FIRST DIVISION

G.R. No. 211281 ***(Light Rail Transit Authority, petitioner vs. Joy Mart Consolidated Inc.* and Isetann Department Store, Inc., respondents);*** **G.R. No. 212602** ***(Joy Mart Consolidated, Inc. and Isetann Department Store, Inc., petitioners vs. Light Rail Transit Authority and Phoenix Omega Development and Management Corp., respondents).***

Promulgated: FEB 15 2022

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SEPARATE CONCURRING OPINION

GESMUNDO, *C.J.*:

Before the Court are two consolidated petitions: in G.R. No. 211281, it assails the Decision[1] dated February 6, 2014 of the Court of Appeals *(CA)* in CA-G.R. CV No. 100000, upholding the right of first option of Joy Mart Consolidated, Inc. *(Joy Mart)* and Isetann Department Store, Inc. *(Isetann)* to develop the consolidated block of the Light Rail Transit *(LRT)* Carriedo station; and in G.R. No. 212602, it assails the same decision and the Resolution dated May 19, 2014 insofar as said rulings dismissed Joy Mart's claim for damages.

These cases stemmed from the government's effort to establish the LRT system to service transportation of the commuting public from Baclaran to Balintawak Monument and vice versa. The property of Joy Mart in Carriedo Street, Sta. Cruz, Manila, where Isetann is located, and three other adjoining parcels of land, with a total area of 1,611 square meters *(sq. m.)*, on which stands the President Hotel and is leased by Joy Mart, were among the properties that would be needed for the LRT system and were being considered for expropriation should negotiations for their acquisition fail. According to the CA, as a gesture of cooperation with the government, Joy Mart consented to sell the property and give up its leasehold rights over the adjacent properties provided that it be given the first option to redevelop the entire area denominated as the consolidated block, totalling 2,014 sq. m.,[2] of the LRT Carriedo station encompassing Joy Mart's properties.[3]

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* Also referred to as Joy Mart Consolidated Corp. in some parts of the *rollo*.

[1] *Rollo* (G.R. No. 211281), pp. 33-51; penned by Associate Justice Normandie B. Pizarro, with Presiding Justice Andres B. Reyes, Jr. (retired Member of the Court) and Associate Justice Manuel M. Barrios, concurring.

[2] Id. at 11.

[3] Id. at 34-35.

On September 8, 1982, Light Rail Transit Authority *(LRTA)* executed an agreement with the Philippine General Hospital Foundation, Inc. *(PGHFI)*, a non-governmental organization, granting the latter the right, permit, authority, and license to develop the areas adjacent to LRTA's property and to manage and operate the concession areas.

On February 22, 1983, Joy Mart conveyed its property, consisting of 403.8 sq. m.[4] in the consolidated block, to LRTA under a deed of absolute sale *(1983 Deed of Sale)* for the consideration of ₱44,000,000.00. According to the CA, Joy Mart also waived its leasehold rights on the adjacent lots in favor of the government, through LRTA.[5] The 1983 Deed of Sale provided among other things, that "upon recommendation of the Special Panel created by the LRT Committee on Land and Property Acquisition [the vendee] agrees that the owners of Isetann and as Lessee of the President Hotel . . . (Joy Mart Consolidated Corp.) should be given the first option in the redevelopment of the consolidated block, notwithstanding the compensation for their property."[6]

On February 1, 1984, LRTA executed a lease agreement with PGHFI, where the latter leased the whole consolidated block of LRTA's now 2,014-sq. m. property.[7] On July 15, 1984, the lease agreement with PGHFI was amended and the leased area was reduced to 1,461 sq. m.[8]

After more than a year since the execution of the 1983 Deed of Sale, on June 18, 1984, Joy Mart entered into a sublease agreement with PGHFI, where Joy Mart subleased 1,141.2 sq. m. of the consolidated block from PGHFI.[9] On August 30, 1984, an addendum to the sublease agreement was executed between Joy Mart and PGHFI increasing the area to be used and occupied by Joy Mart from 1,141.2 sq. m. to 1,461.7 sq. m. Aside from the increase of monthly rental and provision for an escalation clause, Joy Mart was made to pay, and did pay, "goodwill" in the sum of ₱3 Million.[10] Joy Mart then constructed an eight-storey building with 10 fully air-conditioned levels in the leased area.[11]

On March 31, 1986, LRTA cancelled its lease agreement with PGHFI and, in its April 8, 1986 Letter, LRTA informed Joy Mart of this

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[4] Id. at 78-83.
[5] Id. at 79.
[6] Id. at 11.
[7] Id.
[8] Id.
[9] Id.
[10] Id. at 36.
[11] Id.

cancellation[12] and that Joy Mart direct its payments for the sublease to LRTA.[13]

On July 21, 1986, LRTA published in the *Bulletin Today* a notice for pre-qualification and bidding for the LRT commercial stalls beneath the three LRT terminal stations, which included the remaining 553.2 sq. m. portion of the consolidated block not leased by Joy Mart.[14] Three bidders participated, including Phoenix Omega Development and Management Corporation *(Phoenix)*.[15] Joy Mart did not participate in the public bidding.

