EN BANC

G.R. No. 185184 (METROPOLITAN WATERWORKS AND SEWERAGE SYSTEM, represented by its Administrator, DIOSDADO JOSE M. ALLADO, Petitioner **v. PROVINCIAL GOVERNMENT OF BULACAN, represented by GOV. JOSEFINA M. DELA CRUZ,** Respondent)

Promulgated:

OCTOBER 3, 2023

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CONCURRENCE AND DISSENT

LAZARO-JAVIER, *J.*:

The *ponencia* granted the Petition, dismissing the complaint for specific performance/payment of national wealth share filed by respondent Government of Bulacan (respondent local government unit [LGU]) against petitioner Metropolitan Waterworks and Sewerage System (MWSS) for the latter's alleged utilization and development of national wealth within its area, specifically, water from the Angat Dam which sources most of its reserve from respondent LGU.

To settle the issue, the *ponencia* laid down the following requisites before an LGU may demand its share in the proceeds of the utilization and development of national wealth within its territorial jurisdiction pursuant to Section 7, Article X of the 1987 Constitution:[1] ***first,*** there must exist a national wealth forming part of a natural resource; ***second,*** the national wealth must be located within the LGU's territory; and ***third,*** the proceeds must have been generated from the utilization and development of national wealth. Prescinding from these standards, it then ordained that the first and third requisites are wanting since dam water is already considered appropriated water, having been diverted from its natural source; and MWSS is not engaged in the utilization and development of national wealth as it does not operate for profit but performs regulatory functions to ensure the delivery of public services in Metro Manila.

In sum, the *ponencia* ordained that water as a natural resource is national wealth. Consequently, when water is utilized and developed *directly*

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[1] Section 7. Local governments shall be entitled to an equitable share in the proceeds of the utilization and development of the national wealth within their respective areas, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits.

from a natural source, the concerned government entity must abide by the constitutional requirement to give the concerned LGU its equitable share in the proceeds of the utilization and development of national wealth. Here, however, since the *ponencia* classified dam water as appropriated water, it was held that the same is no longer a natural resource that is subject to national wealth tax. Appropriate tax ought to be determined and imposed upon the extraction of water from a natural resource and accordingly, prior to impounding and appropriation of the water.[2]

I *fully agree* to grant the Petition, albeit, on a different, simpler, and more rudimentary ground. The complaint for specific performance must be dismissed simply because it lacks a cause of action. For MWSS is not the entity liable to pay the national wealth tax to respondent LGU.

It is elementary that every ordinary civil action, such as a complaint for specific performance, must be based on a cause of action,[3] which requires the following elements: (1) a right in favor of the plaintiff by whatever means and under whatever law it arises or is created; (2) an obligation on the part of the named defendant to respect or not to violate such right; and (3) an act or omission on the part of such defendant violative of the right of the plaintiff or constituting a breach of the obligation of the defendant to the plaintiff.[4]

There is no question as regards the existence of the first element for respondent LGU has the right to share in the proceeds pertinent to the utilization and development of national wealth within its area. This is clearly enshrined under Section 7, Article X of the 1987 Constitution and Sections 289,[5] 290[6] and 291[7] of the Local Government Code (LGC).

I thus focus on the second and third elements.

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2 *Ponencia*, p. 26.

3 Section 1, Rule 2 of the Revised Rules of Court.

4 *China Banking Corporation v. CA,* 499 Phil. 770 (2005) [Per J. Quisumbing, First Division].

5 SECTION 289. Share in the Proceeds from the Development and Utilization of the National Wealth. – Local government units shall have an equitable share in the proceeds derived from the utilization and development of the national wealth within their respective areas, including sharing the same with the inhabitants by way of direct benefits.

6 SECTION 290. Amount of Share of Local Government Units. – Local government units shall, in addition to the internal revenue allotment, have a share of forty percent (40%) of the gross collection derived by the national government from the preceding fiscal year from mining taxes, royalties, forestry and fishery charges and such other taxes, fees or charges, including related surcharges, interests, or fines, and from its share in any co-production, joint venture or production sharing agreement in the utilization and development of the national wealth within their territorial jurisdiction.

