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The decision of the Court of Appeals was based on a misapprehension of the facts and the law on the application of payment. Hence, the ejectment case subject of the instant petition must be dismissed, without prejudice to the determination and settlement of the money claims of the parties *inter se*.

WHEREFORE, the Court *GRANTS* the petition. The Court *REVERSES* and *SETS ASIDE* the decision of the Court of Appeals in CA-G.R. SP No. 34634.

ACCORDINGLY, the Court *REVERSES* the decision of the Regional Trial Court, Quezon City, Branch 220 in Civil Case No. 94-20813, and dismisses the complaint filed with the Metropolitan Trial Court, Quezon City, Branch 36 in Civil Case No. MTC XXXVI-7089.

No costs.

SO ORDERED.

Davide, Jr., C.J., Puno, Kapunan, and *Ynares-Santiago, JJ.*, concur.

FIRST DIVISION

[G.R. No. 124293. November 20, 2000]

JG SUMMIT HOLDINGS, INC., *petitioner, vs.* **COURT OF APPEALS, COMMITTEE ON PRIVATIZATION, its Chairman and Members, ASSET PRIVATIZATION TRUST and PHILYARDS HOLDINGS, INC.,** *respondents.*

SYNOPSIS

Kawasaki Heavy Industries, Ltd., a Japanese corporation, entered into a joint venture with the government's National

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Investment and Development Corporation (NIDC) for the construction, operation and management of a public utility, the Subic National Shipyard, Inc, now Philippine Shipyard and Engineering Corporation (PHILSECO), with the parties given the right of first refusal. The government's share in PHILSECO was increased to 97.41% leaving Kawasaki's share to 2.59%. The APT, as trustee for the government, offered for sale its 87.67% share in PHILSECO giving KAWASAKI the right to top by 5% the highest bid in "exchange" for its right of first refusal and can designate a company which could exercise said right. The consortium, composed of petitioner and two other foreign corporations, was declared the highest bidder at ₱2.03 billion. Nonetheless, KAWASAKI's designated company, PHI consortium, paid the purchase price and a stock purchase agreement thereafter issued in its favor. Petitioner challenged the same by a petition for *mandamus* with the Court of Appeals. The appellate court, in ruling that the right of first refusal and the right to top are *prima facie* legal and that petitioner is in estoppel, dismissed the petition. Hence, this recourse of petitioner.

Under the Constitution, the operation of shipbuilding and ship repair industry is a public utility which may be granted only to Filipino citizens or associations organized under Philippine laws at least 60% of whose capital is owned by such citizens. The participation of foreign investors is limited to their proportionate maximum share of 40%. Allowing a foreign corporation to participate in a public bidding in the sale of a public utility beyond its authorized share is unconstitutional.

A party cannot be estopped from assailing the unconstitutional provision of any rule.

Petition was granted and the assailed decision of the Court of Appeals was reversed and set aside.

SYLLABUS

1. REMEDIAL LAW; ACTIONS; PARTIES; A CORPORATION MAY REPRESENT ALL MEMBERS OF THE CONSORTIUM; ALL MEMBERS NEED NOT BE IMPLEADED. — While it is true that Rule 3, Section 2 of the Rules of Court provides that "(a)ll persons having an interest in the subject of the action and in

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obtaining the relief demanded shall be joined as plaintiffs," petitioner may file the petition alone. In the first place, Sembawang and Jurong are not indispensable parties, such that their non-joinder as petitioners will not necessarily result in a failure to arrive at a final determination of the case. They may be necessary parties as they were members of the consortium that won the public bidding prior to the exercise of the right to top by private respondent, but the petition may be resolved even without their active participation. Secondly, there is a doubt as to whether or not said foreign corporations are "subject to the jurisdiction of the court as to both service of process and venue." Thirdly, petitioner may be deemed to represent Sembawang and Jurong. The admission of petitioner's counsel that said foreign corporations are underwriting his and the other counsel's fees reflects this fact. By the nexus that binds the members of the consortium, in the event that petitioner succeeds in pursuing this case, it is bound to respect the existence of the consortium and the corresponding responsibilities arising therefrom.

2. **ID.; ID.; ID.; WINNING BIDDER HAS PERSONALITY TO INITIATE PROCEEDINGS TO PREVENT SETTING AT NAUGHT HIS RIGHT.** — Public respondents also contend that petitioner has no standing to question the legality of a provision of the JVA in which it is not a party. However, as this Court held in *Kilosbayan v. Morato*, there is a difference between the rule on real-party-in-interest and the rule on standing, as the latter has constitutional underpinnings. In the case at bar, petitioner has sufficiently alleged constitutional ramifications in the questioned public bidding of the PHILSECO that merit the attention of the Court. Moreover, the prospect of financial gains arising from the award of the sale of PHILSECO is enough personal stake in the outcome of the controversy to vest upon petitioner the *locus standi* to file the petition for *mandamus*. Besides, without Kawasaki-PHI's right to top the highest bid, petitioner would have been awarded the sale as the highest bidder. A winning bidder has personality to initiate proceedings to prevent setting at naught his right; otherwise, his right to due process would be violated. As such winning bidder, petitioner has "a present substantial interest," or such interest in the subject matter of action as will entitle it, under substantive law, to recover if the evidence is sufficient.

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3. **ID.; SPECIAL CIVIL ACTIONS; *MANDAMUS*; DOES NOT LIE TO COMPEL AWARD OF CONTRACT SUBJECT OF BIDDING TO UNSUCCESSFUL BIDDER.** — With respect to the propriety of the remedy availed by petitioner, the Court of Appeals correctly held that the special civil action of *mandamus* is not the proper remedy to question the legality of the exercise of the right to top by private respondent. It does not lie to compel the award of a contract subject of bidding to an unsuccessful bidder. *Mandamus* applies as a remedy only where petitioner's right is founded clearly in law and not when it is doubtful. The Court of Appeals cannot declare petitioner as the winning bidder in this case and direct the COP/APT to award the sale to it without first determining the validity of the right to top stipulated in the ASBR. Moreover, the sale of government share in PHILSECO is a *fait accompli*, in view of the execution of the Stock Purchase Agreement between APT and PHI.

4. **ID.; ID.; ID.; MAY NOT BE AVAILED TO DIRECT EXERCISE OF JUDGMENT.** — *Mandamus* may not be availed to direct the exercise of judgment or discretion in a particular way or to retract or reverse an action already taken in the exercise of either.

