

Republic of the Philippines
SUPREME COURT
Manila

SPECIAL FIRST DIVISION

G.R. No. 124293 **January 31, 2005**

J.G. SUMMIT HOLDINGS, INC., petitioner,

vs.

COURT OF APPEALS; COMMITTEE ON PRIVATIZATION, its Chairman and Members; ASSET PRIVATIZATION TRUST; and PHILYARDS HOLDINGS, INC., respondents.

R E S O L U T I O N

PUNO, J.:

For resolution before this Court are two motions filed by the petitioner, J.G. Summit Holdings, Inc. for reconsideration of our Resolution dated September 24, 2003 and to elevate this case to the Court *En Banc*. The petitioner questions the Resolution which reversed our Decision of November 20, 2000, which in turn reversed and set aside a Decision of the Court of Appeals promulgated on July 18, 1995.

I. Facts

The undisputed facts of the case, as set forth in our Resolution of September 24, 2003, are as follows:

On January 27, 1997, the National Investment and Development Corporation (NIDC), a government corporation, entered into a Joint Venture Agreement (JVA) with Kawasaki Heavy Industries, Ltd. of Kobe, Japan (KAWASAKI) for the construction, operation and management of the Subic National Shipyard, Inc. (SNS) which subsequently became the Philippine Shipyard and Engineering Corporation (PHILSECO). Under the JVA, the NIDC and KAWASAKI will contribute ₱330 million for the capitalization of PHILSECO in the proportion of 60%-40% respectively. One of its salient features is the grant to the parties of the **right of first refusal** should either of them decide to sell, assign or transfer its interest in the joint venture, viz:

1.4 Neither party shall sell, transfer or assign all or any part of its interest in SNS [PHILSECO] to any third party without giving the other under the same terms the right of first refusal. This provision shall not apply if the transferee is a corporation owned or controlled by the GOVERNMENT or by a KAWASAKI affiliate.

On November 25, 1986, NIDC transferred all its rights, title and interest in PHILSECO to the Philippine National Bank (PNB). Such interests were subsequently transferred to the National

Government pursuant to Administrative Order No. 14. On December 8, 1986, President Corazon C. Aquino issued Proclamation No. 50 establishing the Committee on Privatization (COP) and the Asset Privatization Trust (APT) to take title to, and possession of, conserve, manage and dispose of non-performing assets of the National Government. Thereafter, on February 27, 1987, a trust agreement was entered into between the National Government and the APT wherein the latter was named the trustee of the National Government's share in PHILSECO. In 1989, as a result of a quasi-reorganization of PHILSECO to settle its huge obligations to PNB, the National Government's shareholdings in PHILSECO increased to 97.41% thereby reducing KAWASAKI's shareholdings to 2.59%.

In the interest of the national economy and the government, the COP and the APT deemed it best to sell the National Government's share in PHILSECO to private entities. After a series of negotiations between the APT and KAWASAKI, they agreed that the latter's right of first refusal under the JVA be "exchanged" for the right to top by five percent (5%) the highest bid for the said shares. They further agreed that KAWASAKI would be entitled to name a company in which it was a stockholder, which could exercise the right to top. On September 7, 1990, KAWASAKI informed APT that Philyards Holdings, Inc. (PHI)¹ would exercise its right to top.

At the pre-bidding conference held on September 18, 1993, interested bidders were given copies of the JVA between NIDC and KAWASAKI, and of the Asset Specific Bidding Rules (ASBR) drafted for the National Government's 87.6% equity share in PHILSECO. The provisions of the ASBR were explained to the interested bidders who were notified that the bidding would be held on December 2, 1993. A portion of the ASBR reads:

1.0 The subject of this Asset Privatization Trust (APT) sale through public bidding is the National Government's equity in PHILSECO consisting of 896,869,942 shares of stock (representing 87.67% of PHILSECO's outstanding capital stock), which will be sold as a whole block in accordance with the rules herein enumerated.

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2.0 The highest bid, as well as the buyer, shall be subject to the final approval of both the APT Board of Trustees and the Committee on Privatization (COP).

2.1 APT reserves the right in its sole discretion, to reject any or all bids.

3.0 This public bidding shall be on an Indicative Price Bidding basis. The Indicative price set for the National Government's 87.67% equity in PHILSECO is PESOS: ONE BILLION THREE HUNDRED MILLION (₱1,300,000,000.00).

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6.0 The highest qualified bid will be submitted to the APT Board of Trustees at its regular meeting following the bidding, for the purpose of determining whether or not it should be

endorsed by the APT Board of Trustees to the COP, and the latter approves the same. The APT shall advise Kawasaki Heavy Industries, Inc. and/or its nominee, [PHILYARDS] Holdings, Inc., that the highest bid is acceptable to the National Government. Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. shall then have a period of thirty (30) calendar days from the date of receipt of such advice from APT within which to exercise their "Option to Top the Highest Bid" by offering a bid equivalent to the highest bid plus five (5%) percent thereof.

6.1 Should Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. exercise their "Option to Top the Highest Bid," they shall so notify the APT about such exercise of their option and deposit with APT the amount equivalent to ten percent (10%) of the highest bid plus five percent (5%) thereof within the thirty (30)-day period mentioned in paragraph 6.0 above. APT will then serve notice upon Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. declaring them as the preferred bidder and they shall have a period of ninety (90) days from the receipt of the APT's notice within which to pay the balance of their bid price.

