

**REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY**

**SOUTHERN CROSS CEMENT
CORPORATION,**

Petitioner,

- versus -

C.T.A. CASE NO.6742

**THE PHILIPPINE CEMENT
MANUFACTURERS CORPORATION,
THE SECRETARY OF THE
DEPARTMENT OF TRADE AND
INDUSTRY, THE SECRETARY OF THE
DEPARTMENT OF FINANCE, and THE
COMMISSIONER OF THE BUREAU OF
CUSTOMS,**

Promulgated:

JUN 23 2004

Atty. General

Respondents.

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RESOLUTION

For resolution is the Motion to Declare Respondent Cement Manufacturer's Association of the Philippines, Inc. (CMAP), formerly the Philippine Cement Manufacturers Corporation in Default filed by petitioner on October 8, 2003 and the Motion to Dismiss [Petition for Review Ex Abundante Ad Cautelam filed on August 1, 2003] filed by respondent CMAP on October 30, 2003.

In its Motion to Declare Respondent CMAP in default, petitioner posits that it filed its petition for review on August 1, 2003, furnishing copy to respondent CMAP to its last known address as indicated in its submissions

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with the Tariff Commission. Petitioner also states that summons and copy of the petition for review were duly served upon all respondents including respondent CMAP on August 6, 2003 via personal delivery as shown in the Notification. Further, petitioner alleges that after several motions for extensions filed by the Solicitor General in behalf of the public respondents, and actual knowledge of the pending case, by its overt acts - by virtue of the pleading filed with the Supreme Court, wherein respondent CMAP made reference to the case pending before this Court, no responsive pleading or motion for extension has been filed by the respondent CMAP. Hence, petitioner filed herein Motion to Declare Respondent CMAP in Default.

On October 17, 2003 counsel for respondent CMAP filed its Entry of Appearance which also states that it has received a copy of the Motion for Extension of Time to File Answer dated September 12, 2003 filed by the Office of the Solicitor General. However, as of the date of the filing of the entry of appearance respondent CMAP has not yet received the summons of this Court in the petition for review filed by petitioner on August 1, 2003.

Respondent CMAP, also filed its Opposition (To Motion to Declare Respondent Philcemcor in Default dated 7 October 2003), arguing that said motion to declare in default is devoid of merit since it is a matter of record that neither respondent CMAP nor its counsel was served with summons by this

court directing the filing of an answer. Respondent CMAP disputes the allegation of petitioner that it has been served with summons as stated in the notification, considering that the Petition for Review erroneously indicated the address of the respondent at 13 Economia St., Bagumbayan, Libis, Quezon City, although as early as January 2003 CMAP had moved its offices to Corporal St. corner E. Rodriguez Ave., Bagong Ilog, Pasig City.

Respondent, further, contradicts the position of petitioner that mere acquiring of a copy of the Petition for Review and actual knowledge of the pendency of the case is tantamount to service of summons.

The Motion to Declare Respondent CMAP in Default is unsubstantiated. Section 13, Rule 13 of the Rules of Court provides:

SEC.13. *Proof of Service.* – Proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service. If the service is by ordinary mail, proof thereof shall consist of an affidavit of the person of mailing of facts showing compliance with Section 7 of this Rule. If service is made by registered mail, proof shall be made by such affidavit and the registry receipt issued by the mailing office. The registry return card shall be filed immediately upon its receipt by the sender, or in lieu thereof the unclaimed letter together with the certified or sworn copy of the notice given by the postmaster to the addressee.

The proof of personal service of an order of the court may be proved by the official return of the sheriff. Based on the records of the case (p.685 of the Docket), Sheriff III Bellardo Celestial placed a note on the Summons dated August 6, 2003, that he “personally served to addressee but according to guard on duty S.G. Capangpangan, they have already moved out since December

2002” (with arrow pointing to addressee Philippine Cement Manufacturer’s Corp. 13 Economia St. Bagong Bayan, Libis, Quezon City). The said proof of personal service clearly showed that indeed respondent CMAP did not receive any summons from this Court. Hence, the reliance of the petitioner on the Notification alone is misplaced. Indeed, service of summons upon the defendant is essential for the court to acquire jurisdiction over his person.

