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WHEREFORE, the petition is *GRANTED*. The challenged decision of the Court of Appeals in CA-GR SP No. 20005 is *MODIFIED*. As modified, the tax refund to be granted to private respondent Atlas Consolidated Mining and Development Corporation in C.T.A. Case No. 2964 shall be computed on the basis of the rates prescribed under Sections 1 and 2 of R.A. No. 1435 and shall be limited to the payments made by it prior to 21 July 1976. The petitioner shall forthwith revise the computation of the refundable amount which shall be remitted, without interest, to the private respondent within sixty (60) days from the finality of this decision.

No pronouncements as to costs.

SO ORDERED.

Cruz (Chairman), Bellosillo, Quiason, and *Kapunan, JJ., concur*.

FIRST DIVISION

[G.R. No. 106989. May 10, 1994]

H.B. ZACHRY COMPANY INTERNATIONAL, *petitioner, vs*. **HON. COURT OF APPEALS and VINNEL-BELVOIR CORPORATION,** *respondents*.

[G.R. No. 107124. May 10, 1994]

VINNEL-BELVOIR CORPORATION, *petitioner, vs*. **THE COURT OF APPEALS and H.B. ZACHRY COMPANY INTERNATIONAL,** *respondents*.

SYLLABUS

1. REMEDIAL LAW; PROVISIONAL REMEDIES; ATTACHMENT; A WRIT OF ATTACHMENT CANNOT

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BE VALIDLY ENFORCED BEFORE THE COURT ACQUIRES JURISDICTION OVER THE PERSON OF THE DEFENDANT. — [T]he writ of attachment cannot be validly enforced through the levy of Zachry's property before the court had acquired jurisdiction over Zachry's person either through its voluntary appearance or the valid service of summons upon it. To put it in another way, a distinction should be made between the *issuance* and the *enforcement* of the writ. The trial court has unlimited power to issue the writ upon the commencement of the action even before it acquires jurisdiction over the person of the defendant, but enforcement thereof can only be validly done after it shall have acquired such jurisdiction.

2. **ID; CIVIL PROCEDURE; MOTION TO DISMISS; DEFERMENT OF RESOLUTION; THE COURT IS UNDER NO OBLIGATION TO IMMEDIATELY HOLD A HEARING ON THE MOTION, IT IS VESTED WITH DISCRETION TO DEFER SUCH HEARING AND THE DETERMINATION OF THE MOTION UNTIL THE TRIAL OF THE CASE. —** [W]e find that although the order of the trial court denying the motion to dismiss did not clearly state so, it is evident that the trial court perceived the ground of the motion to be not indubitable; hence, it could defer its resolution thereon until the trial of the case. In deciding a motion to dismiss, Section 3, Rule 16 of the Rules of Court grants the court four options: (1) to deny the motion, (2) to grant the motion, (3) to allow amendment of pleadings, or (4) to defer the hearing and determination of the motion until the trial, if the ground alleged therein does not appear to be indubitable. Under the fourth option, the court is under no obligation to immediately hold a hearing on the motion; it is vested with discretion to defer such hearing and the determination of the motion until the trial of the case.

3. **ID; ID; THE COURT OF APPEALS CANNOT INTERFERE WITH THE TRIAL COURT'S DISCRETION IN DENYING A MOTION TO DISMISS FOR LACK OF INDUBITABILITY OF THE GROUND INVOKED. —** [W]e cannot give our assent to the Court of Appeals' order directing the trial court to conduct a hearing for the determination of the proper interpretation of the provisions of the Subcontract Agreement. It would re-open the motion to dismiss — which, upon the trial court's exercise of its discretion, was properly

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denied for lack of indubitability of the ground invoked — and thereby unduly interfere with the trial court's discretion. The proper interpretation could only be done by the trial court after presentation of evidence during trial on the merits pursuant to the tenor of its order denying the motion to dismiss.

APPEARANCES OF COUNSEL

Quisumbing Torres & Evangelista for H. B. Zachry Co.
Feria, Feria, Lugtu & La O' for Vinnell Belvoir Corp.

D E C I S I O N

DAVIDE, JR., *J.*:

Challenged in these petitions for review, which were ordered consolidated on 9 December 1992,[1] is the decision of the Court of Appeals in CA-G.R. SP No. 24174,[2] promulgated on 1 July 1992, the dispositive portion of which reads:

"WHEREFORE, premises considered, this Petition for *Certiorari* and Prohibition is hereby granted in so far as it prayed for the dissolution of the writ of preliminary attachment inasmuch as it was issued prior to the service of summons and a copy of the complaint on petitioner. The writ of preliminary attachment issued by respondent Court on March 21, 1990 is hereby ordered lifted and dissolved as having been issued in grave abuse of discretion by respondent Court.