6.2 Should Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. fail to exercise their "Option to Top the Highest Bid" within the thirty (30)-day period, APT will declare the highest bidder as the winning bidder.

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12.0 The bidder shall be solely responsible for examining with appropriate care these rules, the official bid forms, including any addenda or amendments thereto issued during the bidding period. The bidder shall likewise be responsible for informing itself with respect to any and all conditions concerning the PHILSECO Shares which may, in any manner, affect the bidder's proposal. Failure on the part of the bidder to so examine and inform itself shall be its sole risk and no relief for error or omission will be given by APT or COP. . . .

At the public bidding on the said date, petitioner J.G. Summit Holdings, Inc.² submitted a bid of Two Billion and Thirty Million Pesos (₱2,030,000,000.00) with an acknowledgment of KAWASAKI/[PHILYARDS'] right to top, viz:

4. I/We understand that the Committee on Privatization (COP) has up to thirty (30) days to act on APT's recommendation based on the result of this bidding. Should the COP approve the highest bid, APT shall advise Kawasaki Heavy Industries, Inc. and/or its nominee, [PHILYARDS] Holdings, Inc. that the highest bid is acceptable to the National Government. Kawasaki Heavy Industries, Inc. and/or [PHILYARDS] Holdings, Inc. shall then have a period of thirty (30) calendar days from the date of receipt of such advice from APT within which to exercise their "Option to Top the Highest Bid" by offering a bid equivalent to the highest bid plus five (5%) percent thereof.

As petitioner was declared the highest bidder, the COP approved the sale on December 3, 1993 "subject to the right of Kawasaki Heavy Industries, Inc./[PHILYARDS] Holdings, Inc. to top JGSMI's bid by 5% as specified in the bidding rules."

On December 29, 1993, petitioner informed APT that it was protesting the offer of PHI to top its bid on the grounds that: (a) the KAWASAKI/PHI consortium composed of KAWASAKI, [PHILYARDS], Mitsui, Keppel, SM Group, ICTSI and Insular Life violated the ASBR because the last four (4) companies were the losing bidders thereby circumventing the law and prejudicing the weak winning bidder; (b) only KAWASAKI could exercise the right to top; (c) giving the same option to top to PHI constituted unwarranted benefit to a third party; (d) no right of first refusal can be exercised in a public bidding or auction sale; and (e) the JG Summit consortium was not estopped from questioning the proceedings.

On February 2, 1994, petitioner was notified that PHI had fully paid the balance of the purchase price of the subject bidding. On February 7, 1994, the APT notified petitioner that PHI had exercised its option to top the highest bid and that the COP had approved the same on January 6, 1994. On February 24, 1994, the APT and PHI executed a Stock Purchase Agreement. Consequently, petitioner filed with this Court a Petition for Mandamus under G.R. No. 114057. On May 11, 1994, said petition was referred to the Court of Appeals. On July 18, 1995, the Court of Appeals denied the same for lack of merit. It ruled that the petition for mandamus was not the proper remedy to question the constitutionality or legality of the right of first refusal and the right to top that was exercised by KAWASAKI/PHI, and that the matter must be brought "by the proper party in the proper forum at the proper time and threshed out in a full blown trial." The Court of Appeals further ruled that the right of first refusal and the right to top are prima facie legal and that the petitioner, "by participating in the public bidding, with full knowledge of the right to top granted to KAWASAKI/[PHILYARDS] is...estopped from questioning the validity of the award given to [PHILYARDS] after the latter exercised the right to top and had paid in full the purchase price of the subject shares, pursuant to the ASBR." Petitioner filed a Motion for Reconsideration of said Decision which was denied on March 15, 1996. Petitioner thus filed a Petition for Certiorari with this Court alleging grave abuse of discretion on the part of the appellate court.

On November 20, 2000, this Court rendered x x x [a] Decision ruling among others that the Court of Appeals erred when it dismissed the petition on the sole ground of the impropriety of the special civil action of mandamus because the petition was also one of certiorari. It further ruled that a shipyard like PHILSECO is a public utility whose capitalization must be sixty percent (60%) Filipino-owned. Consequently, the right to top granted to KAWASAKI under the Asset Specific Bidding Rules (ASBR) drafted for the sale of the 87.67% equity of the National Government in PHILSECO is illegal — not only because it violates the rules on competitive bidding — but more so, because it allows foreign corporations to own more than 40% equity in the shipyard. It also held that "although the petitioner had the opportunity to examine the ASBR before it participated in the bidding, it cannot be estopped from questioning the unconstitutional, illegal and inequitable provisions thereof." Thus, this Court voided the transfer of the national government's 87.67% share in PHILSECO to Philyard[s] Holdings, Inc., and upheld the right of JG Summit, as the highest bidder, to take title to the said shares, viz:

WHEREFORE, the instant petition for review on certiorari is GRANTED. The assailed Decision and Resolution of the Court of Appeals are REVERSED and SET ASIDE. Petitioner is ordered to

pay to APT its bid price of Two Billion Thirty Million Pesos (₱2,030,000,000.00), less its bid deposit plus interests upon the finality of this Decision. In turn, APT is ordered to:

- (a) accept the said amount of ₱2,030,000,000.00 less bid deposit and interests from petitioner;
- (b) execute a Stock Purchase Agreement with petitioner;
- (c) cause the issuance in favor of petitioner of the certificates of stocks representing 87.6% of PHILSECO's total capitalization;
- (d) return to private respondent PHGI the amount of Two Billion One Hundred Thirty-One Million Five Hundred Thousand Pesos (₱2,131,500,000.00); and
- (e) cause the cancellation of the stock certificates issued to PHI.

