G.R. Nos. 217126-27 – *CONCHITA CARPIO MORALES, IN HER CAPACITY AS OMBUDSMAN, Petitioner, v. COURT OF APPEALS (SIXTH DIVISION), and JEJOMAR ERWIN S. BINAY, JR., Respondents.*

Promulgated:
November 10, 2015

x- x

CONCURRING AND DISSENTING OPINION

BERSAMIN, *J.*:

I am writing this separate opinion to memorialize my concurrence with the declaration of the ineffectiveness of the first paragraph of Section 14 of Republic Act No. 6770, and of the unconstitutionality of the second paragraph thereof. The main opinion has been written well by our esteemed colleague, Associate Justice Estela M. Perlas-Bernabe, who has exhibited her scholarly bent once again. But let me assure my colleagues in the Majority that if I submit this concurrence, I do not mean to diminish in any way or degree the forcefulness and correctness of the justification for the declaration. I simply want to underscore that Section 14 of Republic Act No. 6770 should be struck down for authorizing the undue interference with the prerogatives of the courts of law to adopt whatever means were allowed by law and procedure to exercise their jurisdiction in the cases properly cognizable by them.

My dissent focuses on the main opinion's re-examination of the doctrine of condonation. This controversy does not call for the revisit of the doctrine, and does not warrant its eventual abandonment. For the Court to persist in the re-examination, as it does now, and to announce its abandonment of the doctrine despite the lack of the premise of justiciability is to indulge in conjecture or in unwarranted anticipation of future controversies. We should refrain from the re-examination.

The Ombudsman's supplemental petition raised condonation for the first time but only to support her insistence that the CA could not validly rely on the doctrine of condonation to justify its issuance of the injunction. She maintained then that condonation was a matter of defense to be properly raised only in the appropriate administrative proceeding, *viz*:

> 6. It must be further emphasized that the condonation doctrine is irrelevant in the Ombudsman's determination of whether the evidence of guilt is strong in issuing preventive suspension orders. Said doctrine does not go into the heart of subject-matter jurisdiction. Neither can it oust the Ombudsman of her jurisdiction which she has already acquired. Private

> respondent's claim of condonation doctrine is equally a matter of defense which, like any other defense, could be raised in the proper pleading, could be rebutted, and could be waived.
>
> As a defense, condonation should be passed upon after a decision on the administrative proceedings, not this early in the proceeding.
>
> 7. The condonation doctrine, however, cannot abate the issuance of a preventive suspension order, precisely because an order of preventive suspension does not render a respondent administratively liable. A respondent may be preventively suspended, yet may be exonerated in the end.
>
> 8. At all events, there is no condonation because private respondent committed the acts subject of the complaint after his re-election in 2013, as was argued by petition in public respondent Court of Appeals.
>
> 9. As mentioned earlier, there is no condonation. The assailed act (i.e. payment), by private respondent's own admission during the proceedings before public respondent Court of Appeals, took place during the period of June and July 2013, which was after his re-election in May 2013.[1]

The Ombudsman again discussed the doctrine of condonation at some length in her Memorandum as the fourth and last argument presented on the issue of the propriety of the temporary restraining order and the writ of preliminary injunction.[2] She reiterated, however, that the doctrine was only a matter of defense that was relevant only in imposing an administrative penalty on the respondent public elective official, to wit:

> 165. Thus, in deciding that the evidence of respondent Binay's guilt is strong, petitioner did not take into consideration the so-called "condonation doctrine" the way respondent Court of Appeals did in its Third Resolution. The condonation doctrine is applicable and relevant only to the imposition of an administrative penalty, not to the issuance of a preventive suspension, the latter being merely a preliminary step in an administrative investigation.
>
> 166. Since a preventive suspension does not hold a public officer liable, it will not be affected by any "condonation" that the electorate may extend to the public officer. Verily, for purposes of aiding an investigation, a public officer may be preventively suspended even as, ultimately, he or she will be exonerated from administrative liability due to the condonation doctrine. CONDONATION IS A MATTER OF DEFENSE – to be positively alleged and to be weighed according to the evidence – during the administrative proceedings, and not at the very preliminary stage thereof.[3]

---

1 Supplemental Petition for Certiorari, p. 4.
2 Memorandum, pp. 646-734.
3 Id. at 703-704.

I agree with the Ombudsman. The question of grave abuse of discretion on the part of the CA could be settled not by re-examining and overturning the doctrine of condonation but by reference to Section 24 of the Republic Act No. 6770. It would be plain error for us to determine whether the Court of Appeals (CA) gravely abused its discretion or not on the basis of the doctrine of condonation.

