

Republic of the Philippines
COURT OF APPEALS
Manila

THIRTEENTH DIVISION

TING GUAN TRADING CORP., CA-G.R. SP No. 92828

Petitioner, Members:

- versus -

SABIO, J., JR., *Chairman*
ASUNCION-VICENTE, R., *and*
VILLON, S. E., *JJ*

HON. CESAR D. SANTAMARIA *as*
Presiding Judge, Branch
145, RTC, Makati City and
Tung Ho Steel Enterprises
Corp.,

Promulgated:

Respondents.

X-----X

DECISION

SABIO, J.L., JR., J.:

A party who makes a special appearance in court challenging the jurisdiction of said court based on the ground, e.g., invalidity of the service of summons, cannot be considered to have submitted himself to the jurisdiction of the court; Even the assertion of

affirmative defenses aside from lack of jurisdiction over the person of the defendant cannot be considered a waiver of the defense of lack of jurisdiction over such person (United Coconut Planters Bank vs. Ongpin, 368 SCRA 464).

The issue in said aforecited jurisprudence is one of the issues raised before Us in this petition for certiorari under Rule 65 of the 1997 Rules of Civil Procedure.

The genesis of the petition, thus:

Sometime in October 24, 2004, private respondent herein, (petitioner therein) instituted Special Proceedings No. 5954 (For Enforcement and Execution of Foreign Arbitral Award under R.A. 9285) against petitioner herein (respondent therein) before public respondent.

Thereafter, petitioner filed a Motion to Dismiss complaint anchored on the following:

- I. That the plaintiff has no legal capacity to sue; and
- II. The action is premature as the Supreme Court has not

yet promulgated rules to implement R.A, 9285”.

(Annex “B”, Rollo p. 71)

A Supplemental Motion to Dismiss on the ground that venue has been improperly laid was filed before the earlier motion could be resolved.

In an order dated May 11, 2005, public respondent denied petitioner's motion to dismiss. Unconvinced petitioner filed a Motion for Reconsideration arguing on the following grounds, to wit:

- I. This Honorable Court Has Not Acquired Jurisdiction Over the Person Of the Respondent;
- II. The Petitioner Has No Cause of Action Or Right To File This Action Against Respondent As Taiwan Is Not A Contracting State Under The New York Convention;
- III. The Petitioner Has No Right Of Action Against Respondent Because Recognition Of The Foreign Arbitral Award In Favor Of A Corporation Of A Non-Contracting State is Contrary To The Public Policy Of the Philippines.”

(Annex “E”, Rollo, p. 79)

Public Respondent court denied petitioner's motion for reconsideration, ratiocinating in this manner:

“It is the contention of the movant that Ms. Fe Tejero upon whom summons for it was served is not one of those authorized to

receive it pursuant to Section 11 of Rule 14 of the Revised Rules of Civil Procedure. On the assumption that said claim is opposite, it is nonetheless untenable. Respondent had already voluntarily submitted itself to the jurisdiction of this court when it filed its motion to dismiss without any qualification parenthetically as to the jurisdiction of this court over its person, if indeed there was invalid service of summons upon it. In so doing, it is considered to have validly waived this ground of alleged lack of jurisdiction over its person as bases for a motion to dismiss. As aptly pointed out by the petitioner, movant is now in laches and estopped from invoking this ground not having raised it for the first time when it filed its motion to dismiss. As invariably held by the Honorable Supreme Court and cited in the opposition of the petitioner, movant is proscribed from availing itself of the ground of lack of jurisdiction if it is favorable to it and disregarding it if it is against its interest.

In this case, it is quite obvious that this ground was only resorted to by the movant when its motion to dismiss was denied for lack of merit. Hence, it is not hard to conclude that it availed of it on hindsight.