With respect to the issue of whether or not parties should submit the instant dispute [to] arbitration, We hereby order public respondent to conduct a hearing for the determination of the proper interpretation of the provisions of the Subcontract Agreement.

No pronouncement as to costs."[3]

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[1] *Rollo*, G.R. No. 107124, 505.

[2] *Id*., G.R. No. 106989, 38-53; *Id*., 39-56. Per Associate Justice Jose C. Campos, Jr., concurred in by Associate Justices Segundino G. Chua and Fortunato A. Vailoces.

[3] *Rollo*, G.R. No. 107124, 56.

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and its September 1992 Resolution[4] which denied the motion for partial reconsideration of H.B. Zachry Company International (hereinafter Zachry) and the motion for reconsideration of Vinnel-Belvoir Corporation (hereinafter VBC).

The pleadings of the parties and the challenged decision disclose the following material facts:

On 17 July 1987, VBC entered into a written Subcontract Agreement[5] with Zachry, a foreign corporation. The latter had been engaged by the United States Navy to design and construct 264 Family Housing Units at the US Naval Base at Subic, Zambales. Under the agreement, specifically under Section 3 on *Payment*, VBC was to perform all the construction work on the housing project and would be paid "for the performance of the work the sum of Six Million Four Hundred Sixty-eight Thousand U.S. Dollars (U.S.$6,468,000.00), subject to additions and deductions for changes as hereinafter provided." This "lump sum price is based on CONTRACTOR'S proposal, dated 21 May 1987 (including drawings), submitted to OWNER for Alternate Design-Apartments." It was also provided "that substantial differences between the proposal and the final drawings and Specification approved by the OWNER may be grounds for an equitable adjustment in price and/or time of performance if requested by either party in accordance with Section 6 [on] Changes."[6] Section 27 of the agreement reads:

"Sec. 27. *DISPUTES PROCEDURE.*

A. In case of any dispute, except those that are specifically provided for in this SUBCONTRACT, between the SUBCONTRACTOR and the CONTRACTOR, the SUBCONTRACTOR agrees to be bound to the CONTRACTOR to the same extent that the CONTRACTOR is bound to the OWNER by the terms of the GENERAL CONTRACT and by any and all decisions or determinations made thereunder by the party or boards

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[4] *Id.*, 58-60.

[5] *Id.*, 105-125 (Annex "A" of Complaint in Civil Case No. 90-772, RTC, Makati).

[6] *Rollo*, G.R. No. 107124, 109.

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so authorized in the GENERAL CONTRACT. The SUBCONTRACTOR, on items or issues relating or attributable to the SUBCONTRACTOR, also agrees to be bound to the CONTRACTOR to the same extent that the CONTRACTOR is bound to the OWNER by the final decision of a court of competent jurisdiction, whether or not the SUBCONTRACTOR is a party to such proceeding. If such a dispute is prosecuted or defended by the CONTRACTOR against the OWNER under the terms of the GENERAL CONTRACT or in court action, the SUBCONTRACTOR agrees to furnish all documents, statements, witnesses and other information required by the CONTRACTOR for such purpose. It is expressly understood that as to any and all work done and agreed to be done by the CONTRACTOR and as to any and all materials, equipment or services furnished or agreed to be furnished by the SUBCONTRACTOR, and as to any and all damages incurred by the SUBCONTRACTOR in connection with this SUBCONTRACT, the CONTRACTOR shall not be liable to the SUBCONTRACTOR to any greater extent than the OWNER is liable to and pays the CONTRACTOR for the use and benefit of the SUBCONTRACTOR for such claims, except those claims arising from acts of the CONTRACTOR. No dispute shall interfere with the progress of the WORK and the SUBCONTRACTOR agrees to proceed with his WORK as directed, despite any disputes it may have with the CONTRACTOR, the OWNER, or other parties.

B. If at any time any controversy should arise between the CONTRACTOR and the SUBCONTRACTOR, with respect to any matter or thing involved in, related to or arising out of this SUBCONTRACT, which controversy is not controlled or determined by subparagraph 27. A. above or other provisions in this SUBCONTRACT, then said controversy shall be decided as follows:

1. The SUBCONTRACTOR shall be conclusively bound and abide by the CONTRACTOR'S written decision respecting said controversy, unless the SUBCONTRACTOR shall commence arbitration proceedings as hereinafter provided within thirty (30) days following receipt of such written decision.

2. If the SUBCONTRACTOR decides to appeal from the written decision of the CONTRACTOR, then the controversy shall be decided by arbitration in accordance with the then current rules of the Construction Industry Arbitration Rules of the American Arbitration Association, and the arbitration decision shall be final and binding on both parties; provided,

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however, that proceedings before the American Arbitration Association shall be commenced by the SUBCONTRACTOR not later than thirty (30) days following the CONTRACTOR'S written decision pursuant to subparagraph 27.B.1 above. If the SUBCONTRACTOR does not file a demand for arbitration with the American Arbitration Association and CONTRACTOR within this thirty (30) day period, then the CONTRACTOR'S written decision is final and binding.

