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SECOND DIVISION

[G.R. No. 122452. January 29, 2001]

TAM WING TAK, *petitioner, vs.* **HON. RAMON P. MAKASIAR (in his Capacity as Presiding Judge of the Regional Trial Court of Manila, Branch 35) and ZENON DE GUIA (in his capacity as Chief State Prosecutor),** *respondents.*

SYNOPSIS

Petitioner Tam Wing Tak, in his capacity as director of Concord-World Properties, Inc., (Concord for brevity), a domestic corporation, filed an affidavit-complaint with the Quezon City Prosecutor's Office, charging Vic Ang Siong with violation of B.P. Blg. 22. The City Prosecutor issued a resolution dismissing the complaint. A copy of the City Prosecutor's resolution was sent by registered mail to petitioner in the address he indicated in his complaint-affidavit. Notwithstanding that petitioner was represented by counsel, the latter was not furnished a copy of the resolution. Petitioner appealed the dismissal of his complaint by the City Prosecutor to the Chief State Prosecutor. The Chief State Prosecutor dismissed the appeal for having been filed out of time. Petitioner's lawyer received a copy of the letter-resolution dismissing the appeal on January 20, 1995. Respondent Chief State Prosecutor denied the motion for reconsideration. Petitioner then filed Civil Case No. 95-74394 for mandamus with the Regional Trial Court of Quezon City to compel the Chief State Prosecutor to file or cause the filing of an information charging Vic Ang Siong with violation of B.P. Blg. 22. The trial court dismissed the petition. Petitioner moved for reconsideration, but was denied. Hence, the present petition. Petitioner alleged that there is no such "generally accepted practice" which gives a tribunal the option of serving pleadings, orders, resolutions, and other papers to either the opposing party himself or his counsel. Petitioner insisted that the fundamental rule in this jurisdiction is that if a party appears by counsel, then service can only be validly made upon counsel, and service upon the party himself becomes

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invalid and without effect. Petitioner relied upon Rule 13, Section 2 of the Rules of Court and the Supreme Court's ruling in *J.M. Javier Logging Corp. v. Mardo*, 24 SCRA 776 (1968) to support his stand.

The Supreme Court dismissed the petition. The Court ruled that there was valid service upon petitioner pursuant to Section 2 of Department of Justice Order No. 223. The holding of a preliminary investigation is a function of the Executive Department and not of the Judiciary. Thus, the rule on service provided for in the Rules of Court cannot be made to apply to the service of resolutions by public prosecutors, especially as the agency concerned, in this case, the Department of Justice, has its own procedural rules governing said service. A plain reading of Section 2 of DOJ Order No. 223 clearly showed that in a preliminary investigation, service can be made upon the party himself or through his counsel. It must be assumed that when the Justice Department crafted the said section, it was done with knowledge of the pertinent rule in the Rules of Court and of jurisprudence interpreting it. The DOJ could have just adopted the rule on service provided for in the Rules of Court, but did not. Instead, it opted to word Section 2 of DOJ Order No. 223 in such a way as to leave no doubt that in preliminary investigations, service of resolutions of public prosecutors could be made upon either the party or his counsel.

SYLLABUS

1. **REMEDIAL LAW; CRIMINAL PROCEDURE; PRELIMINARY INVESTIGATION; HOLDING OF PRELIMINARY INVESTIGATION IS A FUNCTION OF THE EXECUTIVE AND NOT OF THE JUDICIARY; RULE ON SERVICE PROVIDED FOR IN THE RULES OF COURT CANNOT BE MADE TO APPLY TO THE SERVICE OF RESOLUTIONS BY PUBLIC PROSECUTORS, ESPECIALLY AS THE AGENCY CONCERNED, IN THE PRESENT CASE, THE DEPARTMENT OF JUSTICE, HAS ITS OWN PROCEDURAL RULES GOVERNING SERVICE.** — The Rules of Court were promulgated by this Court pursuant to Section 13, Article VII of the 1935 Constitution (now Section 5 [5], Article VIII of the Constitution) to govern "pleadings, practice and procedure in all courts of the Philippines." The purpose of the Rules is

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clear and does not need any interpretation. The Rules were meant to govern *court* (stress supplied) procedures and pleadings. As correctly pointed out by the Solicitor General, a preliminary investigation, notwithstanding its judicial nature, is not a court proceeding. The holding of a preliminary investigation is a function of the Executive Department and not of the Judiciary. Thus, the rule on service provided for in the Rules of Court cannot be made to apply to the service of resolutions by public prosecutors, especially as the agency concerned, in this case, the Department of Justice, has its own procedural rules governing said service.