7 SECTION 291. Share of the Local Governments from any Government Agency or Government-Owned or Controlled Corporation. – Local government units shall have a share based on the preceding fiscal year for the proceeds derived by any government agency or government-owned or -controlled corporation engaged in the utilization and development of the national wealth based on the following formula whichever will produce a higher share for the local government unit:

(a) One percent (1%) of the gross sales or receipts of the preceding calendar year; or

(b) Forty percent (40%) of the mining taxes, royalties, forestry and fishery charges and such other taxes, fees or charges, including related surcharges, interests, or fines the government agency or government-owned or -controlled corporation would have paid if it were not otherwise exempt.

It is clear from the aforesaid provisions of the Constitution and the LGC that the obligation to pay national wealth share rests with the entity which utilized and developed the national wealth found within respondent LGU's territory, i.e., the waters from the Angat River which were subsequently diverted and stored in the Angat Dam.

On this score, I agree that "utilization and development" of the subject waters *stems* from "appropriation" thereof, which requires the issuance of the necessary water permit by the National Water Resources Board (NWRB). As defined under the Water Code of the Philippines,[8] "appropriation of water" is the "acquisition of rights over the use of waters or the *taking or diverting of waters from a natural source* in the manner and for any purpose allowed by law."[9] It has been established, however, that MWSS is not the entity which controls the diversion of waters from their respective natural sources to the Angat Dam.

Quite clearly, in *IDEALS, Inc., et al v. PSALM, et al.*,[10] we already identified the National Power Corporation (NPC) as the appropriator of the waters that are subsequently impounded in the Angat Dam, *viz.*:

> Under the Water Code concept of appropriation, a foreign company may not be said to be "appropriating" our natural resources if it utilizes the waters collected in the dam and converts the same into electricity through artificial devices. **Since the NPC remains in control of the operation of the dam by virtue of the water rights granted to it,** as determined under DOJ Opinion No. 122, s. 1998, there is no legal impediment to foreign-owned companies undertaking the generation of electric power **using waters already appropriated by NPC, the holder of water permit.** x x x (Emphasis supplied, citations omitted).

Consequently, it is NPC, not MWSS, which respondent LGU ought to have impleaded as the defendant in its complaint. As it stands, therefore, the Court may already grant the Petition on this score alone. Whether dam water is identified as national wealth or otherwise, the fact that respondent LGU has no cause of action against MWSS remains.

On the merits, however, I respectfully voice my dissent. For I am of the humble view that water *does not* cease to be part of the national wealth just because it is removed from its natural source. This interpretation, I believe, is more consistent with the intention of no ordinary provision of law but of an important and innovative aspect of the highest law of the land, the Constitution.

I elucidate.

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8 Presidential Decree No. 1067, Series of 1976.

9 Article 9, Water Code of the Philippines.

10 696 Phil. 486, 546 (2012) [Per J. Villarama, *En Banc*].

First. The interpretation of the *ponencia* that for a water resource to be considered as national wealth, it is and *must remain* part of its natural source finds no basis in law. Allow me quote the relevant portions of the *ponencia* which demonstrated this inference, thus:[11]

> That national wealth refers to "natural resources" is echoed in Article 386(b) of the Implementing Rules and Regulations of the LGC as follows:
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> > Article 386(b) of the Implementing Rules and Regulations of RA 7160 provides:
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> > Article 386. Share in the Proceeds from the Development and Utilization of the National Wealth. –
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> > x x x
> >
> > (b) The term national wealth shall mean all natural resources situated within the Philippine territorial jurisdiction including lands of public domain, waters, minerals, coal, petroleum, mineral oils, potential energy forces, gas and oil deposits, forest products, wildlife, flora and fauna, fishery and aquatic resources, and all quarry products.
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> **There is therefore no question that water, being a natural resource, is national wealth. *However*, water is deemed "appropriated water" when taken or diverted from a natural resource.** As explicitly provided under the Water Code of the Philippines, as amended (Water Code), appropriation of water is the "acquisition of rights over the use of waters or the taking or diverting of waters from [natural resources]." These natural resources are enumerated in Articles 5 and 6 of the Water Code: x x x (Emphases supplied)

Foremost, the quoted Article 386(b) of the Implementing Rules and Regulations of the LGC, on which the *ponencia* anchored its interpretation, merely identified waters as natural resources. On this score, I agree with the *initial* inference of the *ponencia* that based on this legal provision, to be considered national wealth, the subject matter *must exist* in a natural source. Nowhere, however, did Article 386(b) qualify that the same, to be considered as such, must *remain* in its natural source.