On November 28, 1986, LRTA and Phoenix executed a Commercial Stalls Concession Contract.[16] According to Joy Mart, it learned of the contract between LRTA and Phoenix when the latter's construction activities commenced within the consolidated block of the LRT Carriedo station. Joy Mart then filed a complaint for specific performance and damages against LRTA and Phoenix because LRTA allegedly breached the right of first option granted to Joy Mart when Phoenix was granted the agreement within the consolidated block.[17]

The RTC ruled in favor of LRTA and Phoenix. It held, among others, that while LRTA granted a first option provision to Joy Mart, the former may not be bound because it is a government entity whose contracts are subject to competitive public bidding.[18] On appeal, the CA held that under the contested right of first option, the LRTA should have first offered redevelopment of the premises to Joy Mart, and only if the latter fails to exercise its right of first priority could LRTA lawfully put up the same for public bidding.[19]

Hence, LRTA filed a petition for review on *certiorari* assailing that the CA seriously erred in upholding the right of first option in favor of Joy Mart;[20] while Joy Mart filed a petition for review on *certiorari* arguing that the award of compensatory damages in its favor should be increased to ₱489,559,288.80.[21]

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[12] Id. at 11.
[13] Id. at 13.
[14] Id. at 11. In the CA Decision, the CA states that the area developed by Phoenix was 543.75 sq. m. (see *rollo* [G.R. No. 211281], p. 46).
[15] Id.
[16] Id. at 126.
[17] Id. at 12.
[18] Id. at 41.
[19] Id. at 47.
[20] Id. a 23.
[21] *Rollo* (G.R. No. 212602), p. 15.

Associate Justice Amy C. Lazaro-Javier's Dissenting Opinion *(Dissenting Opinion)* held that Joy Mart and Isetann had the right of first option, which should be construed as a right of first refusal, hence, LRTA erred when it did not honor such right; that the sublease between PGHFI and Joy Mart constituted as partial compliance of LRTA with respect to the first option right of Joy Mart; that public bidding could be excused in favor of Joy Mart and Isetann due to the purported first option right; and, that Joy Mart and Isetann should be granted damages in the form of 25 years of deposited rental income under the commercial stalls concession contract between LRTA and Phoenix.

After reviewing the pleadings submitted by the parties, I share a different view with the Dissenting Opinion.

The right of first refusal has no legal basis.

The basis of Joy Mart's first option right is one of the whereas clauses in the 1983 Deed of Sale[22] between Joy Mart and LRTA for the sale of Joy Mart's 403.8-sq. m. lot, which provides:

> WHEREAS, the VENDEE, upon recommendation of the Special Panel created by the LRT Committee on Land and Property Acquisition agrees that "the owners of Isetann and as Lessee of the President Hotel ... (Joy Mart Consolidated Corp.) should be given the first option in the redevelopment of the consolidated block, notwithstanding the compensation for their property."[23]

According to the Dissenting Opinion, this first option allegedly given by LRTA to Joy Mart, provided in the whereas clause, should be treated as a right of first refusal, to wit:

> Verily, "right of first option" is actually a misnomer in this case. For in the absence of a specific period to exercise such right, Joy Mart and Isetann's right is actually one of first refusal. There is no fixed timeframe for them to exercise such right as it first required LRTA to offer them the redevelopment contract on specific terms.
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> Though different from an option contract, contractual stipulations on the right of first refusal are just as valid and binding. Here, the LRTA bound itself to respect Joy Mart and Isetann's right of first refusal upon signing the Deed of Absolute Sale was executed on February 22, 1983.

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[22] *Rollo* (G.R. No. 211281), pp. 78-83.
[23] Id. at 79.

