to answer for any damages-that may be caused to [respondent] by the wrongful issuance thereof."^[12] In response to DCCI's Motion, JFC filed a Comment With Motion to Stay Execution By The Posting Of Supersedeas Bond.^[13]

As earlier adverted to, the CA, in its assailed Resolution of September 21, 1998,^[14]

directed the RTC to issue a writ of execution upon petitioner's posting of a P10 million bond, and to stay execution upon respondent's filing of a supersedeas bond of P15 million. DCCI filed a Motion for Reconsideration of this Resolution insofar as it allowed a stay of execution, which Motion the CA denied for lack of merit in the questioned Resolution of December 22, 1998.^[15]

Ruling of the Court of Appeals

In the first assailed Resolution, the Court of Appeals ordered immediate execution because JFC had failed to question by certiorari the Special Order granting it. However, as the liability of the respondent was yet to be determined on appeal, the CA granted a stay of execution upon respondent's posting of a supersedeas bond.

In the second assailed Resolution, the appellate court denied petitioner's Motion for Reconsideration of the stay of execution, because of "attendant circumstances x x x recited in the assailed resolution, viz."^[16]

"x x x Firstly, [respondent] first addressed [its] motion to stay execution to the court a quo which considered it as premature because [petitioner] has not as yet posted the required bond. Secondly, by the time [petitioner] was ready to post the bond, the records had already been transmitted to this Court. x x x [Petitioner] filed with this Court its 'Motion for Issuance of Premature Writ of Execution', dated July 28, 1998. And this probably prompted [respondent] to reiterate its motion to stay execution by posting of supersedeas bond. Having thus prodded this Court to act on its motion of July 28, 1998, it could not prevent it from acting on [respondent's] motion to stay execution, which is but an offshoot of its own motion."

The CA also rejected the imputation of forum-shopping. It held that when the petitioner posted the bond, the respondent could not file with the trial court its own motion to post a supersedeas bond since the records had already been elevated to the CA.

Hence, this Petition.^[17]

The Issues

In its Memorandum,^[18] the petitioner raises the following issues:^[19]

1. Whether or not under Section 3, Rule 39, of the Rules of Court an appellate court like the Honorable Court of Appeals has discretionary power to stay the discretionary execution issued by the trial court;
2. Whether or not a party in whose favor the discretionary execution was issued may be estopped by attendant circumstances from assailing the lack of authority/discretionary power of the appellate court to stay the discretionary execution issued by the trial court;
3. Whether or not the pendency of the appeal is a just and proper ground to stay the discretionary execution of a judgment under

Section 3, Rule 39 of the Rules of Court;

4. Whether or not the holding of the trial court that the Motion to Stay Execution by the Posting of A Supersedeas Bond is prematurely filed constitutes a denial thereof; and,
5. Whether or not the re-filing of the immediately preceding Motion with the Honorable Court of Appeals constitutes forum-shopping."

In its own Memorandum,^[20] respondent raises the procedural issue of whether recourse under Rule 45 is the proper remedy to question an Order granting a stay of execution pending appeal.

In sum, the parties raise the following issues: (1) whether a petition for review under Rule 45 is the proper remedy to question an order staying execution pending appeal; (2) whether the CA has jurisdiction to issue such order, and whether estoppel barred petitioner from questioning the former's jurisdiction; (3) whether the pendency of an appeal or the posting of a supersedeas bond justifies a stay of execution pending appeal; and (4) whether respondent is guilty of forum-shopping.

The Court's Ruling

We find no reason to grant execution pending appeal.

First Issue: **Interlocutory Orders**

A petition for review under Rule 45 is the proper remedy to question *final* judgments, not interlocutory orders, of the Court of Appeals. We agree with respondent that the assailed Resolutions granting a stay of execution are interlocutory orders; therefore, Rule 45 is not the proper vehicle to assail them before this Court.^[21] The RTC Decision, which has ruled on petitioner's entitlement to escalated construction cost, was challenged in the original appeal before the CA, where the case is still pending.

On the other hand, the subjects of this Petition are the Resolution dated September 21, 1998, insofar as it granted a stay of execution pending appeal; and that of December 22, 1998, which denied reconsideration of the first order. These Resolutions do not constitute "final orders or resolutions," as explained in *De Ocampo v. Republic*, from which we quote:

"An order is deemed final when it finally disposes of the pending action so that nothing more can be done with it in the lower court (*Mejia v. Alimorong*, 4 Phil. 572; *Insular Government v. Roman Catholic Bishop of Nueva Segovia*, 17 Phil. 487; *People v. Macaraig*, 54 Phil. 904). In other words, a final order is that which gives an end to the litigation (*Olsen & Co. v. Olsen*, 48 Phil. 238). The test to ascertain whether an order is interlocutory or final is: does it leave something to be done in the trial court with respect to the merits of the case? If it does, it is interlocutory; if it does not, it is final (*Moran*, Comments on the Rules of Court, Vol. 1, 3rd ed. pp. 806-807). A final order is that which disposes of the whole subject-matter or terminates the particular proceedings or action, leaving

nothing to be done but to enforce by execution what has been determined (2 Am. Jur., section 22, pp. 861-862). (Reyes v. De Leon, G.R. No. L-3720, June 24, 1952)."[22]

Interlocutory orders are those that determine incidental matters which do not touch on the merits of the case or put an end to the proceedings. It is well-settled that a petition for certiorari under Rule 65,[23] not Rule 45, is the proper remedy to question an improvident order granting execution pending appeal and thereby relieve the adverse party from the immediate effects thereof. The same principle applies to a stay of such execution.

Under Rule 45 of the Rules of Court, review by this Court of a judgment, a final order or a resolution is discretionary.[24] It is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons for it. Some of these reasons are: (1) when the court *a quo* has decided a question of substance, which has not theretofore been determined by the Supreme Court, or when it has decided it in a way probably not in accord with law or with the applicable decisions of the Court; or (2) when the court *a quo* has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of the power of supervision.[25]

Before granting a petition due course or outrightly striking it down, the Court reserves the right to hear the side of the adverse party(ies). For this purpose, it may require or allow the filing of such pleadings, briefs, memoranda or documents as it may deem necessary within periods and under conditions which it may consider appropriate.[26]

Hence, in its Resolution of March 10, 1999, this Court required the respondent to comment on the Petition and expunged the latter's Motion to Dismiss and petitioner's Comment/Opposition to the said Motion. Section 5 of Rule 56 allows the filing of a motion to dismiss, but such motion may not be entertained if this Court, in the exercise of its sound discretion, requires respondent to comment.

Be that as it may, in the exercise of our judicial discretion, we shall treat this matter as a petition for certiorari under Rule 65 of the Rules of Court, in order to resolve the substantive and important issues being raised.

Second Issue: **Discretionary Jurisdiction**

Petitioner argues that under Section 3 of Rule 39, the discretionary power to order a stay of execution is "compartmentalized" in the court *that granted execution pending appeal*. Petitioner further contends that when it filed its Motion for Issuance of Premature Execution, it effectively asked the CA to perform a ministerial duty to implement the trial court's Special Order.

We disagree. The CA may not be compelled to enforce a Special Order issued by the trial court.[27] The CA has its own separate and original discretionary jurisdiction to grant or to stay execution pending appeal, except in civil cases decided under the Rules on Summary Procedure and in other cases when the law or the Rules provide