3. This agreement to arbitrate shall be specifically enforceable."[7]

When VBC had almost completed the project, Zachry complained of the quality of work, making it a reason for its decision to take over the management of the project, which paragraph C, Section 7 of the Subcontract Agreement authorized. However, prior to such take-over, the parties executed on 18 December 1989 a Supplemental Agreement,[8] pertinent portions of which read as follows:

"2. All funds for progress as computed by the schedule of prices under the subcontract will be retained by ZACHRY to insure sufficiency of funds to finish the lump sum project as scoped by the subcontract. However, one month after the date of this agreement, when ZACHRY shall have determined the cost to complete the subcontract, ZACHRY shall as appropriate, release to VBC the corresponding portion of the amounts retained.

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7. All costs incurred by ZACHRY chargeable to VBC under the subcontract from the date of the takeover to complete the scope of the subcontract will be to the account of VBC and/or its sureties. Zachry will advise both VBC and its sureties on a periodic basis as to progress and accumulated costs.

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9. VBC will be invited to participate in negotiations with the Navy in Change Orders concerning its scope of work. VBC will

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[7] *Rollo*, G.R. No. 107124, 120-121.

[8] *Id.*, 126-130. (Annex "B" of Complaint in Civil Case No. 90-772, RTC Makati).

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accept as final, without recourse against ZACHRY the Navy's decision regarding its interest in these Change Orders or modifications."

In accordance with the above conditions, VBC submitted to Zachry on 10 January 1990 a detailed computation of the cost to complete the subcontract on the housing project. According to VBC's computation, there remains a balance of $1,103,000.00 due in its favor as of 18 January 1990. This amount includes the sum of $200,000.00 allegedly withheld by Zachry and the labor escalation adjustment granted earlier by the US Navy in the amount of $282,000.00 due VBC. Zachry, however, not only refused to acknowledge the indebtedness but continually failed to submit to VBC a statement of accumulated costs, as a result of which VBC was prevented from cheking the accuracy of the said costs. On 2 March 1990, VBC wrote Zachry a letter demanding compliance with its obligations.[9] Zachry still failed to do so. VBC made representations to pursue its claim, including a formal claim with the Officer-in-Charge of Construction, NAVFAC Contracts, Southwest Pacific, [10] which also failed.

Hence, on 20 March 1990, VBC filed a Complaint[11] with the Regional Trial Court (RTC) of Makati against Zachry for the collection of the payments due it with a prayer for a writ of preliminary attachment over Zachry's bank account in Subic Base and over the remaining thirty-one undelivered housing units which were to be turned over to the US Navy by Zachry on 30 March 1990. The case was docketed as Civil Case No. 90-772 and was raffled to Branch 142 of the said court presided over by Judge Salvador P. de Guzman, Jr. Paragraph 2 of the Complaint alleges that defendant Zachry "is a foreign corporation with address at 527 Longwood Street, San Antonio, Texas, U.S.A. and has some of its officers working at U.S. Naval Base, Subic Bay, Zambales where it may be served with summons."

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[9] *Rollo*, G.R. No 107124, 131-132.

[10] *Rollo*, G.R. No. 107124, 133.

[11] *Id*., 92-102.

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On 21 March 1990, the trial court issued an order granting the application for the issuance of the writ of preliminary attachment and fixing the attachment bond at ₱24,266,000.00.[12] VBC put up the required bond and on 26 March 1990, the trial court issued the writ of attachment,[13] which was served, together with the summons, a copy of the complaint with annexes, the bond, and a copy of the order of attachment, on 27 March 1990 in the manner described in the Sheriff's Partial Return[14] of 29 March 1990:

"upon defendant H.B. Zachry Company (International) at its field office in U.S. Naval Base, Subic Bay, Zambales thru Ruby Apostol who acknowledged receipt thereof. Mr. James M. Cupit, defendant's authorized officer was in their Manila Office at the time of service."

The return further states:

"That on March 28, 1990, the undersigned sheriff went to the office of defendant H. B. Zachry Company (International) at c/o A.M. Oreta & Co. at 5th Floor, Ermita Building, Arquiza corner Alhambra streets, Ermita, Manila to serve the Court's processes but was informed by Atty. Felix Lobiro of A.M. Oreta & Co., that defendant H.B. Zachry Company has its own office at Room 600, 6th Floor of the same building (Ermita Building). However, said defendant's office was closed and defendant company (ZACHRY) only holds office during Mondays and Tuesdays of the week as per information gathered from the adjacent office."