5. **ID.; ACTIONS; CAUSE OF ACTION; DETERMINED BY ALLEGATIONS IN PLEADING; FAILURE TO INCLUDE *CERTIORARI* IN CAPTION SHOULD NOT NEGATE FACT THAT PETITIONER CHARGED PUBLIC RESPONDENT WITH GRAVE ABUSE OF DISCRETION.** — Petitioner's failure to include *certiorari* in its caption should not negate the fact that the petition charged public respondent with grave abuse of discretion in awarding the sale to private respondent. Well-settled is the rule that it is not the caption of the pleading but the allegations therein that determine the nature of the action and the Court shall grant relief warranted by the allegations and the proof even if no such relief is prayed for.

6. **CONSTITUTIONAL LAW; STATUTES; WHEN A LAW EXPRESSLY REPEALS A PRIOR LAW WHICH IS ITSELF REPEALED, THE LAW FIRST REPEALED IS NOT REVIVED UNLESS EXPRESSLY SO PROVIDED.** — Indeed, P.D. No. 666 dated March 5, 1975 explicitly stated that a "shipyard" was not a "public utility." However, Section 1 of P.D. No. 666 was expressly repealed by Section 20 of Batas Pambansa Blg. 391, the Investment Incentive Policy Act of 1983. Subsequently,

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Executive Order No. 226, the Omnibus Investments Code of 1987, was issued and Section 85 thereof expressly repealed B.P. Blg. 391. The express repeal of B.P. Blg. 391 by E.O. No. 226 did not revive Section 1 of P.D. No. 666, declassifying the shipbuilding and ship repair industry as a public utility, as said executive order did not provide otherwise. When a law which expressly repeals a prior law is itself repealed, the law first repealed shall not be thereby revived unless expressly so provided. Consequently, when the APT drafted the ASBR sometime in 1993, P.D. No. 666 no longer existed in our statute books. While it is true that the repeal of a statute does not operate to impair rights that have become vested or accrued while the statute was in force, there are no vested rights of the parties that should be protected in the case at bar. The reason is simple: said decree was already inexistent when the ASBR was issued.

7. CIVIL LAW; OBLIGATIONS AND CONTRACTS; JOINT VENTURE; DEFINED. — A joint venture is an association of persons or companies jointly undertaking some commercial enterprise with all of them generally contributing assets and sharing risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement to share both in profit and losses. Persons and business enterprises usually enter into a joint venture because it is exempt from corporate income tax. Considered more of a partnership, a joint venture is governed by the laws on contracts and on partnership. The joint venture created between NIDC and Kawasaki falls within the purview of an "association" pursuant to Section 5 of Article XIV of the 1973 Constitution and Section 11 of Article XII of the 1987 Constitution. Consequently, a joint venture that would engage in the business of operating a public utility, such as a shipyard, must observe the proportion of 60%-40% Filipino-foreign capitalization.

8. ID.; ID.; ID.; FOREIGN CORPORATION'S RIGHT OF FIRST REFUSAL; LIMITED TO A MAXIMUM 40% SHARE. — Notably, paragraph 1.4 of the JVA accorded the parties the right of first refusal "*under the same terms*." This phrase implies that when either party exercises the right of first refusal under paragraph 1.4, they can only do so to the extent allowed them by paragraphs 1.2 and 1.3 of the JVA or under the proportion of 60%-40% of the shares of stock. Thus, should the NIDC

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opt to sell its shares of stock to a third party, Kawasaki could only exercise its right of first refusal to the extent that its total shares of stock would not exceed 40% of the entire shares of stock of SNS or PHILSECO. The NIDC, on the other hand, may purchase even beyond 60% of the total shares. As a government corporation and necessarily a 100% Filipino-owned corporation, there is nothing to prevent its purchase of stocks even beyond 60% of the capitalization as the Constitution clearly limits only foreign capitalization. Kawasaki was bound by its *contractual obligation* under the JVA that limits its right of first refusal to 40% of the total capitalization of PHILSECO. Thus, *Kawasaki cannot purchase beyond 40% of the capitalization of the joint venture on account of both constitutional and contractual proscriptions.*

9. REMEDIAL LAW; COURTS; ROLE. — It is well settled that the role of courts is to ascertain whether a branch or instrumentality of Government has transgressed its constitutional or statutory boundaries. The courts, must examine those boundaries in the light of provisions of the law. Otherwise, it would stray into the realm of policy decision-making.

10. CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; DELEGATION OF LEGISLATIVE AUTHORITY; RULES AND REGULATIONS ADOPTED MUST RESPECT CONSTITUTIONAL PROVISIONS. — Implicitly written in any delegated legislative authority, such as that provided for in Proclamation No. 50, is the requisite that the rules and regulations which an administrative body adopts must respect pertinent provisions of the Constitution and the law. Article XII, Section 11 of the Constitution providing for a 60% Filipino capitalization in order that public utilities may be granted a franchise should thus be deemed a paramount consideration in drafting the ASBR.

11. ID.; NATIONAL ECONOMY AND PATRIMONY; PUBLIC UTILITIES; RULE ALLOWING FOREIGN CORPORATION TO ENGAGE IN OPERATION OF PUBLIC UTILITY FOR UNLIMITED TIME, DIRECTLY AND OPENLY REPUGNANT TO CONSTITUTION. — In this regard, worth noting is paragraph 15.0 of the ASBR, which provides that: "In the event that the winning bidder is a 100% foreign-owned corporation, it may name its nominee corporation to whom the NG shares shall be conveyed, provided it owns 40% equity in the nominee

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corporation, so as not to affect PHILSECO's qualification to own real estate properties in the Philippines." This rule is fraught with dangerous implications. It allows a completely foreign corporation to participate in the public bidding of more than 60% of the total shares of a public utility corporation without setting a period within which the foreign bidder should name its nominee. As it is, the rule allows a totally foreign investor to engage in the business of operating a public utility for an unlimited period of time in total disregard of the constitutional proscription on the percentage of Filipino ownership of corporations engaged therein. Paragraph 15.0 of the ASBR is thus directly and openly repugnant to the Constitution considering that it allows foreign corporations to operate a public utility for an unlimited period of time.

12. ADMINISTRATIVE LAW; DISPOSAL OF PUBLIC PROPERTY; PUBLIC BIDDING; ACCORDING A PARTY RIGHT TO TOP BID VIOLATES RULE ON COMPETITIVE BIDDING. — In carrying out its objective of disposing of government property, the APT should take into account the pertinent laws. Since the method of disposing the PHILSECO that the APT had adopted was through public bidding, it was duty-bound to follow the rules and regulations on *competitive* public bidding, in order to uphold the elementary rule on fairness in such disposition. In according the KHI/PHI the right to top, the APT violated the rule on competitive public bidding, under which the highest bidder is declared the winner entitled to the award of the subject of the auction sale. In effect, the grant to KHI/PHI of the right to top can be likened to a second bidding, which, however, is allowed only if there is a failure of bidding, such as when there is only one bidder or none at all. By placing KHI/PHI in the advantageous position of topping the highest bidder, the APT set aside the basic rule in public bidding that there be an opportunity for competition. While it may be argued that the right to top was aimed at giving the best financial advantage to the government, the manner by which that right was conceived and arrived at in this case manifested bias in favor of KHI, thereby clearly brushing aside the rule on *fair competition.* More importantly, the ASBR provision on the right to top the highest bidder completely disregarded the stipulation in the JVA between NIDC and KHI to comply with the 60%-40% capitalization arrangement whereby KHI, the foreign investor,

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would be able to exercise its right of first refusal to the extent of only 40% of the total capitalization of the PHILSECO. Thus, KHI, whose investment exposure was already diminished to only 2.59% of the total PHILSECO shares, was given the privilege, through its nominee PHI, of exercising the right to top the highest bid to 87.67% of those shares or definitely over and above its 40% contractual right to PHILSECO shares under the JVA. Consequently, the APT rendered nugatory the constitutional and contractual proscriptions clearly to favor a foreign investor.