2. **ID.; ID.; ID.; ID.; SERVICE OF RESOLUTIONS UNDER SECTION 2 OF DEPARTMENT OF JUSTICE ORDER NO. 223 COULD BE MADE UPON EITHER THE PARTY OR HIS COUNSEL.** — A plain reading of Section 2 of DOJ Order No. 223 clearly shows that in preliminary investigation, service can be made upon the party himself or through his counsel. It must be assumed that when the Justice Department crafted the said section, it was done with knowledge of the pertinent rule in the Rules of Court and of jurisprudence interpreting it. The DOJ could have just adopted the rule on service provided for in the Rules of Court, but did not. Instead, it opted to word Section 2 of DOJ Order No. 223 in such a way as to leave no doubt that in preliminary investigations, service of resolutions of public prosecutors could be made upon either the party or his counsel. Moreover, the Constitution provides that "Rules of procedure of special courts and quasi judicial bodies shall remain effective unless disapproved by the Supreme Court." There is naught in the records to show that we have disapproved and nullified Section 2 of DOJ Order No. 223 and since its validity is not an issue in the instant case, we shall refrain from ruling upon its validity. We hold that there was valid service upon petitioner pursuant to Section 2 of DOJ Order No. 223.

3. **ID.; SPECIAL CIVIL ACTIONS; *MANDAMUS*; NO REVERSIBLE ERROR MAY BE ATTRIBUTED TO THE COURT *A QUO* WHEN IT DISMISSED PETITIONER'S SPECIAL CIVIL ACTION FOR *MANDAMUS*; REASON.** — Respondent Chief State Prosecutor in refusing to order the filing of an information for violation of B.P. Blg. 22 against Vic Ang Siong did not act without or in excess of jurisdiction or with grave abuse of discretion. First, with respect to the

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agreement between Concord and Victor Ang Siong to amicably settle their difference, we find this resort to an alternative dispute settlement mechanism as not contrary to law, public policy, or public order. Efforts of parties to solve their disputes outside of the courts are looked on with favor, in view of the clogged dockets of the judiciary. Second, it is not disputed in the instant case that Concord, a domestic corporation, was the payee of the bum check, not petitioner. Therefore, it is Concord, as payee of the bounced check, which is the injured party. Since petitioner was neither a payee nor a holder of the bad check, he had neither the personality to sue nor a cause of action against Vic Ang Siong. Under Section 36 of the Corporation Code, read in relation to Section 23, it is clear that where a corporation is an injured party, its power to sue is lodged with its board of directors or trustees. Note that petitioner failed to show any proof that he was authorized or deputized or granted specific powers by Concord's board of directors to sue Victor Ang Siong for and on behalf of the firm. Clearly, petitioner as a minority stockholder and member of the board of directors had no such power or authority to sue on Concord's behalf. Nor can we uphold his act as a derivative suit. For a derivative suit to prosper, it is required that the minority stockholder suing for and on behalf of the corporation must allege in his complaint that he is suing on a derivative cause of action on behalf of the corporation and all other stockholders similarly situated who may wish to join him in the suit. There is no showing that petitioner has complied with the foregoing requisites. It is obvious that petitioner has not shown any clear legal right which would warrant the overturning of the decision of public respondents to dismiss the complaint against Vic Ang Siong. A public prosecutor, by the nature of his office, is under no compulsion to file a criminal information where no clear legal justification has been shown, and no sufficient evidence of guilt nor *prima facie* case has been presented by the petitioner. No reversible error may be attributed to the court *a quo* when it dismissed petitioner's special civil action for *mandamus*.

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APPEARANCES OF COUNSEL

Sycip, Salazar, Hernandez & Gatmaitan Law Office for petitioner.

The Solicitor General for respondents.