To be sure, "to exist" in a natural source, is *obviously different* and *non sequitur* to "remaining part" of an organic source. For one could have existed at a certain place but ceases to remain there, yet, retains its original nature until transformed.

Neither do I subscribe to the inference that followed which prescinded from the definition of "appropriation" under the Water Code. As established under the earlier discussion, "appropriation" more properly refers to the

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[11] *Id.*

"utilization and development" of national wealth rather than identifying *what* comprises national wealth. It simply meant to say that water is appropriated once it is diverted from where it is naturally found, but did not, in any categorical manner, state that once it *is* diverted, it is no longer a natural resource.

Second. We need not go further to define what is meant by national wealth under the Constitution to aid us in determining whether dam water can be classified as such. For it is quite apparent from the Constitutional Commission's deliberations, which the *ponencia* itself quoted, that "remaining part" of the natural source is *not a qualification* to being a natural resource. Consider:

> MR. OPLE: x x x
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> In association with Commissioner Davide, I propose the amendment which reads as follows: "Local governments shall be entitled to share in the proceeds of the exploitation and development of the national wealth within their respective areas x x x In view of the significance of this new section, may I ask the Committee's leave to give a brief explanation, Madam President.
> x x x
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> In the hinterland regions of the Philippines, most municipalities receive an annual income of only about P200,000 so that after paying the salaries of local officials and employees, nothing is left to fund any local development project. This is a prescription for a self-perpetuating stagnation and backwardness, and numbing community frustrations, as well as a chronic disillusionment with the central government. The thrust towards local autonomy in this entire Article on Local Governments may suffer the fate of earlier heroic efforts of decentralization which, without innovative features for local income generation, remained a pious hope and a source of discontent. To prevent this, this amendment which Commissioner Davide and I jointly propose will open up a whole new source of local financial self-reliance by establishing a constitutional principle of local governments, and their populations, sharing in the proceeds of national wealth in their areas of jurisdiction. **The sharing with the national government can be in the form of shares from revenues, fees and charges levied on the exploitation or development and utilization of natural resources <u>such as</u> mines, <u>hydroelectric</u> and geothermal <u>facilities</u>, timber, including rattan, fisheries, and processing industries based on indigenous raw materials.** x x x (Emphasis and underscoring supplied)

Note that the Constitutional Commission, and the proponent of the subject Constitutional provision himself, cited hydroelectric facilities as an example of exploitation or development and utilization of natural resources. This mention of hydroelectric facilities is most telling. For hydroelectric facilities typically use waters impounded in *dams* or other diversion facilities to generate hydroelectric power. Clearly, dam water, albeit removed from its original and natural source, does not necessarily cease to be a natural resource.

Third. The reliance on *IDEALS, Inc., et al v. PSALM, et al*[12] to justify their non-classification of dam water as natural resource is tragically misplaced. To recall, one of the bone of contention in *IDEALS* is whether the transfer of ownership and operations of the Angat Hydroelectric Power Plant (AHEPP) to Korea Water Resources Corporation (K-Water), a foreign company, violates the Constitution insofar as it allegedly allows said non-Filipino entity to utilize our natural resources, including the waters in Angat Dam to operate the power plant.

The Court ruled in the negative. More than the nature of dam water as its basis, the Court anchored its ruling especially on the fact that while K-Water shall operate the hydroelectric power plant, control of the Angat Dam and the flow of the waters therein into the tunnels of the power plant remains with the NPC, a government-owned and controlled corporation, *viz.*:

> Opinion No. 122, s. 1988
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> **It is also significant to note that NPC, a government-owned and controlled corporation, has the effective control over all elements of the extraction process, including the amount and timing thereof considering that x xx the water will flow out of the power tunnel and through the power plant, to be used for the generation of electricity, only when the Downstream Gates are opened, which occur only upon the specific water release instructions given by NPC to SRPC. This specific feature of the agreement**, taken together with the above-stated analysis of the source of water that enters the plant, **support the view that the nationality requirement embodied in Article XII, Section 2 of the present Constitution** and in Article 15 of the Water Code, **is not violated.**
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> x x x
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> **Since the NPC remains in control of the operation of the dam by virtue of water rights granted to it, as determined under DOJ Opinion No. 122, s. 1998, there is no legal impediment to foreign-owned companies undertaking the generation of electric power using waters already appropriated by NPC, the holder of water permit.** Such was the situation of hydropower projects under the BOT contractual arrangements whereby foreign investors are allowed to finance or undertake construction and rehabilitation of infrastructure projects and/or own and operate the facility constructed. However, in case the facility requires a public utility franchise, the facility operator must be a Filipino corporation or at least 60% owned by Filipino. (Emphasis supplied)

If, as the *ponencia* posits, dam water is not a natural resource, there would have been no issue whether K-Water or NPC controls the Angat Dam. For a foreign corporation could have freely maintained the same if the impounded waters therein did not constitute national wealth as the same would not run counter to the Constitution.