SO ORDERED.

In separate Motions for Reconsideration, respondents submit[ted] three basic issues for resolution: (1) Whether PHILSECO is a public utility; (2) Whether under the 1977 JVA, KAWASAKI can exercise its right of first refusal only up to 40% of the total capitalization of PHILSECO; and (3) Whether the right to top granted to KAWASAKI violates the principles of competitive bidding.³ (citations omitted)

In a Resolution dated September 24, 2003, this Court ruled in favor of the respondents. On the first issue, we held that Philippine Shipyard and Engineering Corporation (PHILSECO) is not a public utility, as by nature, a shipyard is not a public utility⁴ and that no law declares a shipyard to be a public utility.⁵ On the second issue, we found nothing in the 1977 Joint Venture Agreement (JVA) which prevents Kawasaki Heavy Industries, Ltd. of Kobe, Japan (KAWASAKI) from acquiring more than 40% of PHILSECO's total capitalization.⁶ On the final issue, we held that the right to top granted to KAWASAKI in exchange for its right of first refusal did not violate the principles of competitive bidding.⁷

On October 20, 2003, the petitioner filed a Motion for Reconsideration⁸ and a Motion to Elevate This Case to the Court *En Banc*.⁹ Public respondents Committee on Privatization (COP) and Asset Privatization Trust (APT), and private respondent Philyards Holdings, Inc. (PHILYARDS) filed their Comments on J.G. Summit Holdings, Inc.'s (JG Summit's) Motion for Reconsideration and Motion to Elevate This Case to the Court *En Banc* on January 29, 2004 and February 3, 2004, respectively.

II. Issues

Based on the foregoing, the relevant issues to resolve to end this litigation are the following:

1. Whether there are sufficient bases to elevate the case at bar to the Court *en banc*.
2. Whether the motion for reconsideration raises any new matter or cogent reason to warrant a reconsideration of this Court's Resolution of September 24, 2003.

Motion to Elevate this Case to the

Court En Banc

The petitioner prays for the elevation of the case to the Court *en banc* on the following grounds:

1. The main issue of the propriety of the bidding process involved in the present case has been confused with the policy issue of the supposed fate of the shipping industry which has never been an issue that is determinative of this case.¹⁰
2. The present case may be considered under the Supreme Court Resolution dated February 23, 1984 which included among *en banc* cases those involving a novel question of law and those where a doctrine or principle laid down by the Court *en banc* or in division may be modified or reversed.¹¹
3. There was clear executive interference in the judicial functions of the Court when the Honorable Jose Isidro Camacho, Secretary of Finance, forwarded to Chief Justice Davide, a memorandum dated November 5, 2001, attaching a copy of the Foreign Chambers Report dated October 17, 2001, which matter was placed in the agenda of the Court and noted by it in a formal resolution dated November 28, 2001.¹²

Opposing J.G. Summit's motion to elevate the case *en banc*, PHILYARDS points out the petitioner's inconsistency in previously **opposing** PHILYARDS' Motion to Refer the Case to the Court *En Banc*. PHILYARDS contends that J.G. Summit should now be estopped from asking that the case be referred to the Court *en banc*. PHILYARDS further contends that the Supreme Court *en banc* is not an appellate court to which decisions or resolutions of its divisions may be appealed citing Supreme Court Circular No. 2-89 dated February 7, 1989.¹³ PHILYARDS also alleges that there is no novel question of law involved in the present case as the assailed Resolution was based on well-settled jurisprudence. Likewise, PHILYARDS stresses that the Resolution was merely an outcome of the motions for reconsideration filed by it and the COP and APT and is "consistent with the inherent power of courts to 'amend and control its process and orders so as to make them conformable to law and justice.'"¹⁴ Private respondent belittles the petitioner's allegations regarding the change in ponente and the alleged executive interference as shown by former Secretary of Finance Jose Isidro Camacho's memorandum dated November 5, 2001 arguing that these do not justify a referral of the present case to the Court *en banc*.

