REPUBLIC OF THE PHILIPPINES
SUPREME COURT
Manila

SECOND DIVISION

NOTICE

Sirs/Mesdames:

Please take notice that the Court, Second Division, issued a Resolution dated **17 February 2021** *which reads as follows*:

"**G.R. No. 211448** ***(M.E. Sicat Construction, Inc. v. Biwater [Malaysia] SDN. BHD).*** – This is a petition for *certiorari* under Rule 65 imputing grave abuse of discretion against the Court of Appeals *(CA)* in promulgating its September 26, 2013 Decision[1] and February 19, 2014 Resolution[2] in CA-G.R. SP No. 127085, which set aside the June 21, 2012 Resolution[3] of the Regional Trial Court of Quezon City, Branch 218 *(RTC)* in Civil Case No. Q-11-70477. The CA held that the arbitration clause in the Supply Agreements entered by the parties herein does not apply in the Complaint for Sum of Money filed by respondent.

Antecedents

In 2009, Manila Water Company, Inc. *(Manila Water)* awarded three (3) contracts in favor of M.E. Sicat Construction, Inc., *(petitioner)* namely:

(1) Sludge Treatment Facility of the Balara Water Treatment Plant;

(2) Capacity and Process Optimization at Balara Water Treatment Plant 1 Filter Bed Upgrade; and

(3) Capacity and Process Optimization at Balara Water Treatment Plant 2 Filter Bed Upgrade.

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[1] *Rollo*, pp. 40-48; penned by Associate Justice Jose C. Reyes, Jr. (a retired Member of this Court) with Associate Justices Mario V. Lopez (now a Member of this Court) and Socorro B. Inting, concurring.
[2] Id. at 50.
[3] Id. at 104-106; penned by Judge Luis Zenon Q. Maceren.

To implement these projects, petitioner entered into Supply Agreements[4] with Biwater (Malaysia) SDN BHD *(respondent)*, a foreign corporation based in Kuala Lumpur, Malaysia, on September 2, 2009[5] and April 23, 2010.[6] The parties stipulated that 30 days upon submission of invoices, petitioner shall make payments to respondent within seven (7) days from receipt of payment from Manila Water. The parties also agreed to a retention of ten percent (10%) of the approved cost of goods in each claim, to be withheld by petitioner and released to respondent upon the final acceptance of the goods.[7]

It appears that petitioner had not been able to make prompt payments. After several meetings and negotiations, petitioner through its President, Michael Sicat *(Sicat)*, and respondent agreed on July 27, 2010 to a Recovery Plan[8] as follows:

> 1. For all billings (for both Sludge and Filter projects) [M.E. Sicat] will transmit the whole amount to Biwater (excluding VAT deduction).
>
> 2. All recovery of retention are reserved to Biwater.
>
> 3. Above to take place until such times as monies owed to Biwater have been fully recovered (as at 9th July Php 123,456,496.62).
>
> 4. Above payments are in addition to the normal project monthly progress claims which will be paid on time and in full.[9]

Despite the Recovery Plan, petitioner continued to be slow in making payments to respondent.[10]

On August 27, 2010, the parties made supplemental arrangements under a Repayment Plan providing that:

> x x x x
>
> C) [M.E. SICAT] TO NOTIFY BIWATER OF PAYMENT RECEIVED FROM MANILA WATER WITHIN 2 DAYS OF RECEIPT OF PAYMENT.

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[4] Id. at 51-74.
[5] Id. at 53.
[6] Id. at 60 and 68.
[7] Id. at 53, 62 and 70.
[8] Id. at 147.
[9] Id.
[10] Id. at 109-110.

D) ALL PAYMENTS FROM MANILA WATER BE BANKED IN A BANK ACCOUNT WHERE BIWATER ARE CO-SIGNATORIES–USE HSBC (WITH CLIFF ADDED AS BIWATER'S SIGNATORY) OR OPEN AN ACCOUNT WITH ANOTHER BANK WITHCLIFF/STEVE PANG AS BIWATER'S SIGNATORIES.

E) COPY OF ALL CLAIMS TO MANILA WATER BE FORWARDED TO BIWATER ON A MONTHLY BASIS.