13. ID.; ID.; ID.; RIGHT OF FIRST REFUSAL CANNOT BAR ANOTHER BIDDER FROM SUBMITTING A BID. — While the right of first refusal entitled KHI to priority in the award of the contract, that right cannot bar another bidder from submitting a bid because, precisely, the law requires public bidding in government contracts. Thus, by engrafting in the provisions of the ASBR the right to top, which was only an offshoot of the right of first refusal, the APT effectively did away with public bidding insofar as KHI/PHI was concerned. To be sure, the right to top is different from the right to match. In the latter, a qualified *bidder* is given the privilege of offering the same bid as that of the highest bidder. In the former, as provided for by the ASBR, a *non-bidder* is accorded the right to top the highest bid. There is reason, therefore, for the petitioner to complain that the APT made a show of a public bidding in order to elicit the highest bid, only to award the sale to a non-bidder. The unfair manner by which the purported public bidding was conducted by the APT is even made more blatant by the fact that *after* the "public bidding," KHI exercised the right to top through its nominee, private respondent PHI, which has among its stockholders some losing bidders.

14. CIVIL LAW; ESTOPPEL; PARTY CANNOT BE ESTOPPED IN ASSAILING CONSTITUTIONALITY OF BIDDING RULES AND PROCEDURE. — It was thus error for the Court of Appeals to conclude that petitioner was estopped from contesting the validity of the ASBR and the bidding procedure conducted pursuant to it. It is clear from the provisions of the ASBR itself that the basic rules on fair competition in public biddings have been disregarded. Although petitioner had the opportunity to examine the ASBR before it participated in the bidding, it cannot be estopped from questioning the unconstitutional, illegal and

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inequitable provisions thereof. Estoppel is unavailing in this case; otherwise, it would stamp validity to an act that is prohibited by law or against public policy.

APPEARANCES OF COUNSEL

Romulo Mabanta Buenaventura Sayoc & Delos Angeles for petitioner.

Sycip Salazar Hernandez & Gatmaitan for private respondent.

D E C I S I O N

YNARES-SANTIAGO, *J.*:

On January 27, 1977, 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, NIDC and Kawasaki would maintain a shareholding proportion of 60% - 40%, respectively. One of the provisions of the JVA accorded the parties the right of first refusal should either party sell, assign or transfer its interest in the joint venture. Thus, paragraph 1.4 of the JVA states:

"Neither party shall sell, transfer or assign all or any part of its interest in SNS 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." (Italics supplied.)

On November 25, 1986, NIDC transferred all its rights, title and interest in PHILSECO to the Philippine National Bank (PNB). More than two months later or on February 3, 1987, by virtue of Administrative Order No. 14, PNB's interest in PHILSECO was transferred to the National Government.

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Meanwhile, 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. On February 27, 1987, a trust agreement was entered into between the National Government and the APT by virtue of which 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%.

Exercising their discretion, the COP and the APT deemed it in the best interest of the national economy and the government to privatize PHILSECO by selling 87.67% of its total outstanding capital stock to private entities. After a series of negotiations between the APT and Kasawaki, 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 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) would exercise its right to top by 5%.

At the pre-bidding conference held on September 28, 1993, interested bidders were given copies of the JVA between NIDC and Kawasaki, and of the Asset Specific Bidding Rules (ASBR) drafted for the 87.67% equity (*sic*)[1] in PHILSECO of the National Government. Salient provisions of the ASBR state:

"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

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[1] The heading of the ASBR states that the same rules were specifically set up for "97.41% equity of the national government in Philippine Shipyard & Engineering Corporation (PHILSECO)" (*Rollo* of CA-G.R. SP No. 34208, p. 46).

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87.67% of PHILSECO's outstanding capital stock), which will be *sold as a whole block* in accordance with the rules herein enumerated.

xxx x x x xxx

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).*

xxx x x x xxx

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. x x x"

The provisions of the ASBR were explained to the interested bidders who were notified that bidding would be held on December 2, 1993.

At the public bidding on said date, the consortium composed of petitioner JG Summit Holdings, Inc., Sembawang Shipyard Ltd. of Singapore (Sembawang), and Jurong Shipyard Limited of Malaysia (Jurong), was declared the highest bidder at ₱2.03 billion. The following day, December 3, 1993, the COP approved the sale of 87.67% National Government shares of stock in PHILSECO to said consortium. It notified petitioner of said approval "subject to the right of Kawasaki Heavy Industries, Inc./Philyards Holdings, Inc. to top JGSMI's (petitioner's) bid by 5% as specified in the bidding rules."

On December 29, 1993, petitioner informed the 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 (for ₱1.528 billion) thereby circumventing

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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 —

"x x x for proper determination and disposition, pursuant to Section 9, paragraph 1 of B.P. 129, granting the Court of Appeals 'original jurisdiction to issue writs of *mandamus* x x x and auxiliary writs or processes, whether or not in aid of its appellate jurisdiction,' which jurisdiction is concurrent with this Court, there being no special and important reason for this Court to assume jurisdiction over the case in the first instance."[2]

On July 18, 1995, the Court of Appeals "denied" for lack of merit the petition for *mandamus*. Citing *Guanio v. Fernandez*,[3] it held that *mandamus* is not the proper remedy to "compel the undoing of an act already done or the correction of a wrong already perpetuated, even though the action taken was clearly illegal." It was further ruled that it was not the proper forum for a "mere petition for *mandamus*" that aimed 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."

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[2] CA Record, p. 135; CA-G.R. SP No. 34208.

[3] 55 Phil. 814 (1931).

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After ruling that the right of first refusal and the right to top are *prima facie* legal, the Court of Appeals found petitioner to be in estoppel for the following reasons:

"5. If petitioner found the right to top to be illegal, it should not have participated in the public bidding; or it should have questioned the legality of the rules before the courts or filed a petition for declaratory relief (Rule 64, Rules of Court) before the public bidding could have taken place.