In insisting that its Motion to Elevate This Case to the Court *En Banc* should be granted, J.G. Summit further argued that: its Opposition to the Office of the Solicitor General's Motion to Refer is different from its own Motion to Elevate; different grounds are invoked by the two motions; there was unwarranted "executive interference"; and the change in *ponente* is merely noted in asserting that this case should be decided by the Court *en banc*.¹⁵

We find no merit in petitioner's contention that the propriety of the bidding process involved in the present case has been confused with the policy issue of the fate of the shipping industry which, petitioner maintains, has never been an issue that is determinative of this case. The Court's Resolution of September 24, 2003 reveals a clear and definitive ruling on the propriety of the bidding process. In discussing whether the right to top granted to KAWASAKI in exchange for its right of first refusal violates the principles of competitive bidding, we made an exhaustive discourse on the rules and principles of public bidding and whether they were complied with in the case at bar.¹⁶ This Court categorically ruled on the petitioner's argument that PHILSECO, as a shipyard, is a public utility which should maintain a 60%-40% Filipino-foreign equity ratio, as it was a pivotal issue. In doing so, we recognized the impact of our ruling on the shipbuilding industry which was beyond avoidance.¹⁷

We reject petitioner's argument that the present case may be considered under the Supreme Court Resolution dated February 23, 1984 which included among *en banc* cases those involving a novel question of law and those where a doctrine or principle laid down by the court *en banc* or in division may be modified or reversed. The case was resolved based on basic principles of the right of first refusal in commercial law and estoppel in civil law. Contractual obligations arising from rights of first refusal are not new in this jurisdiction and have been recognized in numerous cases.¹⁸ Estoppel is too known a civil law concept to require an elongated discussion. Fundamental principles on public bidding were likewise used to resolve the issues raised by the petitioner. To be sure, petitioner leans on the right to top in a public bidding in arguing that the case at bar involves a novel issue. We are not swayed. The right to top was merely a condition or a reservation made in the bidding rules which was fully disclosed to all bidding parties. In **Bureau Veritas, represented by Theodor H. Hunermann v. Office of the President, et al.**,¹⁹ we dealt with this conditionality, *viz*:

x x x It must be stressed, as held in the case of *A.C. Esguerra & Sons v. Aytona, et al.*, (L-18751, 28 April 1962, 4 SCRA 1245), that in an "invitation to bid, there is a **condition imposed upon the bidders to the effect that the bidding shall be subject to the right of the government to reject any and all bids subject to its discretion. In the case at bar, the government has made its choice and unless an unfairness or injustice is shown, the losing bidders have no cause to complain nor right to dispute that choice. This is a well-settled doctrine in this jurisdiction and elsewhere.**"

The discretion to accept or reject a bid and award contracts is vested in the Government agencies entrusted with that function. The discretion given to the authorities on this matter is of such wide latitude that the Courts will not interfere therewith, unless it is apparent that it is used as a shield to a fraudulent award (*Jalandoni v. NARRA*, 108 Phil. 486 [1960]). x x x The

exercise of this discretion is a policy decision that necessitates prior inquiry, investigation, comparison, evaluation, and deliberation. This task can best be discharged by the Government agencies concerned, not by the Courts. The role of the Courts is to ascertain whether a branch or instrumentality of the Government has transgressed its constitutional boundaries. But the Courts will not interfere with executive or legislative discretion exercised within those boundaries. Otherwise, it strays into the realm of policy decision-making.

It is only upon a clear showing of grave abuse of discretion that the Courts will set aside the award of a contract made by a government entity. Grave abuse of discretion implies a capricious, arbitrary and whimsical exercise of power (*Filinvest Credit Corp. v. Intermediate Appellate Court*, No. 65935, 30 September 1988, 166 SCRA 155). The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law, as to act at all in contemplation of law, where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility (*Litton Mills, Inc. v. Galleon Trader, Inc., et al.* [L-40867, 26 July 1988, 163 SCRA 489]).

The facts in this case do not indicate any such grave abuse of discretion on the part of public respondents when they awarded the CISS contract to Respondent SGS. In the "Invitation to Prequalify and Bid" (Annex "C," supra), the CISS Committee **made an express reservation of the right of the Government to "reject any or all bids or any part thereof or waive any defects contained thereon and accept an offer most advantageous to the Government."** It is a well-settled rule that where such reservation is made in an Invitation to Bid, the highest or lowest bidder, as the case may be, is not entitled to an award as a matter of right (*C & C Commercial Corp. v. Menor*, L-28360, 27 January 1983, 120 SCRA 112). Even the lowest Bid or any Bid may be rejected or, in the exercise of sound discretion, the award may be made to another than the lowest bidder (*A.C. Esguerra & Sons v. Aytona*, supra, citing 43 Am. Jur., 788). (emphases supplied)*1awphi1.nét*

Like the condition in the **Bureau Veritas** case, the right to top was a condition imposed by the government in the bidding rules which was made known to all parties. **It was a condition imposed on all bidders equally, based on the APT's exercise of its discretion in deciding on how best to privatize the government's shares in PHILSECO.** It was not a whimsical or arbitrary condition plucked from the ether and inserted in the bidding rules but a condition which the APT approved as the best way the government could comply with its contractual obligations to KAWASAKI under the JVA and its mandate of getting the most advantageous deal for the government. The right to top had its history in the mutual right of first refusal in the JVA and was reached by agreement of the government and KAWASAKI.

Further, there is no "executive interference" in the functions of this Court by the mere filing of a memorandum by Secretary of Finance Jose Isidro Camacho. The memorandum was merely "noted" to acknowledge its filing. It had no further legal significance. Notably too, **the assailed Resolution dated September 24, 2003 was decided unanimously by the Special First Division in favor of the respondents.**

Again, we emphasize that a decision or resolution of a Division is that of the Supreme Court²⁰ and the Court *en banc* is not an appellate court to which decisions or resolutions of a Division may be appealed.²¹

For all the foregoing reasons, we find no basis to elevate this case to the Court *en banc*.