On 27 March 1990, VBC filed an Amended Complaint[15] in Civil Case No. 90-772 to implead as additional defendants the US Navy Treasury Office-Subic Naval Base and Captain A.L. Wynn, an officer of the US Navy, against whom VBC payed for a restraining order or preliminary injunction to restrain the latter from preparing the treasury warrant checks to be paid to Zachry and the former from signing the said checks and to restrain

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[12] *Id*., 136.

[13] *Id*., 137.

[14] *Id*., 138-139.

[15] *Rollo*, G.R. No. 107124, 140-153.

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both from making any further payments to Zachry. It also amended paragraph 2 on the status and circumstances of Zachry as follows:

"2. Defendant, H.B. Zachry Co. (International) x x x is a foreign corporation with address at 527 Longwood Street, San Antonio, Texas, U.S.A. *and may be served with summons and all other legal processes at the following addresses: a) H.B. Zachry Company (International), U.S. Naval Base, Subic Bay, Zambales; and b) H.B. Zachry Company (International) c/o A.M. Oreta & Co., 5th Floor Ermita Building, Arquiza corner Alhambra Streets, Ermita, Manila, through its authorized officer James C. Cupit*."[16]

On 6 April 1990, Zachry filed a motion to dismiss the complaint[17] on the ground of lack of jurisdiction over its person because the summons was not validly served on it. It alleges that it is a foreign corporation duly licensed on 13 November 1989 by the Securities and Exchange Commission to do business in the Philippines[18] and, pursuant to Section 128 of the Corporation Code of the Philippines, had appointed Atty. Lucas Nunag[19] as its resident agent on whom any summons and legal processes against it may be served. Atty. Nunag's address is at the 10th Floor, Shell House, 156 Valero St., Makati, Metro Manila.

Summons and a copy of the Amended Complaint were served on 24 April 1990 on Zachry through Atty. Nunag as shown in the sheriff's return dated 24 April 1990.[20]

On 26 April 1990, VBC filed a Manifestation[21] to inform the court of the above service of summons on Zachry which it claimed rendered moot and academic the motion to dismiss.

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[16] *Id*., 140.

[17] *Rollo*, G.R. No. 107124, 194-197.

[18] *Id*., 198.

[19] *Id*., 199-200.

[20] *Id*., 203.

[21] *Id*., 204.

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On 24 May 1990, Zachry filed an Omnibus Motion[22] (a) to dismiss the complaint for lack of jurisdiction over its person since the subsequent service of summons did not cure the jurisdictional defect it earlier pointed out and, in the alternative, to dismiss the case or suspend the proceedings therein for failure of the plaintiff to submit the controversy in question to arbitration as provided for in its contract with Zachry; and (b) to dissolve the writ of attachment of 26 March 1990 "for having been issued without jurisdiction, having been issued prior to the service of summons." The arbitration provision referred to is Section 27.B of the Subcontract Agreement quoted earlier. In support of its alternative prayer for the suspension of proceedings, it cited Section 7 of R.A. No. 876, otherwise known as the Arbitration Act which provides:

"Sec. 7. *Stay of Civil Action* — If any suit or proceeding be brought upon an issue, arising out of an agreement providing for the arbitration thereof, the Court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action or proceeding until an arbitration has been had in accordance with the terms of the agreement. x x x"

This provision is almost identical with Section 3 of the United States Arbitration Act.

As to the invalidity of the writ of attachment, Zachry avails of the decision in *Sievert vs. Court of Appeals*[23] wherein this Court said:

"Attachment is an ancillary remedy. It is not sought for its own sake but rather to enable the attaching party to realize upon relief sought and expected to be granted in the main or principal action. A court which has not acquired jurisdiction over the person of the defendant, cannot bind that defendant whether in the main case or in any ancillary proceeding such as attachment proceedings. The service of a petition for preliminary attachment without the prior or simultaneous service of summons and a copy of the complaint in

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[22] *Id*., 206-218.

[23] 168 SCRA 692 [1988].

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the main case — and that is what happened in this case — does not of course confer jurisdiction upon the issuing court over the person of the defendant."[24]

VBC opposed the Omnibus Motion. Pleadings related to the Omnibus Motion were subsequently filed. [25]

In its Order of 19 September 1990,[26] the trial court resolved the Omnibus Motion and the related incidents by declaring that "the merits of the case can only [be] reached after due presentation of evidence." Hence, it denied the motion and directed the defendants to file their answer within the period provided by law.

On 8 October 1990, Zachry filed a motion for the reconsideration[27] of the above order assailing the court's inaction on the second and third issues raised in its Omnibus Motion, *viz*., the necessity of arbitration and the invalidity of the writ of attachment. VBC opposed the motion.[28] On 9 January 1991, the court issued an order denying the motion for reconsideration by ruling that the writ of preliminary attachment was regularly issued and that the violations of the Subcontract Agreement can be "tranced [sic] only after the case is heard on the merits."