By participating in the public bidding, with full knowledge of the right to top granted to Kawasaki/Philyards, petitioner 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.

6. The fact that the losing bidder, Keppel Consortium (composed of Keppel, SM Group, Insular Life Assurance, Mitsui and ICTSI) appears to have joined Philyards in the latter's effort to raise ₱2.131 billion necessary in exercising the right to top by 5% is a valid activity in free enterprise that is not contrary to law, public policy or public morals. It should not be a cause of grievance for petitioner as it is the very essence of free competition in the business world. Astute businessmen involved in the public bidding in question knew what they were up against. And when they participated in the public bidding with prior knowledge of the right to top, they did so, with full knowledge of the eventuality that the highest bidder may still be topped by Kawasaki/Philyards by 5%. It is admitted by petitioner that it likewise represents a consortium composed of JG Summit, Sembawang Singapore and Jurong of Malaysia. Why should petitioner then expect Philyards to limit itself to its own resources when the latter can enter into agreements with other entities to help it raise the money it needed to pay the full purchase price as in fact it had already paid the National Government in the amount of P2.131 billion as required under the ASBR?"[4]

Petitioner filed a motion for the reconsideration of said Decision which was denied on March 15, 1996. Petitioner thus filed the instant petition for review on *certiorari*, raising the following arguments:

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[4] *Rollo*; pp. 209-210.

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I.

THE COURT OF APPEALS GRIEVOUSLY ERRED IN HOLDING THAT PETITIONER JG SUMMIT IS LEGALLY ESTOPPED FROM CHALLENGING THE LEGALITY OF THE RIGHT TO TOP, INSERTED IN THE BIDDING RULES, AS WELL AS THE RIGHT OF FIRST REFUSAL FROM WHICH THE RIGHT TO TOP WAS ADMITTEDLY SOURCED, BY SIMPLY STATING THAT THOSE RIGHTS ARE VALID AND ENFORCEABLE WITHOUT RULING ON ANY OF THE IMPORTANT LEGAL AND CONSTITUTIONAL GROUNDS RAISED BY THE PETITIONER AS FOLLOWS:

(A) THE RIGHT OF FIRST REFUSAL, GRANTED TO A JAPANESE CORPORATION AT A TIME WHEN IT HELD 40% EQUITY IN PHILSECO, A LANDHOLDING CORPORATION, IS NULL AND VOID FOR BEING CONTRARY TO THE CONSTITUTION.

(B) THE RIGHT TO TOP WAS GRANTED TO THE JAPANESE CORPORATION AT A TIME WHEN IT MERELY HELD 2.6% EQUITY IN PHILSECO.

(C) THE RIGHT OF FIRST REFUSAL GRANTED TO THE JAPANESE CORPORATION OVER SHARES OF STOCK IS CONTRARY TO THE CORPORATION CODE.

(D) THE RIGHT TO TOP IS CONTRARY TO PUBLIC POLICY AS IT IS ANATHEMA TO COMPETITIVE PUBLIC BIDDING FOR BEING UNDULY RESTRICTIVE THEREOF, AND, MOREOVER, IS CONTRARY TO DUE PROCESS OF LAW AS IT IS AGAINST THE BASIC RUDIMENTS OF FAIR PLAY.

(E) THE GRANT OF THE RIGHT TO TOP IS A CRIMINAL VIOLATION OF THE ANTI-GRAFT LAW AS IT GIVES A CLEARLY UNWARRANTED BENEFIT IN FAVOR OF PHILYARDS AS SHOWN BY CLEAR AND UNDISPUTED DOCUMENTARY EVIDENCE.

II

THE COURT OF APPEALS GRIEVOUSLY ERRED IN HOLDING THAT *MANDAMUS* IS NOT A PROPER REMEDY IN THIS CASE.

III.

FOLLOWING ITS OWN FINDINGS, THE COURT OF APPEALS GRIEVOUSLY ERRED (A) IN NOT DIRECTING THAT TRIAL BE

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HELD ON ALLEGED ISSUES OF FACT AND (B) IN NOT APPOINTING AN *AMICUS CURIAE* FROM AMONG THE LAWYERS IN THE COMMISSION ON AUDIT TO DETERMINE THE APPLICABILITY OF ITS REQUIREMENTS TO THE TRANSACTIONS IN THIS CASE.[5]

In their comment on the petition, private respondent PHI contends that the real party in interest which should have filed the petition for *mandamus* is the JG Summit Consortium and not solely petitioner JG Summit Holdings, Inc. which is just a part of that consortium. Since Sembawang and Jurong, the other members of the consortium, are indispensable parties to the petition,[6] petitioner's failure to implead them as co-petitioners warranted the dismissal of the petition.

Public respondents' contention must fail. While it is true that Rule 3, Section 2 of the Rules of Court provides that "(a)ll persons having an interest in the subject of the action and in obtaining the relief demanded shall be joined as plaintiffs," petitioner may file the petition alone. In the first place, Sembawang and Jurong are not indispensable parties, such that their non-joinder as petitioners will not necessarily result in a failure to arrive at a final determination of the case.[7] They may be necessary parties as they were members of the consortium that won the public bidding prior to the exercise of the right to top by private respondent, but the petition may be resolved even without their active participation. Secondly, there is a doubt as to whether or not said foreign corporations are "subject to the jurisdiction of the court as to both service of process and venue."[8] Thirdly, petitioner may be deemed to represent Sembawang and Jurong. The admission of petitioner's counsel that said foreign corporations are underwriting his and the other counsel's fees reflects this fact.[9] By the nexus that binds the

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[5] Petition, pp. 15-16.

[6] *Rollo*, pp. 284-288.

[7] Rules of Court, Rule 3, Sec. 7.

[8] Sec. 8, *supra*.

[9] CA Record, p. 473; TSN, March 2, 1995, pp. 99-100.

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members of the consortium, in the event that petitioner succeeds in pursuing this case, it is bound to respect the existence of the consortium and the corresponding responsibilities arising therefrom.

Public respondents also contend that petitioner has no standing to question the legality of a provision of the JVA in which it is not a party.[10] However, as this Court held in *Kilosbayan v. Morato*,[11] there is a difference between the rule on real-party-in-interest and the rule on standing, as the latter has constitutional underpinnings. In the case at bar, petitioner has sufficiently alleged constitutional ramifications in the questioned public bidding of the PHILSECO that merit the attention of the Court. Moreover, the prospect of financial gains arising from the award of the sale of PHILSECO is enough personal stake in the outcome of the controversy to vest upon petitioner the *locus standi* to file the petition for *mandamus*. Besides, without Kawasaki-PHI's right to top the highest bid, petitioner would have been awarded the sale as the highest bidder. A winning bidder has personality to initiate proceedings to prevent setting at naught his right; otherwise, his right to due process would be violated.[12] As such winning bidder, petitioner has "a present substantial interest," or such interest in the subject matter of action as will entitle it, under substantive law, to recover if the evidence is sufficient.[13]

With respect to the propriety of the remedy availed by petitioner, the Court of Appeals correctly held that the special civil action of *mandamus* is not the proper remedy to question the legality of the exercise of the right to top by private respondent. It does not lie to compel the award of a contract subject of bidding to an unsuccessful bidder.[14] *Mandamus* applies as a remedy

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[10] *Rollo*, pp. 38-40.