The general investigatory power of the Ombudsman is decreed by Section 13 (1), Article XI of the 1987 Constitution,[4] while her statutory mandate to act on administrative complaints is founded on Section 19 of Republic Act No. 6770, *viz.*:

> Section 19. Administrative complaints. — The Ombudsman shall act on all complaints relating, but not limited, to acts or omissions which:
>
> 1. Are contrary to law or regulation;
>
> 2. Are unreasonable, unfair, oppressive or discriminatory;
>
> 3. Are inconsistent with the general course of an agency's functions, though in accordance with law;
>
> 4. Proceed from a mistake of law or an arbitrary ascertainment of facts;
>
> 5. Are in the exercise of discretionary powers but for an improper purpose; or
>
> 6. Are otherwise irregular, immoral or devoid of justification.

In line with the power to investigate administrative cases, the Ombudsman is vested with the authority to preventively suspend respondent public officials and employees pursuant to Section 24 of Republic Act No. 6770, which provides:

> Section 24. Preventive Suspension. — The Ombudsman or his Deputy may preventively suspend any officer or employee under his authority pending an investigation, if in his judgment the evidence of guilt is strong, and (a) the charge against such officer or employee involves dishonesty, oppression or grave misconduct or neglect in the performance of duty; (b) the charges would warrant removal from the service; or (c) the respondent's continued stay in office may prejudice the case filed against him.
>
> The preventive suspension shall continue until the case is terminated by the Office of the Ombudsman but not more than six (6)

---

[4] Sec. 13. The Office of the Ombudsman shall have the following powers, functions, and duties:
(1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient; x x x

> months, without pay, except when the delay in the disposition of the case by the Office of the Ombudsman is due to the fault, negligence or petition of the respondent, in which case the period of such delay shall not be counted in computing the period of suspension herein provided.

It is important to note, however, that the Ombudsman has no authority to issue the preventive suspension order in connection with criminal investigations of government officials or employees because such authority rests in the courts in which the criminal cases are filed.[5]

Under Section 24, *supra*, two requisites must concur to render the preventive suspension order valid. The first requisite is unique because it can be satisfied in only one way, which is that the evidence of guilt is strong in the judgment of the Ombudsman or the Deputy Ombudsman. But the second requisite may be satisfied in three different ways, namely: (1) that the offense charged involves dishonesty, oppression or grave misconduct or neglect in the performance of duty; or (2) the charge would warrant removal from the service; or (3) the respondent's continued stay in office may prejudice the case filed against him or her.[6]

Respondent Jejomar Erwin S. Binay, Jr., along with other officers and employees of the City of Makati, were administratively charged in the Office of the Ombudsman with grave misconduct, serious dishonesty, and conduct prejudicial to the best interest of the service.[7] In her joint order dated March 10, 2015, the Ombudsman stated that the requisites for the issuance of the preventive suspension order against Binay, Jr. and his co-respondents were satisfied, specifically:

> The **first** requisite is present in these cases, as shown by the supporting evidence attached as Annexes to the Complaint. These Annexes include, among other things, sworn statements of *alleged* losing bidders and of some members of the Makati City BAC attesting to the irregularities in the subject procurement; documents negating the purported publication of bids; and disbursement vouchers, checks, and official receipts showing disbursement of public funds by the city government.
>
> As regard the **second** requisite, all the circumstances enumerated therein are likewise present. The Complaint charges respondents with Grave Misconduct, Serious Dishonesty and Conduct Prejudicial to the Best Interest of the Service. If proven true, they constitute grounds for removal from public service under the Revised Rules on Administrative Cases in the Civil Service. Moreover, since the respondents' respective positions give them access to public records and influence on possible witnesses, respondents' continued stay in office may prejudice the cases

---

5 See *Luciano v. Provincial Governor*, No. L-30306, June 20, 1969, 28 SCRA 517.

6 *Office of the Ombudsman v. Evangelista*, G.R. No. 177211, March 13, 2009, 581 SCRA 350.

7 Docketed as OMB-C-A-15-0058, OMB-C-A-15-0059, OMB-C-A-15-0060, OMB-C-A-15-0061, OMB-C-A-15-0062, OMB-C-A-15-0063.

> filed against them. Thus, their *preventive suspension without pay for a period of six (6) months* is in order.

When he assailed the preventive suspension order by petition for *certiorari* in the CA, Binay, Jr. alleged that the preventive suspension order was illegal and issued with grave abuse of discretion because: (1) it contravened well-settled jurisprudence applying the doctrine of condonation; and (2) evidence of his guilt was not strong. He prayed that a temporary restraining order or writ of preliminary injunction be issued to enjoin the implementation of the preventive suspension order.