F) COPY OF ALL CLAIMS APPROVED BY MANILA WATER BE FORWARDED TO BIWATER ON A MONTHLY BASIS.[11]

While petitioner initially complied with its commitments under the Repayment Plan, it subsequently reneged on its obligation to make the agreed bank deposits.[12] Respondent's representative again met with Sicat on June 1, 2011 in Manila and drew an agreement as reflected in the electronic mail dated June 13, 2011 addressed to Sicat as follows:

> [M. E. Sicat] debt repayments to Biwater to continue as previously agreed i.e., all [Manila Water] payments (in total) on the Balara Projects to be paid to Biwater as received from [Manila Water] without delay, including all VAT payments.
>
> Debt repayments to Biwater by [M. E. Sicat] as from 1st June 11 will be guaranteed by [petitioner] to be a minimum of Php 6.5m per month. [M. E. Sicat] will attempt to improve of this schedule with a view to repay as quickly as possible.
>
> [Manila Water] payments (in total) on the Balara Projects to include all current and any future VO's (yet to be agreed with [Manila Water]).[13]

Despite the subsequent agreements, petitioner continued in defaulting from its payments. Thus, after sending a final demand to pay[14] which remained unheeded, respondent filed a Complaint[15] for collection of sum of money with prayer for issuance of a writ of preliminary attachment against respondent.

Instead of filing an answer, petitioner filed a Motion to Dismiss[16] based on the following grounds: (1) lack of cause of action/prematurity due to noncompliance with the provisions of the Supply Agreement, specifically,

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[11] Id. at 148.
[12] Id. at 111.
[13] Id. at 150.
[14] Id. at 151-153.
[15] Id. at 107-115.
[16] Id. at 185-191.

referral to arbitration; and (2) lack of legal personality to bring an action because respondent is a foreign corporation not licensed to do business in the Philippines. Respondent filed its corresponding Opposition.[17]

RTC Ruling

In its June 21, 2012 Resolution,[18] the trial court granted the motion to dismiss in the following manner:

> **WHEREFORE**, Defendant's "Motion to Dismiss" is hereby GRANTED. The case is hereby dismissed without prejudice.
>
> SO ORDERED.[19]

The RTC held that arbitration should be first complied with considering that the Repayment Plan was a derivative of the Supply Agreements. As such, the arbitration clause in the agreements shall apply.

Respondent's motion for reconsideration was likewise denied under the trial court's August 17, 2012 Resolution.[20]

CA Ruling

Respondent filed a petition for *certiorari* under Rule 65 which the CA granted in the now assailed decision. The CA decreed:

> **WHEREFORE**, in view of the foregoing, the Petition for *Certiorari* is **GRANTED**. The assailed Resolutions dated June 21, 2012 and August 17, 2012, issued by the Regional Trial Court of Quezon City, Branch 218, which dismissed the Complaint for Sum of Money, in Civil Case No. Q-11-70477, are **SET ASIDE**. Accordingly, let this case be **[REMANDED]** to the said RTC for further proceedings.
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> **SO ORDERED**.[21]

The appellate court said that the arbitration clause in the Supply Agreements provided for two (2) ways of resolving any dispute or controversy between the parties: first, by amicable means; and second, by referral to

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[17] Id. at 192-201.
[18] Id. at 104-106.
[19] Id. at 106.
[20] Id. at 101-103.
[21] Id. at 48.

arbitration. When petitioner reneged on its obligations to pay, the parties resolved the problem and amicably agreed on the Recovery Plan and to the supplemental agreements. By executing these agreements, the parties had agreed to settle their dispute on nonpayment by amicable means. The Supply Agreements did not provide that in case the amicable settlement did not work, recourse to arbitration should be made or that the parties must refer the issues to arbitration. Both the Recovery Plan and Repayment Plan did not have an arbitration clause.[22]

The CA also opined that after consenting to settle the matter of nonpayment amicably, herein petitioner cannot be allowed to assert that it should resort to arbitration. It noted that no practical purpose can be achieved by dismissing the case and referring the same to arbitration.[23]

Petitioner filed a motion for reconsideration but the CA denied the same in its February 19, 2014 Resolution.[24]

Consequently, petitioner filed a petition for *certiorari* which this Court initially dismissed for failure to establish that the CA committed grave abuse of discretion in rendering the assailed Decision and Resolution.[25] Finding merit in petitioner's motion for reconsideration, this Court reinstated the petition through a February 22, 2017 Resolution[26] and ordered respondent to file its comment on the petition.

ISSUES

Petitioner imputes grave abuse of discretion on the part of the CA based on the following grounds:

I

> In disregarding the explicit agreement of the parties to arbitrate before recourse to the courts of law, the Honorable Court of Appeals committed grave abuse of discretion amounting to lack or excess of jurisdiction;

II

> In misinterpreting the agreements between the parties by ignoring the arbitral clause, the Honorable Court of Appeals acted with grave abuse of discretion amounting to lack or excess of jurisdiction;

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[22] Id. at 46-47.
[23] Id. at 47.
[24] Id. at 50.
[25] Id. at 279; see Resolution dated June 25, 2014.
[26] Id. at 354.