Dissatisfied with the denial, Zachry filed with the Court of Appeals on 14 February 1991 a petition for *certiorari* and prohibition,[29] which was docketed as CA-G.R. SP No. 24174. Zachry contends therein that:

1. The proceedings before respondent trial court should be suspended, pending submission of the dispute to arbitration pursuant to Section 27-B of the Subcontract Agreement;

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[24] *Id*. at 696-697 (footnote omitted).

[25] Such as the Reply to the Operation, Rejoinder to the Reply, and Sur-Rejoinder.

[26] *Rollo*, G.R. No. 107124, 260-262.

[27] *Id*., 263-269.

[28] *Id*., 270-277.

[29] *Id*., 61-68.

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2. Alternatively, the complaint should be dismissed, pending arbitration pursuant to Section 27-B of the Subcontract Agreement;

3. As a third alternative, the complaint should be dismissed, because the dispute has been resolved with finality under Section 27-B of the Subcontract Agreement; and

4. The writ of preliminary attachment should be dissolved, as having been outside, or in excess of respondent court's jurisdiction, having been issued prior to the service of summons on petitioner.

It then prays that (a) the orders of the trial court of 19 September 1990 and 9 January 1991 be annulled for having been issued without or in excess of jurisdiction or with grave abuse of discretion; and (b) the trial court be directed to immediately suspend the proceedings in Civil Case No. 90-772 pending arbitration proceedings in accordance with the terms of Section 27.B of the Subcontract Agreement or, alternatively, to dismiss the amended complaint and dissolve the writ of attachment. It also prays for the issuance of a temporary restraining order and a writ of preliminary injunction to restrain the trial court from proceeding further in Civil Case No. 90-772.

On 18 February 1991, the Court of Appeals issued a temporary restraining order.[30]

On 1 July 1991, the Court of Appeals promulgated the challenged decision[31] dissolving the writ of preliminary attachment issued by the trial court and ordering it to conduct a hearing to determine the proper interpretation of the provisions of the Subcontract Agreement. As to the writ of attachment, the Court of Appeals held that summons was served on Zachry only on 24 April 1990; hence, applying *Sievert vs. Court of Appeals*,[32] the trial court "had no authority yet to act coercively against the defendant" when it issued the writ of attachment on 21 March 1990. As to arbitration, it ruled:

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[30] *Rollo*, G.R. No. 107124, 91.

[31] *Id*., G.R. No. 106989, 38-53; *Id*., 39-56.

[32] *Supra* note 23.

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"We are of the reasoned opinion that unlike in the factual situation in the cases cited by petitioner, the contract involved in the case at bar is, with respect to its arbitration clause, vogue [sic] and uncertain. Section 27.B which is the provision upon which petitioner anchors its claims is ambiguous in its terminology when it states that 'if at anytime any controversy should arise between the contractor and the subcontractor x x x which controversy is not controlled or determined by Section 27.A above or other provision of this subcontract x x x.' This provision states that only when a controversy arises between the contractor and the subcontractor which is not covered by Section 27.A or any provision of the Subcontract Agreement will the parties submit to arbitration. As to what controversies fall under Section 27.B, it is not clear from a mere perusal of the provisions. It is therefore not correct for petitioner to say that any and all dispute arising between the contracting parties should be resolved by arbitration prior to a filing of a suit in court."[33]

VBC and Zachry filed a motion for reconsideration and a partial motion for reconsideration, respectively.[34] The former urged the Court of Appeals to consider the decision of this Court of 29 November 1991 in *Davao Light & Power Co. vs. Court of Appeals*[35] wherein this Court ruled that a writ of preliminary attachment may be issued *ex-parte* prior to the service of summons and a copy of the complaint on the defendants. On the other hand, Zachry insists that "[t]here is nothing 'vague' or 'ambiguous about'" the provision on dispute procedures set forth in Subsections 27.B.1 to 27.B.3 of the Subcontract Agreement.

In its Resolution of 2 September 1992,[36] the Court of Appeals denied the above motions of the parties.

Hence, these petitions which were given due course in this Court's Resolution of 8 March 1993.[37]

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[33] *Rollo*, G.R. No. 106989, 50-51; *Id*., G.R. No. 107124, 52-53.

[34] *Id*., G.R. No. 107124, 405-410; 411-417.

[35] 204 SCRA 343 [1991].

[36] *Rollo*, G.R. No. 107124, 58-60.

[37] *Id*., 524.

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In G.R. No. 106989, petitioner Zachry reiterates all the issues it raised before the Court of Appeals, except that regarding the validity of the writ of attachment which was decided in its favor.