The CA heeded Binay, Jr.'s prayer for injunctive reliefs chiefly on the basis of the doctrine of condonation. In the resolution promulgated on March 16, 2015, the CA, citing the pronouncement in *Garcia, Jr. v. Court of Appeals*,[8] granted Binay, Jr.'s application for the temporary restraining order, holding as follows:

> In *Garcia v. Court of Appeals* (GR No. 185132, April 24, 2009), the Supreme Court held that suspension from office of an elective official, whether as a preventive measure or as a penalty will undeservedly deprive the electorate of the services of the person they have conscientiously chosen and voted into office.
>
> The Supreme Court in said case likewise found serious and urgent the question, among other matters, of whether the alleged acts were committed in the previous term of office of petitioner therein. This is because if it were established that the acts subject of the administrative complaint were indeed committed during petitioner's prior term, then following settled jurisprudence, he can no longer be administratively charged. It further declared imperative on the part of the appellate court, as soon as it was apprised of the said considerable grounds, to issue an injunctive writ so as not to render moot, nugatory and ineffectual the resolution of the issues in the *certiorari* petition. (*Garcia,* supra)
>
> The Supreme Court also declared that it would have been more prudent on the part of the CA, on account of the extreme urgency of the matter and the seriousness of the issues raised in the certiorari petition, to issue a TRO while it awaits the respective comments of the respondents and while it judiciously contemplates on whether or not to issue a writ of preliminary injunction. It pointed out that the basic purpose of a restraining order is to preserve the status quo until the hearing of the application for preliminary injunction. That, it is a preservative remedy for the protection of substantive rights and interests. (*Garcia,* supra)
>
> In view of the seriousness of the issues raised in the Petition for Certiorari and the possible repercussions on the electorate who will unquestionably be affected by suspension of their elective official, **the Court resolves to grant petitioner's prayer for a Temporary Restraining Order for a period of sixty (60) days from notice hereof,**

---

[8] G.R. No. 185132, April 24, 2009.

> **conditioned upon the posting by petitioner of a bond in the amount of FIVE HUNDRED THOUSAND PESOS (₱500,000.00)**[9]

In ultimately granting the writ of preliminary injunction through its April 6, 2015 resolution, the CA, relying on the doctrine of condonation adopted in *Garcia, Jr.*; *Joson III v. Court of Appeals*;[10] *Aguinaldo v. Santos*;[11] and *Salalima v. Guingona, Jr.*,[12] explained:

> *Garcia* was simply an echo of teachings in *Joson v. Court of Appeals* (G.R. No. 160652, February 13, 2006) where the High Court declared that suspension from office of an elective official would deprive the electorate of the services of the person they have voted into office.
>
> Along this line, the concept of condonation, as advocated by petitioner and opposed by public respondent Ombudsman, will assume resonance.
>
> Premised on *Aguinaldo, Salalima* and *Garcia,* petitioner asserted that the public respondent Ombudsman can hardly impose preventive suspension of petitioner, given his election in 2010 and re-election in 2013 as Makati City Mayor, relative to his perceived illegal participation in anomalous activities for the Makati City Hall Building II project from 2007 to 2013.
>
> x x x x
>
> To reiterate, there was no disagreement that petitioner was elected in 2010 and re-elected as City Mayor of Makati in 2013. The acts constitutive of the charges in the Complaint pertained to events from November 8, 2007, when City Ordinance No. 2007-A-015 appropriated ₱1,240,000,000.00 as supplemental budget for 2007. From this budget, ₱400,000,000.00 was allocated for the parking building. It was allegedly during this time that a Negotiated Contract for the architectural and engineering services were negotiated and approved. Disbursements allegedly favored Hilmarc and MANA amidst irregularities in the bidding process during the term of petitioner as City Mayor of Makati.
>
> Yet, to subscribe to public respondent Ombudsman's submission that condonation can only be appreciated by the investigating body *after* it is ventilated as an exculpation by petitioner and *considered solely* by public respondent, following the exercise of its investigatory power, will ignore the Court's constitutional power and duty to evaluate the factual and legal foundations for, nay, impediments to, a preventive suspension in an administrative case.[13]

In my view, however, the CA erroneously banked on the pronouncements in *Garcia, Jr.*, *Joson III*, *Aguinaldo*, and *Salalima* to

---

9 CA Resolution dated March 16, 2015, pp. 4-5.
10 G.R. No. 160652, February 13, 2006, 482 SCRA 360.
11 G.R. No. 94115, August 21, 1992, 212 SCRA 768.
12 G.R. No. 117589-92, May 22, 1996, 257 SCRA 55.
13 CA Resolution dated April 6, 2015, pp. 6-10.