In any case, this petition cannot be dismissed on the ground that the summons was wrongfully issued as the petitioner can always move for the issuance of an alias summons to be served in accordance with the pertinent rule on the matter, as held in the recent case of *Philippine American Life and General Insurance Company vs. Hon. Augusto V. Breva, etc., et al.*, G.R. No. 147937, promulgated on November 11, 2004, citing the cases of *Lingner & Fisher GMBH vs. Intermediate Appellate Court* (125 SCRA 522) and *Teh vs. Court of Appeals* (401 SCRA 576) which invariably held to paraphrase the High Tribunal, that there is no abuse of discretion on the part of the trial court when it denied that petitioner's motion to dismiss the complaint and ordered the issuance of an alias summons, which is not however necessary, i.e., the issuance of an alias summons in this case as discussed earlier.

With respect to the last two grounds relief upon by the movant while it is true that Taiwan is not a party to the New York Convention, it cannot be denied that Singapore where the arbitral award was rendered is a Contracting State of the aforementioned convention. Corollarily, the Philippines being a contracting party also to the New York Convention and pursuant to the specific law on the matter more particularly Section 42 of Republic Act No. 9285

is duty bound to act on this petition without violating its public policy on equal protection clause of the constitution.”

(Annex “F”, p. 85 and 86).

Aggrieved, petitioner now comes to Us, contending that public respondent committed grave abuse of discretion in not granting the motion to dismiss, supplemental motion to dismiss and motion for reconsideration, arguing on the following submissions, namely:

- 1) The Foreign arbitral award is void because the International Court of Arbitration had no jurisdiction over the dispute between petitioner and private respondent;
- 2) The court presided by public respondent did not acquire jurisdiction over the person of the defendant;
- 3) Venue is improperly laid;
- 4) The action is pre-mature because no Rules of Procedure have been promulgated by the Supreme Court.
- 5) The private respondent has no right of action and no cause of action against petitioner because it is a corporation which was organized and existing under the laws of Taiwan

which is not a contracting state to the New York Convention. It is against the public policy of the Philippines to recognize and enforce a Foreign Arbitral Award in Favor of Private Respondent which is a Taiwanese Corporation because Taiwan is not bound to recognize and enforce a foreign arbitral award rendered in favor of petitioner as it is not bound to recognize and enforce the same by any convention or accord.

Private respondent, in its memorandum, opposed the petition, arguing on the following submissions:

1) Ting Guan has not made out a proper case for certiorari under Rule 65;

2) Petition fatally defective for failure to provide, as required by the Rules of Court, copies of relevant pleadings submitted to the trial court particularly those filed by Tung Ho, hence should be dismissed outright.

3) Cases cited by Ting Guan in failure to attach pleadings and documents relevant and pertinent to the petition not in point.

4) The welter of jurisprudence is that denial of a motion to dismiss cannot be subject of certiorari. Ting Guan should file

its answer and appeal.

5) The rule is that the motion to dismiss should be filed within the period to file the answer which is 15 days from the service of summons and not more.

6) Only two (2) grounds/issues interposed in Ting Guan's Motion to Dismiss dated November 24, 2004 may be raised to this Honorable court the rest of the grounds were filed outside of the reglementary period and consequently are barred from determination in this appeal.

7) The trial court has lawfully acquired jurisdiction over the person of Ting Guan.

8) It was not only the motion to dismiss involving other grounds that amounted to voluntary appearance.

9) The ICC International Court of Arbitration that heard and decided the case between Tung Ho and Ting Guan in Singapore is the body chosen by the parties in the Sales Contract. Issue raised for the first time and should not be entertained.

10) Venue is properly laid in the trial court of Makati in

accordance with R.A. 9285.

11) Lack of Rules of Procedure to be promulgated by the Supreme Court is not an element of jurisdiction. Present rules sufficient for case to go forward.

12) *Amadore vs. Romulo* is not applicable.

13) The fact that Tung Ho was organized and existing under the law of Taiwan does not bar it from instituting the action for enforcement because it is not a contracting state to the New York Convention.

14) No Public policy is breached by enforcing the arbitral award in the Philippines.