In G.R. No. 107124, petitioner VBC raises the following issues:

"A. WHETHER THE ISSUANCE OF THE WRIT OF PRELIMINARY ATTACHMENT PRIOR TO THE SERVICE OF THE SUMMONS AND A COPY OF THE AMENDED COMPLAINT ON THE RESPONDENT IS VALID.

B. WHETHER RESORT TO ARBITRATION PRIOR TO FILING A SUIT IN COURT IS REQUIRED BY THE SUBCONTRACT AGREEMENT UNDER THE FACTS OBTAINING IN THE PRESENT CASES."

As to the first issue, VBC takes refuge in the ruling in *Davao Light & Power Co. vs. Court of Appeals*[38] and argues that the issuance of the writ of attachment on 21 March 1990, although before the service of the summons, was valid. Its issuance and implementation are two different and separate things; the first is not affected by any defect in the implementation which may be corrected. Moreover, assuming *arguendo* that the initial service of summons was defective, it was cured by the numerous pleadings thereafter filed. Finally, whatever doubts existed on the effectiveness of the implementation of the writ was erased by its re-service on the resident agent of Zachry.

As to the issue on arbitration, VBC maintains that arbitration is not required under the facts obtaining in the present case because the applicable provision of the Subcontract Agreement is Section 3 on Payment and not Section 27.B on Arbitration. Zachry's fraudulent actuations and gross violation of the Subcontract Agreement render prior resort to arbitration futile and useless. The preliminary attachment, which was essential to secure the interest of the petitioner, could not have been obtained through arbitration proceedings.

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[38] *Supra* note 35.

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Zachry, in its Comment,[39] contends that pursuant to the Sievert and *Davao Light* rulings, the issuance of the writ of attachment before the service of summons on Zachry's resident agent was invalid and that the various pleadings filed by the parties did not cure its invalidity. It argues that the arbitration procedure is set forth in Section 27.B of the Subcontract Agreement. If further maintains that pursuant to *General Insurance vs. Union Insurance*,[40] the alleged fraudulent actuations which relate to the merits of the case may be properly addressed to the arbitrators and that there is no merit to the claim that arbitration would be useless since the arbitration proceeding would be presided over by an independent and competent arbitral tribunal.

The issues in these petitions are properly defined by VBC in G.R. No. 107124.

We find for petitioner VBC.

It was error for the Court of Appeals to declare, on the ground of grave abuse of discretion, the nullity of the writ of attachment issued by the trial court on 21 March 1990. In the first place, the writ was in fact issued only on 26 March 1990 and served, together with the summons, copy of the complaint, the Order of 21 March 1990, and the bond, on 27 March on Zachry at its field office in Subic Bay, Zambales, through one Ruby Apostol. What the Court of Appeals referred to as having been issued on 21 March 1990 is the order granting the application for the issuance of a writ of preliminary attachment upon the posting of a bond of ₱24,266,000.00.[41] In the second place, even granting *arguendo* that the Court of Appeals had indeed in mind the 26 March 1990 writ of attachment, its issuance, as well as the issuance of the 21 March 1990 Order, did not suffer from any procedural or jurisdictional defect; the trial court could validly issue both.

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[39] *Rollo*, G.R. No. 107124, 443-452.

[40] 179 SCRA 530 [1989].

[41] *Rollo*, G.R. No. 107124, 136.

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However, the writ of attachment cannot be validly enforced through the levy of Zachry's property before the court had acquired jurisdiction over Zachry's person either through its voluntary appearance or the valid service of summons upon it.[42] To put it in another way, a distinction should be made between the issuance and the enforcement of the writ. The trial court has unlimited power to issue the writ upon the commencement of the action even before it acquires jurisdiction over the person of the defendant, but enforcement thereof can only be validly done after it shall have acquired such jurisdiction. This is the rule enunciated in *Davao Light & Power Co. vs. Court of Appeals.*[43] In that case, this Court stated:

"The question is whether or not a writ of preliminary attachment may issue *ex parte* against a defendant before acquisition of jurisdiction of the latter's person by service of summons or his voluntary submission to the Court's authority.

The Court rules that the question must be answered in the affirmative and that consequently, the petition for review will have to be granted.

It is incorrect to theorize that after an action or proceeding has been commenced and jurisdiction over the person of the plaintiff has been vested in the court, *but before the acquisition of jurisdiction over the person of the defendant (either by service of summons or his voluntary submission to the court's authority)*, nothing can be validly done by the plaintiff or the court. It is wrong to assume that the validity of acts done during this period should be dependent on, or held in suspension until, the actual obtention of jurisdiction over the defendant's person. The obtention by the court of jurisdiction over the person of the defendant is one thing; quite another is the acquisition of jurisdiction over the person of the plaintiff or over the subject-matter or nature of the action, or the res or object thereof.[44]

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[42] *Paramount Insurance corp. vs. Japzon*, 211 SCRA 879 [1992]; *Minucher vs. Court of Appeals*, 214 SCRA 242 [1992].