D E C I S I O N

QUISUMBING, *J.*:

This is a petition for review on *certiorari* of the decision of the Regional Trial Court of Manila, Branch 35, dated September 14, 1995, which dismissed herein petitioner's special civil action for mandamus and sustained the Letter-Order of respondent Chief State Prosecutor. The latter dismissed petitioner's appeal from the resolution of the City Prosecutor of Quezon City, which, in turn, dismissed petitioner's complaint against Vic Ang Siong for violation of the Bouncing Checks Law or B.P. Blg. 22.

The factual background of this case is as follows:

On November 11, 1992, petitioner, in his capacity as director of Concord-World Properties, Inc., (Concord for brevity), a domestic corporation, filed an affidavit-complaint with the Quezon City Prosecutor's Office, charging Vic Ang Siong with violation of B.P. Blg. 22. Docketed by the prosecutor as I.S. No. 93-15886, the complaint alleged that a check for the amount of ₱83,550,000.00, issued by Vic Ang Siong in favor of Concord, was dishonored when presented for encashment.

Vic Ang Siong sought the dismissal of the case on two grounds: First, that petitioner had no authority to file the case on behalf of Concord, the payee of the dishonored check, since the firm's board of directors had not empowered him to act on its behalf. Second, he and Concord had already agreed to amicably settle the issue after he made a partial payment of ₱19,000,000.00 on the dishonored check.

On March 23, 1994, the City Prosecutor dismissed I.S. No. 93-15886 on the following grounds: (1) that petitioner lacked

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the requisite authority to initiate the criminal complaint for and on Concord's behalf; and (2) that Concord and Vic Ang Siong had already agreed upon the payment of the latter's balance on the dishonored check.

A copy of the City Prosecutor's resolution was sent by registered mail to petitioner in the address he indicated in his complaint-affidavit. Notwithstanding that petitioner was represented by counsel, the latter was not furnished a copy of the resolution.

On June 27, 1994, petitioner's counsel was able to secure a copy of the resolution dismissing I.S. No. 93-15886. Counting his 15-day appeal period from said date, petitioner moved for reconsideration on July 7, 1994.

On October 21, 1994, the City Prosecutor denied petitioner's motion for reconsideration. Petitioner's counsel received a copy of the denial order on November 3, 1994.

On November 7, 1994, petitioner's lawyer filed a motion to extend the period to appeal by an additional 15 days counted from November 3, 1994 with the Chief State Prosecutor. He manifested that it would take time to communicate with petitioner who is a Hong Kong resident and enable the latter to verify the appeal as procedurally required.

On November 8, 1994, petitioner appealed the dismissal of his complaint by the City Prosecutor to the Chief State Prosecutor. The appeal was signed by petitioner's attorney only and was not verified by petitioner until November 23, 1994.

On December 8, 1994, the Chief State Prosecutor dismissed the appeal for having been filed out of time. Petitioner's lawyer received a copy of the letter-resolution dismissing the appeal on January 20, 1995.

On January 30, 1995, petitioner moved for reconsideration.

On March 9, 1995, respondent Chief State Prosecutor denied the motion for reconsideration.

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Petitioner then filed Civil Case No. 95-74394 for mandamus with the Regional Trial Court of Quezon City to compel the Chief State Prosecutor to file or cause the filing of an information charging Vic Ang Siong with violation of B.P. Blg. 22.

On September 14, 1995, the trial court disposed of the action as follows:

WHEREFORE, for utter lack of merit, the petition for mandamus of petitioner is DENIED and DISMISSED.

SO ORDERED.[1]

Petitioner moved for reconsideration, but the trial court denied this motion in its order dated October 24, 1995.

Hence, the instant petition.

Before this Court, petitioner claims respondent judge committed grave errors of law in sustaining respondent Chief State Prosecutor whose action flagrantly contravenes: (1) the established rule on service of pleadings and orders upon parties represented by counsel; (b) the basic principle that except in private crimes, any competent person may initiate a criminal case; and (3) the B.P. Blg. 22 requirement that arrangement for full payment of a bounced check must be made by the drawer with the drawee within five (5) banking days from notification of the check's dishonor.[2]

We find pertinent for our resolution the following issues:

(1) Was there valid service of the City Prosecutor's resolution upon petitioner?