[11] 316 Phil. 652, 695 (1995).

[12] See: *Republic v. NLRC*, 314 Phil. 507, 538.

[13] *Kilosbayan v. Morato, supra* at p. 698.

[14] *Borromeo v. City of Manila*, 62 Phil. 512 (1935).

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only where petitioner's right is founded clearly in law and not when it is doubtful.[15] Thus:

"In order that a writ of *mandamus* may issue, it is essential that the person petitioning for the same has a clear legal right to the thing demanded and that it is the imperative duty of the respondent to perform the act required. It neither confers powers nor imposes duties and is never issued in doubtful cases. It is simply a command to exercise a power already possessed and to perform a duty already imposed."[16]

The Court of Appeals cannot declare petitioner as the winning bidder in this case and direct the COP/APT to award the sale to it without first determining the validity of the right to top stipulated in the ASBR. Moreover, the sale of government share in PHILSECO is a *fait accompli*, in view of the execution of the Stock Purchase Agreement between APT and PHI. *Mandamus* may not be availed to direct the exercise of judgment or discretion in a particular way or to retract or reverse an action already taken in the exercise of either.[17]

Be that as it may, the Court of Appeals erred when it dismissed the petition on the sole ground of the impropriety of the special civil action of *mandamus*. It must be stressed that the petition was also one for *certiorari*, seeking to nullify the award of the sale to private respondent of the PHILSECO shares. Verily, the petition alleges that "respondents COP and APT have committed such a grave abuse of discretion tantamount to lack or excess of their jurisdiction in insisting on awarding the bid to Philyards, for the various reasons stated herein, particularly

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[15] *Garces v. Court of Appeals*, 328 Phil. 403, 409 citing *University of San Agustin v. Court of Appeals*, G.R. No. 100588, 230 SCRA 761 (1994); *Tamano v. Manglapus*, G.R. No. 102787, 214 SCRA 567 (1992); *Sanson v. Barrios*, 63 Phil. 199 (1936), and *Marcelo v. Tantuico, Jr.*, G.R. No. 60074, 142 SCRA 439 (1986).

[16] *Lim Tay v. Court of Appeals*, G.R. No. 126891, 293 SCRA 634, 653 (1998) citing *University of San Agustin, Inc. v. Court of Appeals, supra* at pp. 771-772.

[17] *Angchangco, Jr. v. Hon. Ombudsman*, 335 Phil. 766, 771-772 (1997).

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since the right of first refusal and the right to top the bid are unconstitutional, contrary to law and public policy."[18] Petitioner's failure to include *certiorari* in its caption should not negate the fact that the petition charged public respondent with grave abuse of discretion in awarding the sale to private respondent. Well-settled is the rule that it is not the caption of the pleading but the allegations therein that determine the nature of the action and the Court shall grant relief warranted by the allegations and the proof even if no such relief is prayed for.[19]

Petitioner's main contention is that PHILSECO, as a shipyard, is a public utility and, hence, could be operated only by a corporation at least 60% of whose capital is owned by Filipino citizens, in accordance with Article XII, Section 10 of the Constitution. Petitioner asserts that a shipyard is a public utility pursuant to Section 13 (b) of Commonwealth Act No. 146.[20] Respondents, on the other hand, contend that shipyards are no longer public utilities by express provision of Presidential Decree No. 666, which provided incentives to the shipbuilding and ship repair industry.

Indeed, P.D. No. 666 dated March 5, 1975 explicitly stated that a "shipyard" was not a "public utility." Section 1 thereof provide as follows:

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[18] CA Record, pp. 42-43.

[19] *Solid Homes, Inc. v. Court of Appeals*, 337 Phil. 605, 613 (1997).

[20] The term "public service" includes every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any common carrier, railroad, street railway, traction railway, sub-way motor vehicle, either for freight or passenger, or both with or without fixed route and whatever may be its classification, freight or carrier service of any class, express service, steamboat, or steamship line, pontines, ferries, and water craft, engaged in the transportation of passengers or freight or both, shipyard, marine railway, marine repair shop, wharf or dock, ice plant, ice-refrigeration plant, canal, irrigation system, gas, electric light, heat and power, water supply and power, petroleum, sewerage system, wire or wireless communications system, wire or wireless broadcasting stations and other similar public services x x x. (Italics supplied)

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"d) *Registration required but not as Public Utility. — The business of constructing and repairing vessels or parts thereof shall not be considered a public utility* and no Certificate of Public Convenience shall be required therefor. However, no shipyard, graving dock, marine railway or marine repair shop and no person or enterprise shall engage in the construction and/or repair of any vessel, or any phase or part thereof, without a valid Certificate of Registration and license for this purpose from the Maritime Industry Authority, except those owned or operated by the Armed Forces of the Philippines or by foreign governments pursuant to a treaty or agreement." (Italics supplied.)

However, Section 1 of P.D. No. 666 was expressly repealed by Section 20 of Batas Pambansa Blg. 391, the Investment Incentive Policy Act of 1983.[21] Subsequently, Executive Order No. 226, the Omnibus Investments Code of 1987, was issued and Section 85 thereof expressly repealed B.P. Blg. 391.[22]

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[21] The repealing clause states:

"Sec. 20. The following provisions are hereby repealed:

1) Section 53, P.D. 463 (Mineral Resources Development Decree);
2) Section 1, P.D. 666 (Shipbuilding and Ship Repair Industry);
3) Section 6, P.D. 1101 (Radioactive Minerals);
4) LOI 508 extending P.D. 791 and P.D. 924 (Sugar); and
5) The following articles of Presidential Decree 1789: 2, 18, 19, 22, 28, 30, 39, 49(d), 62, and 77. Articles 45, 46 and 48 are hereby amended only with respect to domestic and export producers.

All other laws, decrees, executive orders, administrative orders, rules and regulations or parts thereof which are inconsistent with the provisions of the Act are hereby repealed, amended or modified accordingly.

All other incentive systems which are not in any way affected by the provisions of this Act may be restructured by the President so as to render them cost-efficient and to make them conform with the other policy guidelines in the declaration of policy provided in Section 2 of this Act."