[43] *Supra* note 35.

[44] *Id.* at 347.

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A preliminary attachment may be defined, paraphrasing the Rules of Court, as the provisional remedy in virtue of which a plaintiff or other proper party may, at the commencement of the action or at any time thereafter, have the property of the adverse party taken into the custody of the court as security for the satisfaction of any judgment that may be recovered. It is a remedy which is purely statutory in respect of which the law requires a strict construction of the provisions granting it. Withal no principle, statutory of jurisprudential, prohibits its issuance by any court before acquisition of jurisdiction over the person of the defendant.

Rule 57 in fact speaks of the grant of the remedy 'at the commencement of the action or at any time thereafter.' The phrase 'at the commencement of the action,' obviously refers to the date of the filing of the complaint — which, as above pointed out, is the date that marks 'the commencement of the action'; and the reference plainly is to a time before summons is served on the defendant, or even before summons issues. What the rule is saying quite clearly is that after an action is properly commenced — by the filing of the complaint and the payment of all requisite docket and other fees — the plaintiff may apply for and obtain a writ of preliminary attachment upon fulfillment of the pertinent requisites laid down by law, and that he may do so at any time, either before or after service of summons on the defendant. And this indeed, has been the immemorial practice sanctioned by the courts: for the plaintiff or other proper party to incorporate the application for attachment in the complaint or other appropriate pleading (counterclaim, cross-claim, third-party claim) and for the Trial Court to issue the writ ex-parte at the commencement of the action if it finds the application otherwise sufficient in form and substance.[45]

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It goes without saying that whatever be the acts done by the Court prior to the acquisition of jurisdiction over the person of the defendant, as above indicated — issuance of summons, order of attachment and writ of attachment (and/or appointment of guardian *ad litem*, or grant of authority to the plaintiff to prosecute the suit as a pauper litigant, or amendment of the complaint by the plaintiff as a matter of right without leave of court) — and however valid and proper

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[45] *Id*. at 349-350 (citations omitted).

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they might otherwise be, these do not and cannot bind and affect the defendant until and unless jurisdiction over his person is eventually obtained by the court, either by service on him of summons or other coercive process or his voluntary submission to the court's authority. Hence, when the sheriff or other proper officer commences implementation of the writ of attachment, it is essential that he serve on the defendant not only a copy of the applicant's affidavit and attachment bond, and of the order of attachment, as explicitly required by Section 5 of Rule 57, but also the summons addressed to said defendant as well as a copy of the complaint and order for appointment of guardian *ad litem*, if any, as also explicitly directed by Section 3, Rule 14 of the Rules of Court. Service of all such documents is indispensable not only for the acquisition of jurisdiction over the person of the defendant, but also upon consideration of fairness, to apprise the defendant of the complaint against him, of the issuance of a writ of preliminary attachment and the grounds therefor and thus accord him the opportunity to prevent attachment of his property by the posting of a counterbond in an amount equal to the plaintiff's claim in the complaint pursuant to Section 5 (or Section 12), Rule 57, or dissolving it by causing dismissal of the complaint itself on any of the grounds set forth in Rule 16, or demonstrating the insufficiency of the applicant's affidavit or bond in accordance with Section 13, Rule 57.[46]

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For the guidance of all concerned, the Court reiterates and reaffirms the proposition that writs of attachment may properly issue *ex parte* provided that the Court is satisfied that the relevant requisites therefor have been fulfilled by the applicant, although it may, in its discretion, require prior hearing on the application with notice to the defendant; but that levy on property pursuant to the writ thus issued may not be validly effected unless preceded, or contemporaneously accompanied, by service on the defendant of summons, a copy of the complaint (and of the appointment of guardian *ad litem*, if any), the application for attachment (if not incorporated in but submitted separately from the complaint), the order of attachment, and the plaintiff's attachment bond."[47]

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[46] *Id*. at 355-356 (citations omitted).

[47] *Id*. at 357.

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We reiterated the rule laid down in *Davao Light* in the subsequent case of *Cuartero vs. Court of Appeals*[48] wherein we stated:

"It must be emphasized that the grant of the provisional remedy of attachment practically involves three stages: first, the court issues the order granting the application; second, the writ of attachment issues pursuant to the order granting the writ; and third, the writ is implemented. For the initial two stages, it is not necessary that jurisdiction over the person of the defendant should first be obtained. However, once the implementation commences, it is required that the court must have acquired jurisdiction over the person of the defendant for without such jurisdiction, the court has no power and authority to act in any manner against the defendant. Any order issuing from the Court will not bind the defendant."