(2) Will mandamus lie to compel the City Prosecutor to file the necessary information in court?

In upholding respondent Chief State Prosecutor, the court *a quo* held:

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[1] *Rollo*, p. 33.

[2] *Id.* at 6-7.

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It is a generally accepted principle in the service of orders, resolutions, processes and other papers to serve them on the party or his counsel, either in his office, if known, or else in the residence, also if known. As the party or his counsel is not expected to be present at all times in his office or residence, service is allowed to be made with a person in charge of the office, or with a person of sufficient discretion to receive the same in the residence.

In the case under consideration, it is not disputed that the controverted Resolution dismissing the complaint of the petitioner against Vic Ang Siong was served on the former by registered mail and was actually delivered by the postmaster on April 9, 1994 at said petitioner's given address in the record at No. 5 Kayumanggi Street, West Triangle, Quezon City. The registered mail was in fact received by S. Ferraro. The service then was complete and the period for filing a motion for reconsideration or appeal began to toll from that date. It expired on April 24, 1994. Considering that his motion for reconsideration was filed only on July 7, 1994, the same was filed beyond the prescribed period, thereby precluding further appeal to the Office of the respondent.[3]

Petitioner, before us, submits that there is no such "generally accepted practice" which gives a tribunal the option of serving pleadings, orders, resolutions, and other papers to either the opposing party himself or his counsel. Petitioner insists that the fundamental rule in this jurisdiction is that if a party appears by counsel, then service can only be validly made upon counsel and service upon the party himself becomes invalid and without effect. Petitioner relies upon Rule 13, Section 2 of the Rules of Court[4] and our ruling in *J.M. Javier Logging Corp. v. Mardo*,

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[3] *Id.* at 32.

[4] Said provision reads:

SEC. 2. *Papers to be filed and served.* — Every order required by its terms to be served, every pleading subsequent to the complaint, every written motion other than one which be heard *ex parte*, and every written notice, appearance, demand, offer of judgment or similar papers shall be filed with the court and served upon the parties affected thereby. If any of such parties has appeared by an attorney or attorneys, service upon him shall be made upon his attorneys or one of them, unless service upon the party himself is ordered by the court. When one attorney appears for several parties, he shall only be entitled to one copy of any paper served upon him by the opposite side.

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24 SCRA 776 (1968) to support his stand. In the *J.M. Javier* case, we held:

> [W]here a party appears by attorney, notice to the former is not a notice in law, unless service upon the party himself is ordered by the court. . .[5]

The Solicitor General, for respondents, contends that the applicable rule on service in the present case is Section 2 of the Department of Justice (DOJ) Order No. 223,[6] which allows service to be made upon either party or his counsel. Respondents argue that while a preliminary investigation has been considered as partaking of the nature of a judicial proceeding,[7] nonetheless, it is not a court proceeding and hence, falls outside of the ambit of the Rules of Court.

We agree with petitioner that there is no "generally accepted practice" in the service of orders, resolutions, and processes, which allows service upon either the litigant or his lawyer. As a rule, notice or service made upon a party who is represented by counsel is a nullity.[8] However, said rule admits of exceptions, as when the court or tribunal orders

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[5] 24 SCRA 779 (1968) citing *Vivero v. Santos*, 98 Phil. 500, 504 (1956); *Chavani v. Tancinco*, 90 Phil. 862, 864 (1952); *San Jacinto v. San Jacinto*, 52 Off. Gaz. 2582.

[6] The provision reads: "The appeal must be filed within a period of fifteen (15) days from receipt of the questioned resolution by the party or his counsel. The period shall be interrupted only by the filing of a motion for resolution within ten (10) days from receipt of the resolution and shall continue to run from the time the resolution denying the counsel has been received by the movant or his counsel." Note that DOJ Order No. 223 dated June 30, 1993 has already been superseded by DOJ Circular No. 70 (2000 NPS) dated July 3, 2000, which took effect on September 1, 2000.

[7] *Cojuangco, Jr., v. Presidential Commission on Good Government*, 190 SCRA 226, 243 (1990).