[22] "ART. 85. *Repealing Clause.* — The following provisions or laws are hereby repealed:

1) Batas Pambansa 44
2) Batas Pambansa 391 (1983)
3) Presidential Decree No. 218.

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The express repeal of B.P. Blg. 391 by E.O. No. 226 did not revive Section 1 of P.D. No. 666, declassifying the shipbuilding and ship repair industry as a public utility, as said executive order did not provide otherwise. When a law which expressly repeals a prior law is itself repealed, the law first repealed shall not be thereby revived unless expressly so provided.[23] Consequently, when the APT drafted the ASBR sometime in 1993, P.D. No. 666 no longer existed in our statute books. While it is true that the repeal of a statute does not operate to impair rights that have become vested or accrued while the statute was in force, there are no vested rights of the parties that should be protected in the case at bar. The reason is simple: said decree was already inexistent when the ASBR was issued.

A shipyard such as PHILSECO being a public utility as provided by law, the following provision of the Article XII of the Constitution applies:

"Sec. 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or *associations* organized under the laws of the Philippines *at least sixty per centum of whose capital is owned by such citizens,* nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The

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4) Presidential Decree No. 1419
5) Presidential Decree No. 1623, as amended
6) Presidential Decree No. 1789 (1981)
7) Presidential Decree No. 2032
8) Executive Order No. 815
9) Executive Order No. 1945 (1985)

All other laws, decrees, executive orders, administrative orders, rules and regulations or parts thereof which are inconsistent with the provisions of this Code are hereby repealed, amended or modified accordingly."

[23] Administrative Code of 1987, Book I, Chapter 5, Section 21.

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State shall encourage equity participation in public utilities by the general public. *The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association shall be citizens of the Philippines.*" (Italics supplied.)

The progenitor of this constitutional provision, Article XIV, Section 5 of the 1973 Constitution, required the same proportion of 60% - 40% capitalization. The JVA between NIDC and Kawasaki entered into on January 27, 1977 manifests the intention of the parties to abide by the constitutional mandate on capitalization of public utilities.[24] Paragraph 1.3 of the JVA, as amended by Addendum No. 2 dated December 28, 1983,[25] provides:

"The authorized capital stock of PHILSECO shall be ₱330 million. The parties shall thereafter increase their subscription in PHILSECO as may be necessary and as called by the Board of Directors, *maintaining a proportion of 60%-40% for NIDC and KAWASAKI, respectively*, up to a total subscribed and paid-up capital stock of ₱312 million." (Italics supplied.)

A joint venture is an association of persons or companies jointly undertaking some commercial enterprise with all of them generally contributing assets and sharing risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement to share both in profit and losses.[26] Persons and business enterprises usually enter into a joint venture because it is exempt from corporate income tax.[27] Considered more of a partnership,[28] a joint venture

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[24] CA Record. pp. 53-69.

[25] CA Record, pp. 71-72.

[26] *Kilosbayan, Incorporated v. Guingona, Jr., supra*, at p. 144.

[27] VILLANUEVA, *PHILIPPINE CORPORATE LAW*, 1998 ed., p. 729.

[28] *Aurbach v. Sanitary Wares Manufacturing Corporation*, G.R. No. 75875, 180 SCRA 130, 147 (1989).

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is governed by the laws on contracts and on partnership. The joint venture created between NIDC and Kawasaki falls within the purview of an "association" pursuant to Section 5 of Article XIV of the 1973 Constitution and Section 11 of Article XII of the 1987 Constitution. Consequently, a joint venture that would engage in the business of operating a public utility, such as a shipyard, must observe the proportion of 60%-40% Filipino-foreign capitalization.

Notably, paragraph 1.4 of the JVA accorded the parties the right of first refusal "*under the same terms*." This phrase implies that when either party exercises the right of first refusal under paragraph 1.4, they can only do so to the extent allowed them by paragraphs 1.2 and 1.3 of the JVA or under the proportion of 60%-40% of the shares of stock. Thus, should the NIDC opt to sell its shares of stock to a third party, Kawasaki could only exercise its right of first refusal to the extent that its total shares of stock would not exceed 40% of the entire shares of stock of SNS or PHILSECO. The NIDC, on the other hand, may purchase even beyond 60% of the total shares. As a government corporation and necessarily a 100% Filipino-owned corporation, there is nothing to prevent its purchase of stocks even beyond 60% of the capitalization as the Constitution clearly limits only foreign capitalization.

Parenthetically, the Maritime Industry Authority (MARINA) which has been tasked to regulate the operation of shipbuilding and ship repair yards,[29] abides by the Filipino capitalization requirement as far as corporations and partnerships are concerned. However, Section 2.3.1 (a) of its Memorandum Circular No. 95, Series of 1994,[30] setting out the Revised Implementing Guidelines on the Licensing of Shipbuilders, Ship Repairers, Afloat Repairers, Boatbuilders and Shipbreakers, seems to exempt joint ventures registered with the SEC, the

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[29] P.D. No. 1059.

[30] This was published in the *Malaya* on December 30, 1994 and submitted to the U.P. Law Center on January 3, 1995.

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BOI and the EPZA from the 60% requirement of Filipino ownership.[31] The said provision states:

"The applicant must be a Filipino citizen or a corporation/ partnership at least 60% of the authorized capital stock of which is owned by Filipino citizens except for joint ventures which are registered with the Securities and Exchange Commission, the Board of Investments and/or Export Processing Zone Authorities."[32]

The constitutionality of said MARINA guideline, however, is not in issue here. Kawasaki was bound by its *contractual obligation* under the JVA that limits its right of first refusal to 40% of the total capitalization of PHILSECO. Thus, *Kawasaki cannot purchase beyond 40% of the capitalization of the joint venture on account of both constitutional and contractual proscriptions.*

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[31] Chapter II, Book II of Executive Order No. 226 provides:

ART. 46. *Permitted Investments.* — (1) Without need of prior authority, anyone not a Philippine national as that term is defined in Article 15 of this Code, and not otherwise disqualified by law, may invest:

(a) In any enterprise registered under Book One hereof, to the extent that the total investment of non-Philippine nationals therein would not affect its status as a registered enterprise under the law;

(b) In an enterprise not registered under Book One hereof, to the extent that the total investment of non-Philippine nationals herein shall not exceed forty percent (40%) of the outstanding capital of that enterprise, unless existing law forbids any non-Philippine ownership in the enterprise or limits ownership by non-Philippine national to a percentage smaller than forty percent (40%).

(2) Within thirty (30) days after notice of the investment is received by it, the enterprise in which any investment is made by a non-Philippine national shall register the same with the Board of Investments for purposes of record. Investments made in the form of foreign exchange or other assets actually transferred to the Philippines shall also be registered with the Central Bank. The Board shall assess and appraise the value of such assets other than foreign exchange.