III

The public respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction in holding that the Recovery Plan and Repayment Plan as agreements independent of and separate from the Supply Agreements;

IV

The Honorable Court of Appeals, in concluding, without basis, that the Regional Trial Court committed grave abuse of discretion, exceeded its jurisdiction and committed reversible error.[27]

Petitioner submits that the execution of the Repayment Plan operated only as a modification of the payment scheme provided in the Supply Agreements and did not serve as waiver of the latter's provisions which remain valid contractual stipulations. The arbitration clause explicitly and unequivocally stated that the resolution of any controversy shall, in the first instance, be resolved amicably. It did not provide that, in case of failure to reach an amicable settlement, the rest of the provision, specifically the referral to arbitration, is to be disregarded and either party may already seek recourse before the courts of law. Indeed, the intent of the parties was to refer any matter not resolved by amicable settlement to arbitration as a second step. The failure to resolve the dispute amicably, as appearing in the first sentence of the arbitration clause, immediately renders operative the referral of such controversy or issue to arbitration, as appearing in the second sentence.[28]

Respondent argues that the present petition should be dismissed for being an improper remedy as petitioner should have filed an appeal from the decision of the CA.[29] In any event, the CA did not commit grave abuse in holding that the RTC overstepped the bounds of its jurisdiction when it compelled the parties to undergo arbitration in the absence of an arbitration clause in the Repayment Plan, which is a separate contract from the Supply Agreements. Moreover, the CA correctly held that resort to arbitration was no longer necessary considering that the parties agreed to settle their dispute through amicable means.[30]

Pending this Court's resolution of the petition, herein petitioner filed an Urgent Application for a Temporary Restraining Order[31] in view of the Order of the RTC Branch 217 to proceed with the hearing of the case with the presentation of evidence *ex parte* by herein respondent. Respondent filed its

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[27] Id. at 21.
[28] Id. at 23-31.
[29] Id. at 344-348.
[30] Id. at 348-354.
[31] Id. at 407-429.

Comment/Opposition[32] to the motion which the Court noted in its July 30, 2019 Resolution.[33]

Did the CA commit grave abuse of discretion in holding that the arbitration clause in the Supply Agreements does not apply to the Repayment and Recovery Plans?

The Court's Ruling

We **DISMISS** the petition for *certiorari.*

The petition for certiorari is an inappropriate remedy

Petitioner resorted to a wrong remedy in filing a petition for *certiorari* under Rule 65 of the Rules of Court to assail the September 26, 2013 Decision and February 19, 2014 Resolution of the CA. Instead, petitioner should have filed a petition for review under Rule 45 which is the proper remedy against a decision of the CA.

It is settled that a petition for review under Rule 45 is not identical to a petition for *certiorari* under Rule 65. Under Rule 45, decisions, final orders or resolutions of the CA in any case, *i.e.*, regardless of the nature of the action or proceedings involved, may be appealed to the Court by filing a petition for review, which would be but a continuation of the appellate process over the original case. On the other hand, a special civil action under Rule 65 is an independent action based on the specific grounds therein provided and, as a general rule, cannot be availed of as a substitute for the lost remedy of an ordinary appeal, including that to be taken under Rule 45. Accordingly, when a party adopts an improper remedy, as in this case, his petition may be dismissed outright.[34]

Furthermore, if an appeal was available to the aggrieved party, the action for *certiorari* would not be entertained. The remedies of appeal and *certiorari* are mutually exclusive, not alternative or successive. Where an

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[32] Id. at 446-454.
[33] Id. at 459.
[34] *Mercado v. Court of Appeals,* 484 Phil. 438, 444 (2004). Under Supreme Court Circular 2-90 (Guidelines to be Observed in Appeals to the Court of Appeals and to the Supreme Court issued on March 9, 1990), an appeal taken to this Court or to the CA by a wrong or an inappropriate mode warrants its outright dismissal.

appeal is available, *certiorari* will not prosper, even if the ground is grave abuse of discretion.[35]

Notwithstanding the impropriety of a petition for *certiorari*, the Court has considered such petition as filed under Rule 45, provided it is filed within the period of filing a Rule 45 petition. We find the same to be availing in the case herein considering that petitioner had filed its Motion for [Extension of] Time[36] to file the petition within 15 days from its receipt of the CA Resolution on February 27, 2014.[37] Hence, We shall treat the instant petition as one filed under Rule 45 of the Rules of Court.

The arbitration clause stipulated in the Supply Agreements shall not apply to the Recovery and Repayment Plans

Petitioner contends that the Repayment Plans had modified the payment scheme stipulated in the Supply Agreements, which made the same subject to the arbitration clause.

Petitioner's argument is untenable.