Motion for Reconsideration

Three principal arguments were raised in the petitioner's Motion for Reconsideration. First, that a fair resolution of the case should be based on contract law, not on policy considerations; the contracts do not authorize the right to top to be derived from the right of first refusal.²² Second, that neither the right of first refusal nor the right to top can be legally exercised by the consortium which is not the proper party granted such right under either the JVA or the Asset Specific Bidding Rules (ASBR).²³ Third, that the maintenance of the 60%-40% relationship between the National Investment and Development Corporation (NIDC) and KAWASAKI arises from contract and from the Constitution because PHILSECO is a landholding corporation and need not be a public utility to be bound by the 60%-40% constitutional limitation.²⁴

On the other hand, private respondent PHILYARDS asserts that J.G. Summit has not been able to show compelling reasons to warrant a reconsideration of the Decision of the Court.²⁵ PHILYARDS denies that the Decision is based mainly on policy considerations and points out that it is premised on principles governing obligations and contracts and corporate law such as the rule requiring respect for contractual stipulations, upholding rights of first refusal, and recognizing the assignable nature of contracts rights.²⁶ Also, the ruling that shipyards are not public utilities relies on established case law and fundamental rules of statutory construction. PHILYARDS stresses that KAWASAKI's right of first refusal or even the right to top is not limited to the 40% equity of the latter.²⁷ On the landholding issue raised by J.G. Summit, PHILYARDS emphasizes that this is a non-issue and even involves a question of fact. Even assuming that this Court can take cognizance of such question of fact even without the benefit of a trial, PHILYARDS opines that landholding by PHILSECO at the time of the bidding is irrelevant because what is essential is that ultimately a qualified entity would eventually hold PHILSECO's real estate properties.²⁸ Further, given the assignable nature of the right of first refusal, any applicable nationality restrictions, including landholding limitations, would not affect the right of first refusal itself, but only the manner of its exercise.²⁹ Also, PHILYARDS argues that if this Court takes cognizance of J.G. Summit's allegations of fact regarding PHILSECO's landholding, it must also recognize PHILYARDS' assertions that PHILSECO's landholdings were sold to another corporation.³⁰ As regards the right of first refusal, private respondent explains that KAWASAKI's reduced shareholdings (from 40% to 2.59%) did not translate to a deprivation or loss of its contractually granted right of first refusal.³¹ Also, the bidding was valid because PHILYARDS exercised the right to top and it was of no moment that losing bidders later joined PHILYARDS in raising the purchase price.³²

In cadence with the private respondent PHILYARDS, public respondents COP and APT contend:

1. The conversion of the right of first refusal into a right to top by 5% does not violate any provision in the JVA between NIDC and KAWASAKI.
2. PHILSECO is not a public utility and therefore not governed by the constitutional restriction on foreign ownership.
3. The petitioner is legally estopped from assailing the validity of the proceedings of the public bidding as it voluntarily submitted itself to the terms of the ASBR which included the provision on the right to top.
4. The right to top was exercised by PHILYARDS as the nominee of KAWASAKI and the fact that PHILYARDS formed a consortium to raise the required amount to exercise the right to top the highest bid by 5% does not violate the JVA or the ASBR.
5. The 60%-40% Filipino-foreign constitutional requirement for the acquisition of lands does not apply to PHILSECO because as admitted by petitioner itself, PHILSECO no longer owns real property.
6. Petitioner's motion to elevate the case to the Court en banc is baseless and would only delay the termination of this case.³³

In a Consolidated Comment dated March 8, 2004, J.G. Summit countered the arguments of the public and private respondents in this wise:

1. The award by the APT of 87.67% shares of PHILSECO to PHILYARDS with losing bidders through the exercise of a right to top, which is contrary to law and the constitution is null and void for being violative of substantive due process and the abuse of right provision in the Civil Code.
 - a. The bidders['] right to top was actually exercised by losing bidders.
 - b. The right to top or the right of first refusal cannot co-exist with a genuine competitive bidding.
 - c. The benefits derived from the right to top were unwarranted.
2. The landholding issue has been a legitimate issue since the start of this case but is shamelessly ignored by the respondents.
 - a. The landholding issue is not a non-issue.
 - b. The landholding issue does not pose questions of fact.

c. That PHILSECO owned land at the time that the right of first refusal was agreed upon and at the time of the bidding are most relevant.

d. Whether a shipyard is a public utility is not the core issue in this case.

3. Fraud and bad faith attend the alleged conversion of an inexistent right of first refusal to the right to top.

a. The history behind the birth of the right to top shows fraud and bad faith.

b. The right of first refusal was, indeed, "effectively useless."

4. Petitioner is not legally estopped to challenge the right to top in this case.

a. Estoppel is unavailing as it would stamp validity to an act that is prohibited by law or against public policy.

b. Deception was patent; the right to top was an attractive nuisance.

c. The 10% bid deposit was placed in escrow.