[32] There is no record showing that the joint venture between NIDC and Kawasaki was registered with the SEC, the Board of Investments and/ or Export Processing Zone Authorities.

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From the facts on record, it appears that at the outset, the APT and Kawasaki respected the 60%-40% capitalization proportion in PHILSECO. However, APT subsequently encouraged Kawasaki to participate in the public bidding of the National Government's shareholdings of 87.67% of the total PHILSECO shares, definitely over and above the 40% limit of its shareholdings. In so doing, the APT went beyond the ambit of its authority.

It is well settled that the role of courts is to ascertain whether a branch or instrumentality of Government has transgressed its constitutional or statutory boundaries. The courts, must examine those boundaries in the light of provisions of the law. Otherwise, it would stray into the realm of policy decision-making.[33]

Proclamation No. 50, creating the COP and the APT, was issued by President Corazon C. Aquino pursuant to her legislative powers under the Provisional Constitution of 1986. Section 12 of said Proclamation vested the APT with the following powers:

(1) To formulate and, after approval by the Committee, implement a program for the disposition of assets transferred to it under this Proclamation, such program to be completed within a period of five years from the date of the issuance of this Proclamation;

(2) Subject to its having received the prior written approval of the Committee to sell such asset at a price and on terms of payment and to a party disclosed to the Committee, to sell each asset referred to it by the Committee to such party and on such terms as in its discretion are in the best interest of the National Government, and for such purpose to execute and deliver, on behalf and in the name of the National Government, such deeds of sale, contracts and other instruments as may be necessary or appropriate to convey title to such assets;

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[33] *Bureau Veritas v. Office of the President*, G.R. No. 101678, 205 SCRA 705, 718 (1992).

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(7) To adopt its internal rules and regulations, to adopt, alter and use a seal which shall be judicially noticed; to enter into contracts; to sue and be sued;

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Pursuant to these provisions, the APT drafted the ASBR. Since the APT's rule-making authority is merely delegated, the ASBR should be measured by the standard set by said proclamation.[34] Notably, the discretion granted by the proclamation to the APT for the sale of government property is circumscribed only by the "best interest of the National Government."

Implicitly written in any delegated legislative authority, such as that provided for in Proclamation No. 50, is the requisite that the rules and regulations which an administrative body adopts must respect pertinent provisions of the Constitution and the law.[35] Article XII, Section 11 of the Constitution providing for a 60% Filipino capitalization in order that public utilities may be granted a franchise should thus be deemed a paramount consideration in drafting the ASBR. In this regard, worth noting is paragraph 15.0 of the ASBR, which provides that:

"In the event that the winning bidder is a 100% foreign-owned corporation, it may name its nominee corporation to whom the NG shares shall be conveyed, provided it owns 40% equity in the nominee corporation, so as not to affect PHILSECO's qualification to own real estate properties in the Philippines."

This rule is fraught with dangerous implications. It allows a completely foreign corporation to participate in the public bidding of more than 60% of the total shares of a public utility corporation without setting a period within which the foreign bidder should name its nominee. As it is, the rule allows a totally foreign investor to engage in the business of operating a public utility for an unlimited period of time in total disregard of the

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[34] *Philippine Communications Satellite Corporation v. Alcuaz*, G.R. No. 84818, 180 SCRA 218, 225 (1989).

[35] *Manila Prince Hotel v. GSIS*, 335 Phil. 82, 101 (1997).

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constitutional proscription on the percentage of Filipino ownership of corporations engaged therein. Paragraph 15.0 of the ASBR is thus directly and openly repugnant to the Constitution considering that it allows foreign corporations to operate a public utility for an unlimited period of time.

In carrying out its objective of disposing of government property, the APT should take into account the pertinent laws. Since the method of disposing the PHILSECO that the APT had adopted was through public bidding, it was duty-bound to follow the rules and regulations on *competitive* public bidding, in order to uphold the elementary rule on fairness in such disposition. As this Court once said:

> "x x x. A competitive public bidding aims to protect the public interest by giving the public the best possible advantages through open competition. It is a mechanism that enables the government agency to avoid or preclude anomalies in the execution of public contracts."[36]

The word "bidding" in its comprehensive sense means making an offer[37] or an invitation to prospective contractors whereby the government manifests its intention to make proposals[38] for the purchase of supplies, materials and equipment for official business or public use,[39] or for public works or repair. The three principles in public bidding are: the offer to the public; an opportunity for competition; and a basis for exact comparison of bids. The distinctive character of the system is destroyed and the purpose of its adoption is thwarted when a regulation thereon excludes any of these principles.[40] Public bidding of

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[36] *National Food Authority v. Court of Appeals*, 323 Phil. 558, 574 (1996) citing *Danville Maritime, Inc. v. Commission on Audit*, G.R. No. 85285, 175 SCRA 701 (1989) and *Malaga v. Penachos, Jr.*, G.R. No. 86695, 213 SCRA 516 (1992).

[37] LUCENARIO, *LAW ON PUBLIC BIDDING AND GOVERNMENT CONTRACTS*, 1960 ed., p. 1 citing *Mercer v. North Little Rock Special School District*, 177 Ark. 127, 6 S.W. 2d 16, 18.

[38] *Ibid.*, citing Art. 1326, Civil Code.

[39] *Ibid.*, citing Secs. 2041-2042 of Revised Administrative Code.

[40] *Malaga v. Penachos, Jr.*, G.R. No. 86695, 213 SCRA 516, 526 (1992).

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government contracts and for the disposition of government assets should have the same principles and objectives. Their only difference, if at all, is that in the public bidding for public contracts, the award is generally given to the lowest bidder while in the disposition of government assets, the award is to the highest bidder.[41] The term "public bidding" imports a sale to the highest bidder with absolute freedom for competitive bidding.[42]

Under Section 504 of the Government Auditing Rules and Regulations, a public auction, which is the mode of divestment or disposal of government property, shall adhere to established mechanics and procedures in public bidding.[43] In such public auction sales, the presence of a Commission on Audit (COA) representative who shall see to the proper observance of auditing rules is imperative.[44] In this case, there is no record that a

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[41] *Danville Maritime, Inc. v. Commission on Audit,* G.R. No. 85285, 175 SCRA 701, 711 (1989).

[42] *Ibid.*, p. 712.

[43] COA Circular No. 89-296 dated January 27, 1989, No. VI (1); GOVERNMENT ACCOUNTING AND AUDITING MANUAL, Vol. I, p. 301.