The validity then of the order granting the application for a writ of preliminary attachment on 21 March 1990 and of the issuance of the writ of preliminary attachment on 26 March 1990 is beyond dispute. However, the enforcement of the preliminary attachment on 27 March 1990, although simultaneous with the service of the summons and a copy of the complaint, did not bind Zachry because the service of the summons was not validly made. When a foreign corporation has designated a person to receive service of summons pursuant to the Corporation Code, that designation is exclusive and service of summons on any other person is inefficacious.[49] The valid service of summons and a copy of the amended complaint was only made upon it on 24 April 1990, and it was only then that the trial court acquired jurisdiction over Zachry's person. Accordingly, the levy on attachment made by the sheriff on 27 April 1990 was invalid. However, the writ of preliminary attachment may be validly served anew.

As to the second issue of arbitration, we find that although the order of the trial court denying the motion to dismiss did

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[48] 212 SCRA 260 [1992]. See also *Manacop vs. Court of Appeals*, 215 SCRA 773 [[1992]; *Master Tours and Travel Corp. vs. Court of Appeals*, 219 SCRA 321 [1993].

[49] See *Poizat vs. Morgan*, 28 Phil. 597 [1914], cited in MANUEL V. MORAN, *COMMENTS ON THE RULES OF COURT* 449 (1979 ed.).

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not clearly state so, it is evident that the trial court perceived the ground of the motion to be not indubitable; hence, it could defer its resolution thereon until the trial of the case. In deciding a motion to dismiss, Section 3, Rule 16 of the Rules of Court grants the court four options: (1) to deny the motion, (2) to grant the motion, (3) to allow amendment of pleadings, or (4) to defer the hearing and determination of the motion until the trial, if the ground alleged therein does not appear to be indubitable. Under the fourth option, the court is under no obligation to immediately hold a hearing on the motion; it is vested with discretion to defer such hearing and the determination of the motion until the trial of the case.[50] The lack of indubitability of the ground involved in Zachry's motion to dismiss is confirmed by the Court of Appeals when it declared:

"Section 27.B which is the provision upon which petitioner [Zachry] anchors its claim is ambiguous in its terminology when it states that 'if at any time any controversy should arise between the contractor and the subcontractor x x x which controversy is not controlled or determined by Section 27.A above or other provisions of this subcontractor' x x x. This provision states that only when a controversy arises between the contractor and subcontractor which is not covered by Section 27.A or any provision of the Subcontractor will the parties submit to arbitration. As to what controversies fall under Section 27.B, it is not clear from a mere perusal of the provisions."

Indeed, the parties could not even agree on what controversies fall within Section 27.B, and, perhaps, rightly so because the said Section 27.B excludes controversies controlled or determined by Section 27.A and other provisions of the Subcontract Agreement, which are themselves unclear. For that reason, VBC insists that its cause of action in Civil Case No. 90-772 is based on Section 3 of the Subcontract Agreement. It may further be emphasized that VBC's complaint was precipitated by Zachry's refusal to comply with the Supplemental Agreement. Evidently, Section 3 of the Subcontract Agreement and the Supplemental Agreement are excluded by Section 27.B. The trial court was, therefore, correct in denying Zachry's motion to dismiss.

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[50] *Mendoza vs. Court of Appeals*, 201 SCRA 343 [1991].

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However, we cannot give our assent to the Court of Appeals' order directing the trial court to conduct a hearing for the determination of the proper interpretation of the provisions of the Subcontract Agreement. It would re-open the motion to dismiss — which, upon the trial court's exercise of its discretion, was properly denied for lack of indubitability of the ground invoked — and thereby unduly interfere with the trial court's discretion. The proper interpretation could only be done by the trial court after presentation of evidence during trial on the merits pursuant to the tenor of its order denying the motion to dismiss. If the trial court should find that, indeed, arbitration is in order, then it could apply Section 7 of R.A. No. 876 which reads as follows:

"Sec. 7. *Stay of civil actio*n. — If any suit or proceeding be brought upon an issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action or proceeding until an arbitration has been had in accordance with the terms of the agreement: Provided, That the applicant for the stay is not in default in proceeding with such arbitration."

WHEREFORE, the petition in G.R. No, 107124 is *GRANTED* while that in G.R. No. 106989 is *DENIED f*or lack of merit. The challenged Decision of 1 July 1992 and Resolution of 2 September 1992 are hereby *SET ASIDE*. The orders of Branch 142 of the Regional Trial Court of Makati in Civil Case No. 90-772 of 19 September 1990 denying the motion to dismiss and of 8 October 1990 denying the motion to reconsider the former are *REINSTATED*. However, the service of the writ of preliminary attachment on 26 March 1990 is hereby declared invalid. The writ may, nevertheless, be served anew.

No pronouncement as to costs.

SO ORDERED.

Cruz (Chairman), Bellosillo, Quiason, and *Kapunan, JJ.*, concur.