J.G. Summit's insistence that the right to top cannot be sourced from the right of first refusal is not new and we have already ruled on the issue in our Resolution of September 24, 2003. We upheld the mutual right of first refusal in the JVA.³⁴ We also ruled that nothing in the JVA prevents KAWASAKI from acquiring more than 40% of PHILSECO's total capitalization.³⁵ Likewise, nothing in the JVA or ASBR bars the conversion of the right of first refusal to the right to top. In sum, nothing new and of significance in the petitioner's pleading warrants a reconsideration of our ruling.

Likewise, we already disposed of the argument that neither the right of first refusal nor the right to top can legally be exercised by the consortium which is not the proper party granted such right under either the JVA or the ASBR. Thus, we held:

The fact that the losing bidder, Keppel Consortium (composed of Keppel, SM Group, Insular Life Assurance, Mitsui and ICTSI), has joined PHILYARDS in the latter's effort to raise ₱2.131 billion necessary in exercising the right to top is not contrary to law, public policy or public morals. There is nothing in the ASBR that bars the losing bidders from joining either the winning bidder (should the right to top is not exercised) or KAWASAKI/PHI (should it exercise its right to top as it did), to raise the purchase price. The petitioner did not allege, nor was it shown by competent evidence, that the participation of the losing bidders in the public bidding was done with fraudulent intent. Absent any proof of fraud, the formation by [PHILYARDS] of a consortium is legitimate in a free enterprise system. The appellate court is thus correct in holding the petitioner estopped from questioning the validity of the transfer of the National Government's shares in PHILSECO to respondent.³⁶

Further, we see no inherent illegality on PHILYARDS' act in seeking funding from parties who were losing bidders. This is a purely commercial decision over which the State should not interfere absent any legal infirmity. It is emphasized that the case at bar involves the disposition of shares in a corporation which the government sought to privatize. As such, the persons with whom PHILYARDS desired to enter into business with in order to raise funds to purchase the shares are basically its business. This is in contrast to a case involving a contract for the operation of or construction of a government infrastructure where the identity of the buyer/bidder or financier constitutes an important consideration. In such cases, the government would have to take utmost precaution to protect public interest by ensuring that the parties with which it is contracting have the ability to satisfactorily construct or operate the infrastructure.

On the landholding issue, J.G. Summit submits that since PHILSECO is a landholding company, KAWASAKI could exercise its right of first refusal only up to 40% of the shares of PHILSECO due to the constitutional prohibition on landholding by corporations with more than 40% foreign-owned equity. It further argues that since KAWASAKI already held at least 40% equity in PHILSECO, the right of first refusal was inutile and as such, could not subsequently be converted into the right to top.³⁷ Petitioner also asserts that, at present, PHILSECO continues to violate the constitutional provision on landholdings as its shares are more than 40% foreign-owned.³⁸ PHILYARDS admits that it may have previously held land but had already divested such landholdings.³⁹ It contends, however, that even if PHILSECO owned land, this would not affect the right of first refusal but only the exercise thereof. If the land is retained, the right of first refusal, being a property right, could be assigned to a qualified party. In the alternative, the land could be divested before the exercise of the right of first refusal. In the case at bar, respondents assert that since the right of first refusal was validly converted into a right to top, which was exercised not by KAWASAKI, but by PHILYARDS which is a Filipino corporation (i.e., 60% of its shares are owned by Filipinos), then there is no violation of the Constitution.⁴⁰ At first, it would seem that questions of fact beyond cognizance by this Court were involved in the issue. However, the records show that **PHILYARDS admits it had owned land up until the time of the bidding.**⁴¹ **Hence, the only issue is whether KAWASAKI had a valid right of first refusal over PHILSECO shares under the JVA considering that PHILSECO owned land until the time of the bidding and KAWASAKI already held 40% of PHILSECO's equity.**

We uphold the validity of the mutual rights of first refusal under the JVA between KAWASAKI and NIDC. First of all, the right of first refusal is a property right of PHILSECO shareholders, KAWASAKI and NIDC, under the terms of their JVA. This right allows them to purchase the shares of their co-shareholder before they are offered to a third party. **The agreement of co-shareholders to mutually grant this right to each other, by itself, does not constitute a violation of the provisions of the Constitution limiting land ownership to Filipinos and Filipino corporations.** As PHILYARDS correctly puts it, if PHILSECO still owns land, the right of first refusal can be validly assigned to a qualified Filipino entity in order to maintain the 60%-40% ratio. This transfer, by itself, does not amount to a violation of the Anti-Dummy Laws, absent proof of any fraudulent intent. The transfer could be made either to a nominee or such other party which the holder of the right of first refusal feels it can comfortably do business with.