[44] The pertinent provision of COA Circular No. 89-296 states:

"VII. *COA ROLE DURING DISPOSAL:* —

In all modes or instances of disposal of government property or assets as hereinabove contemplated, the proceedings shall be undertaken by the appropriate authority in the presence of the Auditor or other COA representative who shall act as an intelligent, responsible and articulate witness thereto. The said act of witnessing shall not be confined merely to seeing what is being done during the proceedings but shall be related to the more meaningful discharge by the Auditor of his/her constitutional duty to examine, audit and settle all accounts pertaining to the expenditures or uses of government funds and property. Thus, the Auditor acting as such witness may verbally advise the agency head or his duly authorized representative of any objectionable feature/s of the proceedings. Otherwise, he may sign documents and other papers pertinent only to those proceedings which he witnessed with his comments which he deems necessary under the circumstances. Related advices and/or comments done in writing should invariably be sent officially to and duly receipted for by the head of the

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COA representative witnessed the public auction on December 2, 1993. Neither is there a showing that the APT observed the requirement of COA Circular No. 89-296, to the effect that a government entity that is disposing of government property shall furnish the COA with the disposal procedure adopted. Likewise, nowhere in the record is it stated that the APT heeded the suggestion of Secretary of Finance and COP Chairman Jayme that its decision to grant Kawasaki the right to top the highest bid be made "known to the Commission on Audit." What appears on record is that the COA did not approve the ASBR, specifically the provision on the right to top the highest bidder. Thus, then COA Chairman Pascasio S. Banaria, replying to the query of petitioner's counsel on whether or not the COA had approved the right to top the highest bid by 5%, stated:

"Per information received from our Auditor at APT, no prior approval was issued by their Office regarding said preferential option. We have instructed our Auditor thereat to advise this Office of the result of the review of the Corporation's procedures for the sale of the assets including the review of the bidding documents pertaining to the subject public bidding pursuant to the provisions of the Commission on Audit Circular No. 89-296 dated January 27, 1989.[45]

In according the KHI/PHI the right to top, the APT violated the rule on competitive public bidding, under which the highest bidder is declared the winner entitled to the award of the subject of the auction sale. In effect, the grant to KHI/PHI of the right to top can be likened to a second bidding, which, however, is allowed only if there is a failure of bidding, such as when there is only one bidder or none at all. [46] By placing KHI/PHI in the advantageous position of topping the highest bidder, the APT set aside the basic rule in public bidding that there be an opportunity for competition.

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agency or his duly authorized representative concerned. These written advices or comments shall form part of the bases of action to be taken by the auditor in the pre-audit or post audit of the subject transactions."

[45] *Rollo*, p. 133.

[46] *Danville Maritime, Inc. v. Commission on Audit, supra*, at p. 712.

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While it may be argued that the right to top was aimed at giving the best financial advantage to the government, the manner by which that right was conceived and arrived at in this case manifested bias in favor of KHI, thereby clearly brushing aside the rule on *fair competition*. More importantly, the ASBR provision on the right to top the highest bidder completely disregarded the stipulation in the JVA between NIDC and KHI to comply with the 60%-40% capitalization arrangement whereby KHI, the foreign investor, would be able to exercise its right of first refusal to the extent of only 40% of the total capitalization of the PHILSECO. Thus, KHI, whose investment exposure was already diminished to only 2.59% of the total PHILSECO shares, was given the privilege, through its nominee PHI, of exercising the right to top the highest bid to 87.67% of those shares or definitely over and above its 40% contractual right to PHILSECO shares under the JVA. Consequently, the APT rendered nugatory the constitutional and contractual proscriptions clearly to favor a foreign investor.

Furthermore, while the right of first refusal entitled KHI to priority in the award of the contract, that right cannot bar another bidder from submitting a bid because, precisely, the law requires public bidding in government contracts.[47] Thus, by engrafting in the provisions of the ASBR the right to top, which was only an offshoot of the right of first refusal, the APT effectively did away with public bidding insofar as KHI/PHI was concerned. To be sure, the right to top is different from the right to match. In the latter, a qualified *bidder* is given the privilege of offering the same bid as that of the highest bidder.[48] In the former, as provided for by the ASBR, a *non-bidder* is accorded the right to top the highest bid. There is reason, therefore, for the petitioner to complain that the APT made a show of a public bidding in

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[47] See: *Gov. Garcia v. Hon. Burgos*, 353 Phil. 740, 767-768 (1998).

[48] *Manila Prince Hotel v. GSIS, supra*, at p. 100. In that case, the bidding rules provided that "if for any reason, the Highest Bidder cannot be awarded the Block of Shares, GSIS may offer this to the other Qualified Bidders that have validly submitted bids provided that these Qualified Bidders are willing to match the highest bid in terms of price per share."

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order to elicit the highest bid, only to award the sale to a non-bidder. The unfair manner by which the purported public bidding was conducted by the APT is even made more blatant by the fact that *after* the "public bidding," KHI exercised the right to top through its nominee, private respondent PHI, which has among its stockholders some losing bidders.

In drafting the ASBR, the APT should have noted the fact that foreign investors were competing in the bidding. While it is true that foreign investment should be encouraged in this country, however, the ASBR provision on the right to top is unfair to all competitors, be they foreign or local, in the public auction of 87.67% of PHILSECO shares as it provided for a method that would set at naught the entire public bidding.

It was thus error for the Court of Appeals to conclude that petitioner was estopped from contesting the validity of the ASBR and the bidding procedure conducted pursuant to it. It is clear from the provisions of the ASBR itself that the basic rules on fair competition in public biddings have been disregarded. Although 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. Estoppel is unavailing in this case; otherwise, it would stamp validity to an act that is prohibited by law or against public policy.[49]

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 said amount of ₱2,030,000,000.00 less bid deposit and interests from petitioner;

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[49] *Development Bank of the Philippines v. Court of Appeals*, 348 Phil. 14, 32 (1998).

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(b) execute a Stock Purchase Agreement with petitioner;

(c) cause the issuance in favor of petitioner of the certificates of stocks representing 87.67% of PHILSECO's total capitalization;

(d) return to private respondent PHI 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.

Davide, Jr., C.J., Puno, Kapunan, and *Pardo, JJ.*, concur.

FIRST DIVISION

[G.R. No. 124572. November 20, 2000]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **CIRILO OPOSCULO, JR.** ***alias*** **"BONG," JAIME BARIL** ***alias*** **"METONG," WILFREDO BARACAS alias "ADIONG,"** *accused-appellants.*

SYNOPSIS

Appellants were convicted of murder, based mainly on the testimony of eyewitness Henry Cuevas, a nephew of the victim, Glorito, who narrated how accused Ernesto embraced Glorito and held the latter's hands behind his back, and in that helpless position, accused Cirilo drew his "*balisong*" and stabbed Glorito to death in front of accused Ernesto's store.

The Supreme Court affirmed the conviction of appellants on appeal, ruling: that Cuevas' relationship to Glorito does not *per se* destroy his credibility; that positive identification prevails over alibi and denial; that the matter of assigning values to