To our mind, considering the pleadings filed and the issues that have been properly and effectively ventilated, the only issues we need to address are the following:

1) Is the petition fatally defective or is it in proper form and substance and has sufficiently complied with the pertinent Rules?

2) Has petitioner made a proper case for certiorari under

Rule 65?

3) Has the motion to dismiss in the court below been properly filed?

4) Was petitioner estopped from raising the ground of lack of jurisdiction over his person?

5) Did the court a quo acquire jurisdiction over the person of petitioner by alleged voluntary appearance.

6) Was summons properly served to enable the court to acquire jurisdiction over the person of petitioner?

We shall now proceed to address the issues. Par. 2, Sec. 1 of Rule 65 of the Rules of Civil Procedure provides, thus:

“Sec. 1. Petition for certiorari. -- xxx

The petition shall be accompanied by a certified true copy of the judgment, order or resolution subject thereof, copies of all pleadings and documents relevant and pertinent thereto, and a sworn certification of non-forum shopping as provided in the third paragraph of Section 3, Rule 46.” (underscoring ours).

Sec. 6 of Rule 1 provides, thus:

“Sec. 6. Construction.-- These Rules shall be liberally construed in order to promote their objective of securing a just, speedy and inexpensive disposition of every action and proceeding.”

Applying the aforecited pertinent rules to the case at bench, we rule that there has been substantial compliance of par. 2 of Sec. 1 of Rule 65. What the section mandatorily requires are the (1) certified true copy of the judgment, order, or resolution subject thereof; (2) copies of all pleadings and documents relevant and pertinent thereto. Petitioner has attached all such required documents to his Petition. Hence, petition does not merit dismissal.

As to the issue of whether or not petitioner has made a case for certiorari, we answer in the affirmative. True that denial of a motion to dismiss is merely interlocutory and cannot be the subject of certiorari. But that rule admits of exceptions. Certiorari and prohibition are proper if the ground of the motion is lack of jurisdiction (*Ma-ao Sojar Central vs. Barrios*, 79 Phil. 666), cited in *Civil Procedure annotated*, Vol. 1, 2001 Edition, p. 453, *Feria Noche*). Exceptions when denial of a motion to dismiss can be corrected by certiorari under Rule 65, Rules of Court is when the ground for the motion to dismiss is improper venue, *res judicata* or lack of jurisdiction (*Velarde vs. Lopez*, 419 SCRA 422).

In addition, if the assailed interlocutory order is patently erroneous and the remedy of appeal would not afford adequate and expeditious relief, certiorari may be allowed as a mode of redress. Such is the situation obtaining herein. No less than the trial court admitted that there was improper service of summons, but that

jurisdiction over the person of petitioner was acquired because of its voluntary appearance. But as will be discussed below, jurisdiction over the person of petitioner was never acquired, hence the trial court's ruling is void for want of jurisdiction.

We shall now discuss jointly the issues of whether petitioner is estopped from raising the issue of lack of jurisdiction over its person and whether or not petitioner has voluntarily submitted itself to the jurisdiction of the court. In ruling in the affirmative, the trial court held, thus:

“It is the contention of the movant that Ms. Fe Tejero upon whom summons for it was served is not one of those authorized to receive it pursuant to section 11 of Rule 14 of the Revised Rules of Civil Procedure. On the assumption that said claim is opposite, it is nonetheless untenable. Respondent had already voluntarily submitted itself to the jurisdiction of this court when it filed its motion to dismiss without any qualification parenthetically as to the jurisdiction of this court over its person, if indeed there was invalid service of summons upon it. In so doing, it is considered to have validly waived this ground of alleged lack of jurisdiction over its person as bases for a motion to dismiss. As aptly pointed out by the petitioner, movant is now in laches and estopped from invoking this ground not having raised it for the first time when it filed its motion to dismiss. As invariably held by the Honorable Supreme Court and cited in the opposition of the petitioner, movant is proscribed from availing itself of the ground of lack of jurisdiction if it is favorable to it and disregarding it if it is against its interest.