Alternatively, PHILSECO may divest of its landholdings, in which case KAWASAKI, in exercising its right of first refusal, can exceed 40% of PHILSECO's equity. **In fact, it can even be said that if the foreign shareholdings of a landholding corporation exceeds 40%, it is not the foreign stockholders' ownership of the shares which is adversely affected but the capacity of the corporation to own land** – that is, the corporation becomes disqualified to own land. This finds support under the basic corporate law principle that the corporation and its stockholders are separate juridical entities. In this vein, the right of first refusal over shares pertains to the shareholders whereas the capacity to own land pertains to the corporation. Hence, the fact that PHILSECO owns land cannot deprive stockholders of their right of first refusal. **No law disqualifies a person from purchasing shares in a landholding corporation even if the latter will exceed the allowed foreign equity, what the law disqualifies is the corporation from owning land.** This is the clear import of the following provisions in the Constitution:

Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements **with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens.** Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

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Section 7. Save in cases of hereditary succession, **no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.**⁴² (emphases supplied)

The petitioner further argues that "an option to buy land is void in itself (Philippine Banking Corporation v. Lui She, 21 SCRA 52 [1967]). The right of first refusal granted to KAWASAKI, a Japanese corporation, is similarly void. Hence, the right to top, sourced from the right of first refusal, is also void."⁴³ Contrary to the contention of petitioner, the case of **Lui She** did not that say "an option to buy land is void in itself," for we ruled as follows:

x x x To be sure, a lease to an alien for a reasonable period is valid. So is an option giving an alien the right to buy real property on condition that he is granted Philippine citizenship. As this Court said in Krivenko vs. Register of Deeds:

[A]liens are not completely excluded by the Constitution from the use of lands for residential purposes. Since their residence in the Philippines is temporary, they may be granted temporary

rights such as a lease contract which is not forbidden by the Constitution. Should they desire to remain here forever and share our fortunes and misfortunes, Filipino citizenship is not impossible to acquire.

But if an alien is given not only a lease of, but also an option to buy, a piece of land, by virtue of which the Filipino owner cannot sell or otherwise dispose of his property, this to last for 50 years, then it becomes clear that the arrangement is a virtual transfer of ownership whereby the owner divests himself in stages not only of the right to enjoy the land (*jus possidendi, jus utendi, jus fruendi and jus abutendi*) but also of the right to dispose of it (*jus disponendi*) — rights the sum total of which make up ownership. It is just as if today the possession is transferred, tomorrow, the use, the next day, the disposition, and so on, until ultimately all the rights of which ownership is made up are consolidated in an alien. And yet this is just exactly what the parties in this case did within this space of one year, with the result that Justina Santos'[s] ownership of her property was reduced to a hollow concept. If this can be done, then the Constitutional ban against alien landholding in the Philippines, as announced in **Krivenko vs. Register of Deeds, is indeed in grave peril.⁴⁴ (*emphases supplied; Citations omitted*)**

In **Lui She**, the option to buy was invalidated because it amounted to a virtual transfer of ownership as the owner could not sell or dispose of his properties. The contract in **Lui She** prohibited the owner of the land from selling, donating, mortgaging, or encumbering the property during the 50-year period of the option to buy. This is not so in the case at bar where the mutual right of first refusal in favor of NIDC and KAWASAKI does not amount to a virtual transfer of land to a non-Filipino. In fact, the case at bar involves a **right of first refusal over shares of stock** while the **Lui She** case involves an **option to buy the land itself**. As discussed earlier, there is a distinction between the shareholder's ownership of shares and the corporation's ownership of land arising from the separate juridical personalities of the corporation and its shareholders.

We note that in its Motion for Reconsideration, J.G. Summit alleges that PHILSECO continues to violate the Constitution as its foreign equity is above 40% and **yet owns long-term leasehold rights which are real rights**.⁴⁵ It cites Article 415 of the Civil Code which includes in the definition of immovable property, "contracts for public works, and servitudes and other real rights over immovable property."⁴⁶ Any existing landholding, however, is denied by PHILYARDS citing its recent financial statements.⁴⁷ First, these are questions of fact, the veracity of which would require introduction of evidence. The Court needs to validate these factual allegations based on competent and reliable evidence. As such, the Court cannot resolve the questions they pose. Second, J.G. Summit misreads the provisions of the Constitution cited in its own pleadings, to wit:

29.2 Petitioner has consistently pointed out in the past that private respondent is not a 60%-40% corporation, and this violates the Constitution x x x The violation continues to this day because under the law, **it continues to own real property...**

32. To review the constitutional provisions involved, Section 14, Article XIV of the 1973 Constitution (the JVA was signed in 1977), provided:

"Save in cases of hereditary succession, **no private lands** shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain."

32.1 This provision is the same as Section 7, Article XII of the 1987 Constitution.

32.2 Under the Public Land Act, corporations qualified to acquire or hold **lands of the public domain** are corporations at least 60% of which is owned by Filipino citizens (Sec. 22, Commonwealth Act 141, as amended). (emphases supplied)

As correctly observed by the public respondents, the prohibition in the Constitution applies only to ownership of land.⁴⁸ **It does not extend to immovable or real property as defined under Article 415 of the Civil Code.** Otherwise, we would have a strange situation where the ownership of immovable property such as trees, plants and growing fruit attached to the land⁴⁹ would be limited to Filipinos and Filipino corporations only.

III.

WHEREFORE, in view of the foregoing, the petitioner's Motion for Reconsideration is DENIED WITH FINALITY and the decision appealed from is AFFIRMED. The Motion to Elevate This Case to the Court *En Banc* is likewise DENIED for lack of merit.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Ynares-Santiago, Corona, and Tinga, JJ., concur.