The arbitration clause being referred to by petitioner as found in the three (3) Supply Agreements read as follows:

> RESOLUTION OF DISPUTES AND GOVERNING LAWS
>
> **The parties shall seek to resolve in the first instance any dispute, controversy or claim arising out of or relating to this Supply Agreement, or the breach, termination or invalidity thereof, by amicable means. Any dispute arising out of or in connection with this Supply Agreement including any question regarding its existence, validity or termination shall be referred to an arbitrator** to be agreed upon between the Parties or failing agreement to be nominated by the Director, Regional Centre for Arbitration, Kuala Lumpur and any such reference shall be deemed to be a submission to Arbitration within the meaning of the Arbitration Act of 2005 of Malaysia.

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[35] *Local Water Utilities Administration Employees Association for Progress v. Local Water Utilities Administration*, 794 Phil. 496, 505 (2016).
[36] *Rollo*, pp. 3-5.
[37] Id. at 3; the Motion for Extension was filed on March 14, 2014 which the Court granted in the Resolution dated April 23, 2014.

> This Supply Agreement shall be governed by the laws of Malaysia.[38] (emphasis supplied)

The first sentence in the above provision clearly mandates the parties, as the first step in the resolution of their dispute, to have it settled amicably between themselves, as evident from the use of the words "at the first instance." The second sentence requires them to submit any dispute to arbitration, which implies that they had already exerted efforts to resolve their dispute between themselves but no settlement was reached. This must be so, as otherwise, the first sentence would be a surplusage were it the intention of the parties for arbitration to be the only mode by which they can resolve any controversy.

On this note, We disagree with the CA's interpretation that the two methods provided in the arbitration clause are mutually exclusive, thus:

> By executing the Recovery Plan and the Repayment Plan, the parties had made a choice and mutually consented to settle their dispute of non-payment by amicable means and not by arbitration. Indeed, the Supply Agreement did not provide that in case the settlement by amicable means did not work, recourse to arbitration should be made. Neither was it provided therein that to settle their dispute under the Recovery Plan and Repayment Plan, the parties must refer the issues to Arbitration. As in fact, the recovery plan and the repayment plan, in themselves, do not provide for an arbitration clause.[39]

A more reasonable interpretation of the subject clause would be to consider amicable settlement as mandatory in resolving the parties' dispute, failing in which they could have the matter referred to arbitration as the final remedy. Hence, while referral to arbitration is the principal mode of resolving any dispute, claim or controversy arising from or in connection with the Supply Agreements, a preliminary step by means of amicably settling the dispute is required before they can proceed to arbitration.

Nonetheless, We sustain the CA's ruling that the RTC erred in dismissing the case and holding that the issue should first be resolved by referring it to arbitration. Section 24 of Republic Act No. 9285 *(Alternative Dispute Resolution Act of 2004)* provides that the trial court shall refer the case to arbitration upon request of one party or both, except if it finds the arbitration to be "null and void, inoperative or incapable of being performed." In here, the referral to arbitration is inapplicable or inoperative since the issue

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[38] Id. at 56, 65 and 73.
[39] Id. at 47.

of payment had already been voluntarily settled by the parties under the Recovery Plan and Repayment Plan.

Thus, the RTC should have considered that by agreeing to the Recovery Plan and Repayment Plan, the parties had reached an amicable resolution on the issue of payment pursuant to the first sentence of the arbitration clause. Petitioner had contractually bound itself to settle its outstanding liabilities to respondent, and in filing the collection suit, respondent is enforcing the terms of the Repayment Plan. Under the circumstances, referral to arbitration had already become inoperative or inapplicable.

This Court is very much aware of the State policy to promote and encourage arbitration and alternative dispute resolution, as well as its importance in achieving speedy justice and decongestion of court dockets.[40] This policy essentially favors arbitration in the interpretation of arbitration clauses. However, where such interpretation of arbitration clauses will not result in a just, practical and speedy resolution of the controversy, or cause serious prejudice to the other party that rightfully sought judicial intervention, as in the instant case, courts shall refrain from ordering prior referral to arbitration.

ACCORDINGLY, We **DISMISS** the petition; **AFFIRM** the September 26, 2013 Decision and February 19, 2014 Resolution of the Court of Appeals in CA-G.R. SP No. 127085; **DENY** the Urgent Application for a Temporary Restraining Order filed by petitioner for being unmeritorious; and **ORDER** petitioner to **PAY** costs of suit.

SO ORDERED." (**Hernando, *J.,*** *designated additional member vice* **Lopez, M., *J.*** *per Raffle* dated January 13, 2021.)

By authority of the Court:

TERESITA AQUINO TUAZON
Division Clerk of Court

[40] Section 2, R.A. No. 9285.

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