espouse the doctrine of condonation as the basis to issue the injunctive writs under its resolutions promulgated on March 16, 2015 and April 6, 2015. In both *Aguinaldo* and *Salalima*, the Court applied the doctrine of condonation to avoid the *imposition* of administrative liability upon re-elected public officials. Specifically, the Court held in *Aguinaldo* that:

> Petitioner's re-election to the position of Governor of Cagayan has rendered the administrative case pending before Us moot and academic. It appears that after the canvassing of votes, petitioner garnered the most number of votes among the candidates for governoer of Cagayan province. x x x
>
> x x x x
>
> Clearly then, the rule is that a public official cannot be removed for administrative misconduct committed during a prior term, since his re-election to office operates as a condonation of the officer's previous misconduct to the extent of cutting off the right to remove him therefor. The foregoing rule, however, finds no application to *criminal* cases pending against petitioner for acts he may have committed during the failed coup.[14]

while in *Salalima*, the Court maintained that:

> xxx [A]ny administrative liability which petitioner Salalima might have incurred in the execution of the retainer contract in O.P. Case No. 5469 and the incidents related therewith and in the execution on 6 March 1992 of a contract for additional repair and rehabilitation works for the Tabaco Public Market in O.P. Case No. 5450 are deemed extinguished by his reelection in the 11 May 1992 synchronozed elections. So are the liabilities, if any, of petitioner members of the Sangguniang Panlalawigan ng Albay,who signed Resolution No. 129 authorizing petitioner Salalima to enter into the retainer contract in question and who were reelected in the 1992 elections. This is, however, without prejudice to the institution of appropriate civil and criminal cases as may be warranted by the attendant circumstances. x x x[15]

It is clear to me that, based on the language and the factual milieu of *Aguinaldo* and *Salalima*, which both cited *Pascual v. Provincial Board of Nueva Ecija*,[16] and of other akin rulings,[17] condonation shall apply only in case of the re-election of a public officer who is sought to be permanently removed from office as a result of his misconduct, not while such public officer is undergoing investigation. Condonation necessarily implies that the condoned act has already been found to have been committed by the public

---

14 *Aguinaldo v. Santos*, G.R. No. 94115, August 21, 1992, 212 SCRA 768

15 *Salalima v. Guingona, Jr.*, G.R. No. 117589-92, May 22, 1996, 257 SCRA 55, 116.

16 106 Phil. 467 (October 31, 1959).

17 *Lizares v. Hechanova*, No. L-22059, May 17, 1966, 17 SCRA 58; *Office of the Ombudsman v. Torres*, G.R. No. 168309, January 29, 2008, 543 SCRA 46; *Garcia v. Mojica*, G.R. No. 139043, September 10, 1999, 314 SCRA 207.

officer. Hence, condonation applies to the penalty or punishment imposed *after the conduct of an administrative investigation*. Under the circumstances, the pronouncements in *Aguinaldo, Salalima* and the others could not be applicable to the preventive suspension order issued to Binay, Jr. pending his administrative investigation because preventive suspension pending the conduct of an investigation was not yet a penalty in itself, but a mere measure of precaution to enable the disciplining authority to investigate the charges by precluding the respondent from influencing the witnesses against him.[18]

It is worth emphasis that preventive suspension is distinct from the penalty of suspension. The former is imposed on a public official during the investigation while the latter, as a penalty, is served after the *final* disposition of the case.[19] The former is not a punishment or penalty for misconduct in office, but a merely preventive measure, or a preliminary step in the administrative investigation.[20]

As I see it, the CA misconstrued the milieu in *Garcia, Jr.* and *Joson III* as an application of the doctrine of condonation. The Court notably stated in *Garcia, Jr.* and *Joson III* that "suspension from office of an elective official would deprive the electorate of the services of the person they voted into office" in the context of determining the propriety of the issuance of the preventive suspension order. In other words, the statement only served to remind the Ombudsman to issue the preventive suspension orders with utmost caution in view of the gravity of the effects of suspending an incumbent elective local official. Hence, *Garcia, Jr.* and *Joson III* did not apply the doctrine of condonation.

I further underscore that the CA was then only resolving Binay, Jr.'s application for injunctive reliefs against the preventive suspension order issued by the Ombudsman. At that point, the CA's application of the doctrine of condonation was irrelevant and unnecessary.

A preliminary injunction is an order granted at any stage of an action prior to the judgment or final order requiring a party or a court, agency or a person to refrain from a particular act or acts.[21] The requirements for the issuance of a writ of preliminary injunction or temporary restraining order

---

[18] *Board of Trustees of the Government Service Insurance System v. Velasco*, G.R. No. 170463, February 2, 2011, 641 SCRA 372, 387.