Footnotes

¹ Also referred to in this Resolution as "PHILYARDS."

² Also referred to as J G Summit.

³ Resolution promulgated on September 24, 2003, pp. 2 – 10.

⁴ *Id.* at 10 – 13.

⁵ *Id.* at 14 – 22.

⁶ *Id.* at 22 – 25.

⁷ *Id.* at 26 – 32.

⁸ Rollo, p. 1854.

⁹ Rollo, p. 1876.

¹⁰ J.G. Summit's Motion to Elevate this Case to the Court *En Banc* dated October 17, 2003, p. 3; Rollo, p. 1878.

¹¹ *Id.*

¹² *Id.*

¹³ 2. A decision or resolution of a Division of the Court, when concurred in by a majority of its Members who actually took part in the deliberations on the issues in a case and voted thereon, and in no case without the concurrence of at least three of such Members, is a decision or resolution of the Supreme Court (Section 4[3], Article VIII, 1987 Constitution).

3. The Court *en banc* is not an Appellate Court to which decisions or resolutions of a Division may be appealed.

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5. A resolution of the Division denying a party's motion for referral to the Court *en banc* of any Division case, shall be final and not appealable to the Court *en banc*.

6. When a decision or resolution is referred by a Division to the Court *en banc*, the latter may, in the absence of sufficiently important reasons, decline to take cognizance of the same, in which case, the decision or resolution shall be returned to the referring Division.

7. No motion for reconsideration of the action of the Court *en banc* declining to take cognizance of a referral by a Division, shall be entertained.

¹⁴ PHILYARDS' Comment dated February 3, 2004, pp. 26-27; Rollo, pp. 1996-1997.

¹⁵ J.G. Summit's Consolidated Comment dated March 8, 2004.

¹⁶ Resolution dated September 24, 2003, pp. 26-32.

¹⁷ *Id.*, pp. 10-22.

¹⁸ See *Bastida and Ysmael & Co., Inc. v. Dy Buncio & Co., Inc.*, 93 Phil. 195 (1953); *Garcia v. Burgos*, 291 SCRA 546 (1998); *Sadhwani v. CA*, 281 SCRA 75 (1997); *Parañaque Kings Enterprises, Incorporated v. CA*, 268 SCRA 727 (1997); *Polytechnic University of the Philippines v. CA*, 368 SCRA 691 (2001); and *Guzman, Bocaling & Co. v. Bonnevie*, 206 SCRA 668 (1992).

- ¹⁹ G.R. No. 101678, February 3, 1992, 205 SCRA 705.
- ²⁰ Sec. 4(3), Art. VIII, Constitution.
- ²¹ Supreme Court Circular No. 2-89, February 7, 1989.
- ²² J.G. Summit's Motion for Reconsideration dated October 17, 2003, pp. 8-9; Rollo, pp. 1861-1862.
- ²³ *Id.* at 10-13; Rollo, pp. 1863-1866.
- ²⁴ *Id.* at 13-19; Rollo, pp. 1866-1872.
- ²⁵ PHILYARDS' Comment dated February 3, 2004, p. 1; Rollo, p. 1971.
- ²⁶ *Id.* at 2; Rollo, p. 1972.
- ²⁷ *Id.* at 5; Rollo, p. 1975.
- ²⁸ *Id.* at 9; Rollo, p. 1979.
- ²⁹ *Id.* at 12; Rollo, p. 1982.
- ³⁰ *Id.*
- ³¹ *Id.* at 14; Rollo, p. 1984.
- ³² *Id.* at 19; Rollo, p. 1989.
- ³³ COP and APT's Comment dated January 14, 2004, pp. 14-15; Rollo, pp. 1927-1928.
- ³⁴ Resolution dated September 24, 2003, pp. 23-24.
- ³⁵ *Id.* at 22.
- ³⁶ Resolution dated September 24, 2003, pp. 31-32.
- ³⁷ J.G. Summit's Consolidated Reply dated March 11, 2004, p. 14; Rollo, p. 2109.
- ³⁸ *Id.*
- ³⁹ PHILYARDS' Manifestation and Comment dated June 26, 2002, p. 10; Rollo, p. 1334.
- ⁴⁰ PHILYARDS' Comment dated February 3, 2004, pp. 8-16; Rollo, pp. 1978-1986.
- ⁴¹ PHILYARDS' Manifestation and Comment dated June 26, 2002, p. 10; Rollo, p. 1334.

⁴² Constitution, Article XII, National Economy and Patrimony.

⁴³ J.G. Summit's Consolidated Comment dated March 8, 2004, p. 17; Rollo, p. 2112.

⁴⁴ Philippine Banking Corporation v. Lui She, No. L-17587, September 12, 1967, 21 SCRA 52.

⁴⁵ J.G. Summit's Motion for Reconsideration dated October 17, 2003, p. 14; Rollo, p. 1867.

⁴⁶ *Id.* at 15; Rollo, p. 1868.

⁴⁷ PHILYARDS' Manifestation and Comment dated June 26, 2002, p. 10; Rollo, p. 1334.

⁴⁸ COP and APT's Comment dated January 14, 2004, p. 36; Rollo, p. 1949.

⁴⁹ Art. 415(2), Civil Code.