[8] *Antonio v. Court of Appeals*, 153 SCRA 592, 600 (1987) citing *Republic of the Philippines v. Arro*, 150 SCRA 625 (1987).

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service upon the party[9] or when the technical defect is waived.[10]

To resolve the issue on validity of service, we must make a determination as to which is the applicable rule — the rule on service in the Rules of Court, as petitioner insists or the rule on service in DOJ Order No. 223?

The Rules of Court were promulgated by this Court pursuant to Section 13, Article VII of the 1935 Constitution[11] (now Section 5 [5], Article VIII of the Constitution)[12] to govern "pleadings, practice and procedure in all courts of the Philippines." The purpose of the Rules is clear and does not need any interpretation. The Rules were meant to govern *court* (stress supplied) procedures and pleadings. As correctly pointed out by the Solicitor General,

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[9] *Jalover v. Ytorriaga*, 80 SCRA 100, 106 (1977) citing *J.M. Javier Logging Corp. v. Mardo, supra; Elli, et al. v. Ditan, et al.*, 5 SCRA 503 (1962); *McGrath v. Collector of Internal Revenue*, 1 SCRA 639 (1961).

[10] *National Lumber & Hardware Co. v. Velasco*, 106 Phil. 1098, 1101 (1960).

[11] "The Supreme Court shall have the power to promulgate rules concerning pleading, practice and procedure in all courts, and the admission to the practice of law. Said rules shall be uniform for all courts of the same grade and shall not diminish, increase, or modify substantive rights. The existing laws on pleading, practice and procedure are hereby repealed as statutes, and are declared Rules of Court, subject to the power of the Supreme Court to alter and modify the same. The Congress shall have the power to repeal, alter or supplement the rules concerning pleading, practice and procedure and the admission to the practice of law in the Philippines."

[12] "The Supreme Court shall have the following powers:

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[5] Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

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a preliminary investigation, notwithstanding its judicial nature, is not a court proceeding. The holding of a preliminary investigation is a function of the Executive Department and not of the Judiciary.[13] Thus, the rule on service provided for in the Rules of Court cannot be made to apply to the service of resolutions by public prosecutors, especially as the agency concerned, in this case, the Department of Justice, has its own procedural rules governing said service.

A plain reading of Section 2 of DOJ Order No. 223 clearly shows that in preliminary investigation, service can be made upon the party himself or through his counsel. It must be assumed that when the Justice Department crafted the said section, it was done with knowledge of the pertinent rule in the Rules of Court and of jurisprudence interpreting it. The DOJ could have just adopted the rule on service provided for in the Rules of Court, but did not. Instead, it opted to word Section 2 of DOJ Order No. 223 in such a way as to leave no doubt that in preliminary investigations, service of resolutions of public prosecutors could be made upon either the party or his counsel.

Moreover, the Constitution provides that "Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court."[14] There is naught in the records to show that we have disapproved and nullified Section 2 of DOJ Order No. 223 and since its validity is not an issue in the instant case, we shall refrain from ruling upon its validity.

We hold that there was valid service upon petitioner pursuant to Section 2 of DOJ Order No. 223.

On the issue of whether mandamus will lie. In general, mandamus may be resorted to only where one's right is founded clearly in law and not when it is doubtful.[15] The exception is to

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[13] *Larranaga v. Court of Appeals*, 287 SCRA 581, 594-595 (1998); *People v. Navarro,* 270 SCRA 393, 400 (1997).

[14] CONST. Art. viii, Sec. 5(5).

[15] *Garces v. Court of Appeals*, 259 SCRA 99, 105-106 (1996).

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be found in criminal cases where mandamus is available to compel the performance by the public prosecutor of an ostensibly discretionary function, where by reason of grave abuse of discretion on his part, he willfully refuses to perform a duty mandated by law.[16] Thus, mandamus may issue to compel a prosecutor to file an information when he refused to do so in spite of the *prima facie* evidence of guilt.[17]

Petitioner takes the stance that it was grave abuse of discretion on the part of respondent Chief State Prosecutor to sustain the dismissal of I.S. No. 93-15886 on the grounds that: (1) Vic Ang Siong's obligation which gave rise to the bounced check had already been extinguished by partial payment and agreement to amicably settle balance, and (2) petitioner had no standing to file the criminal complaint since he was neither the payee nor holder of the bad check. Petitioner opines that neither ground justifies dismissal of his complaint.