[19] *Villaseñor v. Sandiganbayan*, G.R. No. 180700, March 4, 2008, 547 SCRA 658, 667.

[20] Section 24 of Rule XIV of the Omnibus Rules Implementing Book V of the Administrative Code of 1987 (Executive Order No. 292)

[21] Section 1, Rule 58 of the *Rules of Court.*

are clearly set forth in Section 3, Rule 58 of the *Rules of Court*.[22] The sole objective of the writ of preliminary injunction is to preserve the *status quo* until the merits of the case can be heard fully. The writ of preliminary injunction is generally based solely on initial and incomplete evidence;[23] hence, it should not determine the merits of a case, or decide controverted facts, for, being a preventive remedy, it only seeks to prevent threatened wrong, further injury, and irreparable harm or injustice until the rights of the parties can be settled.[24] As held in *Saulog v. Court of Appeals*,[25] it is sufficient that:

> x x x for the court to act, there must be an existing basis of facts affording a present right which is directly threatened by an act sought to be enjoined. And while a clear showing of the right claimed is necessary, its existence need not be conclusively established. In fact, the evidence to be submitted to justify preliminary injunction at the hearing thereon need not be conclusive or complete but need only be a sampling intended merely to give the court an idea of the justification for the preliminary injunction pending the decision of the case on the merits. This should really be so since our concern here involves only the proprietary of the preliminary injunction and not the merits of the case still pending with the trial court.
>
> **Thus, to be entitled to the writ of preliminary injunction, the private respondent needs only to show that it has the ostensible right to the final relief prayed for in its complaint** x x x. (bold emphasis supplied.)

By relying on the doctrine of condonation, therefore, the CA went beyond the parameters for determining whether or not to issue the injunctive writ. To recall, Binay, Jr. had filed his petition for *certiorari* in the CA primarily to assail the validity of the preventive suspension order. What was raised for the CA to determine was whether or not the Ombudsman satisfactorily complied with the requisites imposed by Section 24 of Republic Act No. 6770 to establish that Binay, Jr. and his co-respondents had the ostensible right to the final relief prayed for in their petition, which was the nullification or lifting of the preventive suspension order. In this regard, the CA plainly exceeded its jurisdiction.

---

[22] Section 3. *Grounds for issuance of preliminary injunction*. - A preliminary injunction may be granted when it is established:

(a) That the applicant is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts, either for a limited period or perpetually;

(b) That the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant; or

(c) That a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.

[23] *Unilever Philippines, (PRC), Inc. v. Court of Appeals*, G.R. No. 119280, August 10, 2006.

[24] *Bank of the Philippine Islands v. Hontanosas, Jr.*, G.R. No. 157163, June 25, 2014.

[25] G.R. No. 119769, September 18, 1996, 262 SCRA 51.

In the meanwhile, the Ombudsman found Binay, Jr. administratively liable, and dismissed him from the service. By such dismissal, the questions raised against the CA's issuance of the writ of preliminary injunction against the Ombudsman were rendered moot and academic. I join the Majority in saying that the preventive suspension order, being an ancillary issuance, was dissolved upon the Ombudsman's resolution of the administrative charges on the merits. Thus, to dwell on the preventive suspension of Binay, Jr. and his co-respondents any further would be superfluous, for, as the Court said in *Philippine Savings Bank v. Senate Impeachment Court*:[26]

> It is a rule of universal application that courts of justice constituted to pass upon substantial rights will not consider questions in which no actual interests are involved; they decline jurisdiction of moot cases. And where the issue has become moot and academic, there is no justiciable controversy, so that a declaration thereon would be of no practical use or value. **There is no actual substantial relief to which petitioners would be entitled and which would be negated by the dismissal of the petition.**

In short, the Court should excuse itself from exercising jurisdiction because the main case, the administrative proceeding against the respondents, has already been decided by the Ombudsman on the merits.

IN VIEW OF THE FOREGOING, I **VOTE** to **PARTIALLY GRANT** the petition for *certiorari* and prohibition, and, accordingly, **SET ASIDE** the Resolution promulgated on April 6, 2015 by the Court of Appeals.

I further **VOTE** to **DISSOLVE** the writ of preliminary injunction issued on April 8, 2015 in C.A.-G.R. SP No. 139453; and to **AFFIRM** the Resolution promulgated on March 20, 2015 in C.A.-G.R. SP No. 139504.

LUCAS P. BERSAMIN
Associate Justice

[26] G.R. No. 200238, November 20, 2012, 686 SCRA 35.