In this case, it is quite obvious that this ground was only resorted to by the movant when its motion to dismiss was denied for lack of merit. Hence, it is not hard to conclude that it availed of it on hindsight.

In any case, this petition cannot be dismissed on the ground that the summons was wrongfully issued as the petitioner can

always move for the issuance of an alias summons to be served in accordance with the pertinent rule on the matter, as held in the recent case of Philippine American Life and General Insurance Company vs. Hon. Augusto V. Breva, etc., et al., G.R. No. 147937, promulgated on November 11, 2004, citing the cases of Lingner & Fisher GMBH vs. Intermediate Appellate Court (125 SCRA 522) and Teh vs. Court of Appeals (401 SCRA 576) which invariably held to paraphrase the Hight Tribunal, that there is no abuse of discretion on the part of the trial court when it denied that petitioner's motion to dismiss the complaint and ordered the issuance of an alias summons, which is not however necessary, i.e., the issuance of an alias summons in this case as discussed earlier.

With respect to the last two grounds relief upon by the movant while it is true that Taiwan is not a party to the New York Convention, it cannot be denied that Singapore where the arbitral award was rendered is a Contracting State of the aforementioned convention. Corollarily, the Philippines being a contracting party also to the New York Convention and pursuant to the specific law on the matter more particularly Section 42 of Republic Act No. 9285 is duty bound to act on this petition without violating its public policy on equal protection clause of the constitution.”

(Rollo, pp. 85-86)

To be sure, Sec. 1 of Rule 16 provides, and we quote:

“Sec. 1. *Grounds*.--- Within the time for but before filing the answer to the complaint or pleading asserting a claim, a motion to dismiss may be made on any of the following grounds: *(underscoring for emphasis)*

- (a) That the court has no jurisdiction over the person of the defending party;
- (b) That the court has no jurisdiction over the subject matter of the claim;
- (c) That venue is improperly laid;
- (d) That the plaintiff has no legal capacity to sue;

- (e) That there is another action pending between the same parties for the same cause;
- (f) That the cause of action is barred by a prior judgment or by the statute of limitations;
- (g) That the pleading asserting the claim states no cause of action;
- (h) That the claim or demand set forth in the plaintiff's pleading has been paid, waived, abandoned, or otherwise extinguished;
- (i) That the claim on which the action is founded is unenforceable under the provisions of the statute of frauds; and
- (j) That a condition precedent for filing the claim has not been complied with."

From the foregoing, it is clear that any of the ground mentioned can be raised within the time before filing the answer to the complaint. Hence, as long as no answer has been filed, the ground can be raised within 15 days from date of receipt of a valid summons. In this case, there was no valid service of summons, and even granting arguendo, one was received, the reglementary period has not lapsed. Petitioner can still very well raise the issue even in its motion for reconsideration and estoppel cannot apply to it.

The motion for reconsideration (Annex E, pages 79 to 84) undeniably moved for the grant of the Motion to Dismiss on the ground of lack of jurisdiction over the person of the petitioner. That the ground is only raised in the motion does not constitute waiver of said ground and neither can petitioner be considered in estoppel and prevented from seasonably raising the same, as was done in the case at bench.

Section 20 of Rule 14 provides, thus:

“Sec. 20. *Voluntary appearance*.-- The defendant's voluntary appearance in the action shall be equivalent to service of summons. The inclusion in a motion to dismiss of other grounds aside from lack of jurisdiction over the person of the defendant shall not be deemed a voluntary appearance.”

As held in the case of *United Coconut Planters, supra*, petitioner has not waived the ground of lack of jurisdiction to have the case dismissed by simply including other grounds. Responded ought to be minded that a motion to dismiss is not a responsive pleading. Hence, no answer having been filed, the filing of the motion to dismiss suspended the running of said reglementary period. Pursuant to Sec. 4 of Rule 16, petitioner would have the remaining period counted from notice of denial within which to file his answer but not less than 5 days in any event. But as already stated, since there was no valid service of summons, the period to file responsive pleading did not begin to run. (*underscoring for emphasis*).