Proceeding to the Motion to Dismiss based on the ground of forum shopping, respondent CMAP accuses petitioner of forum shopping considering that petitioner and its counsel willfully and deliberately filed a false certification against forum-shopping in its petition, when it stated that the issues raised in the instant petition are different from the issues raised in the Petition for Review dated June 23, 2003. Respondent CMAP insists that in the Verification and Certification, petitioner and its counsel deliberately and conveniently omitted the fact that it had filed a Very Urgent Application for a Temporary Restraining Order And/Or A Writ of Preliminary Injunction (Urgent Application) dated July 4, 2003 with the Supreme Court in connection with its Petition for Review dated June 23, 2003. Respondent CMAP concludes that the Urgent Application also seeks to obtain the very same relief that it seeks from this court in the instant petition.



Respondent CMAP cited the case of *Melo v. Court of Appeals* (318 SCRA 94 [1999]) to support its ground for motion to dismiss on the ground of forum shopping. The High Court in the said decision held that forum shopping exists where the elements of *litis pendentia* are present or where a final judgment in one case will amount to *res judicata* in another. *Litis pendentia* as a ground for the dismissal of an action must have the following concurring elements: 1) identity of the parties, or at least such parties who represent the same interests in both actions; 2) identity of rights asserted and relief prayed for, the relief being founded on the same facts; and 3) the identity with respect to the preceding particulars in the two cases is such that any judgment that may be rendered in the pending case, regardless of which party is successful, would amount to *res judicata* in the other case.

From the above requisites of forum shopping which is tantamount to *litis pendentia*, respondents CMAP shows that: 1) the two petitions involve the same parties (petitioner SCCC and respondent CMAP together with the same set of public respondents), 2) the two petitions clearly involve not only the same facts but also the same right asserted and reliefs prayed for (both actions pertain to the imposition of safeguard measures on imported cement or it seeks to prevent the DTI Secretary from granting respondent CMAP's application for safeguard measures), and 3) *res judicata* clearly obtains since a decision in the



Petition for Review with the Supreme Court dated June 23, 2003 will consequently and naturally bind, control and be determinative of the very same issue and subject matter raised in the instant petition for review dated August 1, 2003.

On the other hand, the petitioner explained that the reliefs sought are not identical because in the instant petition, petitioner seeks from this court to annul, reverse and set aside the decision of the Secretary of DTI dated June 25, 2003 which imposes definitive safeguard duty in the amount of P20.60 per 40kg bag of imported gray Portland cement for three years (commencing on December 10, 2001), for being patently contrary to, or not supported by, the facts and the law. As to the petition before the Supreme Court, it seeks to reverse the decision of the Court of Appeals ruling that: a) it had jurisdiction over the appeal of the CMAP, from the decision issued by the Secretary of the DTI under Republic Act No. 8800 and b) the DTI Secretary is not bound by the findings of the Tariff Commission that conditions for the imposition of safeguard measures as enumerated in R.A. No. 8800 do not exist.

The dispositive portion of the decision of the Court of Appeals promulgated on June 5, 2003 in Philippine Cement Manufacturers Corporation v. The Honorable Secretary of DTI, et al. states:

WHEREFORE, based on the foregoing premises, petitioner's prayer to set aside the findings of the Tariff Commission in its Assailed

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Report dated March 12, 2002 is DENIED. On the other hand, the assailed April 5, 2002 Decision of the Secretary of the Department of Trade and Industry is hereby SET ASIDE. Consequently, the case is REMANDED to the public respondent Secretary of the Department of Trade and Industry for a final decision in accordance with R.A. No. 8800 and its Implementing Rules and Regulations.