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12 *Supra* note 10.

Fourth. The quandary at hand is clearly caused by the silence of the law as to the exact nature of dam water *vis-à-vis* national wealth. I humbly maintain, however, that whenever the law is silent, obscure, or ambiguous, the same must be interpreted, *first,* in a manner consistent with the intent of the lawmakers; and *second,* with sound practicality as to render the same fully operational.

With due respect, the interpretation endorsed by the *ponencia* runs counter to these two precepts: *first,* as discussed, the framers of the Constitution considered the generation of electricity by hydroelectric powerplants using waters, such as dam waters, as utilization and development of national wealth; and *second,* declaring that waters cease to be natural resources once removed from their natural source means that there will never be an occasion when water, as a natural resource, may be utilized and developed.

I expound on the second point.

The *ponencia* itself admitted that appropriation of waters is a primordial requirement in concluding that there is utilization and development of national wealth. In other words, water may only be used and developed if it is *first* appropriated. This is but natural. For how can anyone make use of water if they do not first seize it from the rivers, lakes, or ocean? Yet, if we follow the reasoning of the *ponencia*, any use and development of such appropriated water will always merely amount to utilization and development of water, as an object of commerce, but never as a natural resource. Consequently, there will never be any occasion when LGUs may be entitled to their national wealth share pursuant to such activity.

It bears stress that this innovative feature of the Constitution was introduced to fortify the LGUs' self-sustainability and grant them additional means to fund the development of their respective communities. To thus construe water as natural resource in the manner proposed by the *ponencia* would reduce the ingenious thrust of Section 7, Article X of the 1987 Constitution to a mere lip service to the Filipino people.

Lastly. Classifying dam water as natural resource is within the best interest of the public and in keeping with the mandate of the Constitution to conserve and develop our patrimony for the benefit of the Filipino people.

We cannot lose sight of the big picture here. When we speak of dam water in this case, we do not refer to a negligible man-made structure in the province of Bulacan. We speak of the Angat Dam on which the very heart and capital of our country depends. The significance of the Angat Dam cannot be overemphasized. Without its waters, the entire population of Metro Manila would be crippled as it would be drained, so to speak, of its primary source of

water supply. Our agriculture would be imperiled without the irrigation water sourced therefrom while the supply of electricity produced by the AHEPP would fluctuate. It is all but clear that the waters in Angat Dam, if not natural resource, are, at the very least, imbued with the highest of public interest.

Verily, to declare the same as fair object of commerce would open the floodgates to future possible appropriation and exploitation by foreign entities of the same. Not only is this detrimental to the security of significant public utilities, it creates an absurd situation where Filipino entities divert the waters from their natural sources yet it is the foreign entities which may ultimately own, exploit, and develop the same without guarantee that beneficial use would pertain to the Filipino public.

Finally, I reiterate my view that for an act to be considered utilization and development of national wealth, it is not required that proceeds must be subsequently derived. There is simply no law which narrowly restricts the definition of utilization and development of national wealth or natural resource to the extraction of a valuable by-product or the presence of a commercial undertaking and the production of income. It is a dangerous precedent to introduce one now when the case records are scant of discussions on this matter and when the implication of this not-thoroughly-sorted-out definition is far and deep reaching. There is that obvious constitutional implication because activities not covered by the narrow definition could very well skirt the nationality requirement.

At this point, I sincerely believe it is unnecessary to delve into any kind of definition of utilization and development of national wealth and natural resource. For the present case may already be dismissed for lack of cause of action, as I have discussed.

ALL TOLD, I express my concurrence in the result, i.e., to dismiss the Complaint, but for a different ground – lack of cause of action. In the alternative, I respectfully reiterate my dissent to the *ratio* and vote to consider dam water in the Angat Dam as natural resource, regardless of its diversion from its natural source.

AMY C. LAZARO-JAVIER
Associate Justice