Private respondent insists that summons was properly served arguing thus:

“First, summons was in fact properly served. The Return of Service of Summons dated November 26, 2004 by Process Server Ariel A. Momongan stated without equivocation:

“The original copy of summons for the defendant Ting Guan Trading Corporation was received by Fe Tejero, Corporate Secretary, as evidenced by her signature appearing on the original

copy of the summons.” Thus Ting Guan cannot, and grossly belated at that, assail the service of summons on Fe Tejero.

Second, the Sheriff in so far as the record discloses is presumed to have regularly performed his official duty (Rule 131 Sec. 3(M) Revised Rules of Court).”

(Rollo, pp. 200-201)

Sadly, the arguments of private respondent are specious. Fe Tejero, the person who received the summons has not been established as the Corporate Secretary but a mere secretary. Consequently, she is not one of those mentioned as the proper person to whom summons will be served pursuant to Sec. 11 of Rule 14, who are the President, Managing partner, general manager, corporate secretary, treasurer or in house counsel. Strict compliance with the rule is required.

In his book Civil Procedure Annotated, Vol 1, page 388, 2001 Edition, former Supreme Court Justice Jose Y. Feria commented, thus:

“A strict compliance with the mode of service is necessary to confer jurisdiction of the court over a corporation. The officer upon whom service is made must be one who is named in the statute; otherwise, the service is insufficient. The purpose is to render it reasonably certain that the corporation will receive prompt and proper notice in an action against it or to insure that the summons is served on a representative so integrated with the corporation that such person will know what to do with the legal papers served on him. Hence, service on the secretary to the head of the personnel department was not valid. Service upon the branch manager of the

corporation at its branch office in Cagayan de Oro, instead of upon the general manager at its principal office in Davao City, was held invalid.”

The designation of persons or officers who are authorized to accept summons for a domestic corporation or partnership is now limited and more clearly specified in Sec. 11, Rule 14 of the 1997 Rules of Civil Procedure (E.B. Villarosa and partners vs. Benito, 312 SCRA 65). As held in said case the enumeration is restricted, limited and exclusive. Failure to comply with the rule does not effect proper service of summons. (underscoring for emphasis).

As earlier pointed out, there was also no voluntary appearance, hence, the trial court never acquired jurisdiction over the petitioner. Jurisdiction cannot be acquired by the court on the person of the defendant even if he knows the case against him unless he is validly served with summons (Ancheta vs. Ancheta, 424 SCRA 724) and since service of summons is the means by which the court acquires jurisdiction over the person of the defendant, any judgment without such service, in the absence of a valid waiver is null and void (Ancheta, supra). (underscoring for emphasis).

In the light of the foregoing disquisitions clearly showing that the motion to dismiss for failure of the court to acquire jurisdiction over the person of the petitioner was anchored on solid factual and legal grounds, the denial of the same by the trial court constituted grave

abuse of discretion, amounting to lack or excess of jurisdiction and merits a petition for certiorari.

We do not find any need to discuss the other issues at this point in time except to state that the venue was properly laid. It is our considered opinion and so hold that the other issues can be properly ventilated, with factual and legal considerations in the court a quo. We are not a trier of facts, and so factual consideration of said issues is best left for the determination of the trial court.

WHEREFORE, foregoing premises considered, the petition having merit in fact and in law, is hereby **GIVEN DUE COURSE**. Resultantly, the challenged orders, are hereby **REVERSED** and **SET ASIDE** and a new one entered granting petitioners motion to dismiss on the ground of lack of jurisdiction over its person. No costs.

SO ORDERED.

JOSE L. SABIO, JR.
Associate Justice

WE CONCUR:

ROSALINDA ASUNCION-VICENTE
Associate Justice

SESINANDO E. VILLON
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

JOSE L. SABIO, JR.
Associate Justice
Chairman, Thirteenth Division