From which the petitioner filed a Petition for Review before the Supreme Court on June 23, 2003, assailing the said decision on the ground that the Court of Appeals erred in, among others, that: a) it had jurisdiction over the appeal of the Philippine Cement Manufacturer's Corporation (PHILCEMCO) from the decision issued by the Secretary of DTI under R.A. No. 8800 (Safeguard Measures Act), and b) the DTI Secretary is not bound by the findings of the Tariff Commission that conditions for the imposition of the safeguard measures as enumerated in R.A. No. 8800 do not exist. In its relief, petitioner prayed that the Supreme Court, after due proceedings, render judgment, inter alia: a) reversing, annulling, and setting aside the Assailed decision dated June 5, 2003 of the Court of Appeals in CA G.R. No. 70234 in so far as it 1) holds that the Court of Appeals has jurisdiction over an appeal from a final order or judgment of the DTI Secretary issued pursuant to R.A. No. 8800; 2) holds that the DTI Secretary is not bound by the actual findings of the Tariff Commission; and 3) remands the case to the DTI Secretary for "final decision", and b) upholding the April 5, 2002 Decision of the DTI

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Secretary denying PHILCEMCOR'S application for Safeguard Measures and directing the BOC to immediately return the cash bond of SCCC.

On the other hand, in the instant petition, petitioner prayed that this court annul, reverse and set aside the June 25, 2003 decision of the DTI Secretary and deny PHILCEMCOR'S application for safeguard measures.

Forum shopping is present when in two or more cases pending there is identity of parties, rights or causes of action and reliefs sought. (*International School, Inc. (Manila) v. Court of Appeals*, 309 SCRA 474). It may also be the institution of two or more actions or proceedings grounded on the same cause on the supposition that one or the other court would make a favorable disposition. For it to exist, there should be 1) identity of parties, or at least such parties as would represent the same interest in both actions, b) identity of the rights asserted, and relief prayed for, the relief being founded on the same facts; and c) identity of the two preceding particulars such that any such judgment rendered in the other action will, regardless of which party is successful, amount to res judicata in the action under consideration. (*Santos v. COMELEC* 399 SCRA 611, 619 [2003]).

In the instant petition there is no denying that the parties are the same with that of the Petition for Review before the Supreme Court. Petitioner, after filing a Petition for Review on Certiorari before the Supreme Court on

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June 23, 2003, filed the instant petition on August 1, 2003. Although the instant petition is based on the June 25, 2003 decision of the Secretary of DIT, the same is founded on the same facts as that of the assailed Court of Appeals decision of June 5, 2003. There is substantially the same relief being prayed for by the petitioner in both cases, and that is the denial of PHILCFMCOR'S application for Safeguard Measures. In filing the instant petition for certiorari before the Supreme Court, petitioner sought to increase its chances of securing a favorable decision on the supposition that this Court will look with favor on his relief. Perhaps, the situation would be different had petitioner sought to nullify the decision of the Court of Appeals for lack of jurisdiction without going into the merits of the issue of whether or not the Secretary of Trade and Industry is correct in the imposition of safeguard duty. In that case the cause of action is entirely different in the two forums. One, questioning by certiorari for lack of jurisdiction an action of an Appellate Court which only the Supreme Court can rule and another before the Court of Tax Appeals on the merits of the imposition of the safeguard measures solely within its jurisdiction pursuant to RA 8800.

The most important factor in determining the existence of forum-shopping is the vexation caused to the courts and parties-litigants by a party who asks different courts to rule on the same or related causes or grant the



same or substantially the same reliefs. (Roxas v. Court of Appeals (363 SCRA 207 [2001])). Willful and deliberate forum-shopping is a ground for summary dismissal of the case and constitute direct contempt of court. (Sec. 5, Rule 7, Rules of Court.)

WHEREFORE, in view of the foregoing, private respondent's Motion to Dismiss is hereby **GRANTED**. Accordingly, this case is hereby **DISMISSED** and considered **CLOSED** and **TERMINATED**.

SO ORDERED.



ERNESTO D. ACOSTA
Presiding Justice



LOVELL R. BAUTISTA
Associate Justice



JUANITO C. CASTAÑEDA, JR.
Associate Justice