Petitioner's stand is unavailing. Respondent Chief State Prosecutor in refusing to order the filing of an information for violation of B.P. Blg. 22 against Vic Ang Siong did not act without or in excess of jurisdiction or with grave abuse of discretion.

First, with respect to the agreement between Concord and Victor Ang Siong to amicably settle their difference, we find this resort to an alternative dispute settlement mechanism as not contrary to law, public policy, or public order. Efforts of parties to solve their disputes outside of the courts are looked on with favor, in view of the clogged dockets of the judiciary.

Second, it is not disputed in the instant case that Concord, a domestic corporation, was the payee of the bum check, not petitioner. Therefore, it is Concord, as payee of the bounced check, which is the injured party. Since petitioner was neither a payee nor a holder of the bad check, he had neither the personality

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[16] REGALADO, *I REMEDIAL LAW COMPENDIUM* (5th ed.) 464 (1988).

[17] *People v. Orais*, 65 Phil. 744, 757 (1938).

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to sue nor a cause of action against Vic Ang Siong. Under Section 36 of the Corporation Code,[18] read in relation to Section 23,[19] it is clear that where a corporation is an injured party, its power to sue is lodged with its board of directors or trustees.[20] Note that petitioner failed to show any proof that he was authorized or deputized or granted specific powers by Concord's board of director to sue Victor Ang Siong for and on behalf of the firm. Clearly, petitioner as a minority stockholder and member of the board of directors had no such power or authority to sue on Concord's behalf. Nor can we uphold his act as a derivative suit. For a derivative suit to prosper, it is required that the minority stockholder suing for and on behalf of the corporation must allege in his complaint that he is suing on a derivative cause of action on behalf of the corporation and all other stockholders similarly situated who may wish to join him in the suit.[21] There is no showing that petitioner has complied with the foregoing requisites. It is obvious that petitioner has not shown any clear legal right which would warrant the overturning of the decision of public respondents to dismiss the complaint against Vic Ang Siong. A public prosecutor, by the nature of his office, is under no compulsion to file a criminal information where no clear legal justification has been shown, and no sufficient

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[18] SEC. 36. *Corporate powers and capacities.* — Every corporation incorporated under this Code has the power and capacity:

1. To sue and be sued in its corporate name.

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[19] SEC. 23. *The board of directors or trustees.* — Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised . . . by the board of directors or trustees to be elected from among the holders of stock, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year and until their successors are elected and qualified.

[20] *Premium Marble Resources, Inc. v. Court of Appeals,* 264 SCRA 11, 17 (1996).

[21] *Western Institute of Technology, Inc. v. Salas,* 278 SCRA 216, 225 (1997).

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evidence of guilt nor *prima facie* case has been presented by the petitioner.[22] No reversible error may be attributed to the court *a quo* when it dismissed petitioner's special civil action for *mandamus*.

WHEREFORE, the instant petition is *DISMISSED* for lack of merit. Costs against petitioner.

SO ORDERED.

Bellosillo (Chairman), Mendoza, Buena, and *De Leon, Jr., JJ.*, concur.

FIRST DIVISION

[G.R. No. 137152. January 29, 2001]

CITY OF MANDALUYONG, *petitioner, vs.* **ANTONIO N., FRANCISCO N., THELMA N., EUSEBIO N., RODOLFO N., all surnamed AGUILAR,** *respondents.*

SYNOPSIS

Respondents Antonio, Francisco, Thelma, Eusebio and Rodolfo, all surnamed Aguilar, were the registered owners of three adjoining parcels of land with an aggregate area of 1,847 square meters located at 9 de Febrero Street, Brgy. Mauwag, City of Mandaluyong. Several decades ago, on a portion of the said lots, respondents constructed residential houses which they leased out to tenants and on the vacant portion, other families also constructed residential structures which they likewise occupied. In 1983, those lots were classified by the Board of the Housing and Urban Development Coordinating Counsel as an area for priority development for urban land

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[22] *D.M. Consunji, Inc. v. Esguerra*, 260 SCRA 74, 86 (1996).