Whereupon, Joy Mart's "right of first option" became a vested right protected by law, *viz.*:

> A vested right is defined as one which is absolute, complete[,] and unconditional, to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency. The term "vested right" expresses the concept of present fixed interest which, in right reason and natural justice, should be protected against arbitrary State action, or an innately just and imperative right which enlightened free society, sensitive to inherent and irrefragable individual rights, cannot deny.
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> Indeed, the LRTA, which freely signed the Deed of Absolute Sale dated February 22, 1983, cannot now be permitted to renege on its obligation under the contract simply because it has changed its mind. As Article 1308 of the Civil Code decrees: a contract is binding on both contracting parties; its validity or compliance cannot be left to the will of one of them.
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> The right also subsists despite the cancellation of the lease between PGHFI and LRTA as well as the sublease agreement as its existence was not dependent thereon. In fact, the sublease agreement, as correctly found by the Court of Appeals, was executed in partial compliance with Joy Mart's right of first option and not the other way around.[24]

I respectfully disagree.

The purported right of first option was granted by LRTA, a government instrumentality, to Joy Mart under a whereas clause. A right of first refusal is a contractual grant, not of the sale of a property, but of the first priority to buy the property in the event the owner sells the same. As distinguished from an option contract, in a right of first refusal, while the object might be made determinate, the exercise of the right of first refusal would be dependent not only on the owner's eventual intention to enter into a binding juridical relation with another but also on terms, including the price, that are yet to be firmed up.[25]

The right of first refusal has long been recognized, both legally and jurisprudentially, as valid in our jurisdiction. It is significant to note, however, that in those cases where the right of first refusal is upheld by both law and jurisprudence, **the party in whose favor the right is granted has an interest on the object over which the right of first refusal is to be**

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[24] Dissenting Opinion, pp. 10-11.
[25] *Polytechnic University of the Philippines v. Golden Horizon Realty Corp.*, 629 Phil. 462, 474 (2010).

exercised. In those instances, the grant of the right of first refusal is a means to protect such interest.[26]

Stated differently, before a right of first refusal can be legally valid, it must be based on an existing interest on an object. For instance, there may be a valid right of first refusal granted to the lessee by the lessor in a contract of lease. When a lease contains a right of first refusal, the lessor has the legal duty to the lessee not to sell the leased property to anyone at any price until after the lessor has made an offer to sell the property to the lessee. Only after the lessee has failed to exercise his right of first refusal could the lessor sell the property to other buyers under the same terms and conditions offered to the lessee, or under terms and conditions more favorable to the lessor.[27]

The rationale for this doctrine is that the lessee has an existing interest on the property subject of the lease, particularly, the right of possession over the property under the contract of lease. Thus, since the lessee has a right of possession over the property, it is reasonable for the lessee to have first priority over it before the lessor could sell the property subject of the lease to a third person. Evidently, the grantee must have a clear interest on the object, from which the right of first refusal emanates.

Accordingly, when the party seeking to exercise the right of first refusal has a vested interest in, if not a right to, the subject of the right of first refusal, then such right should be recognized. Thus, on account of such interest, a tenant (with respect to the land occupied), a lessee (*vis-à-vis* the property leased), a stockholder (as regards shares of stock), and a mortgagor (in relation to the subject of the mortgage), are all granted first priority to buy the property over which they have an interest in the event of its sale.[28]

On the other hand, public bidding is the established procedure in the grant of government contracts. The award of public contracts, through public bidding, is a matter of public policy. In the award of government contracts, the law requires a competitive public bidding, which 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.[29]

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[26] *Power Sector Assets and Liabilities Management Corp. v. Pozzolanic Philippines, Inc.*, 671 Phil. 731, 756 (2011).
[27] *Villegas v. Court of Appeals*, 530 Phil. 671, 685 (2006).
[28] *Power Sector Assets and Liabilities Management Corp. v. Pozzolanic Philippines, Inc.*, supra at 757.
[29] *Osmeña III v. Power Sector Assets and Liabilities Management Corp.*, 770 Phil. 409, 431 (2015).

The requirement of public bidding is not an idle ceremony. It is the accepted method for arriving at a fair and reasonable price. It ensures that overpricing, favoritism, and other anomalous practices are eliminated or minimized.[30] The history of public bidding in government procurement was explained in *Abaya v. Ebdane, Jr.*:[31]

> It is necessary, at this point, to give a brief history of Philippine laws pertaining to procurement through public bidding. The United States Philippine Commission introduced the American practice of public bidding through Act No. 22, enacted on October 15, 1900, by requiring the Chief Engineer, United States Army for the Division of the Philippine Islands, acting as purchasing agent under the control of the then Military Governor, to advertise and call for a competitive bidding for the purchase of the necessary materials and lands to be used for the construction of highways and bridges in the Philippine Islands. Act No. 74, enacted on January 21, 1901 by the Philippine Commission, required the General Superintendent of Public Instruction to purchase office supplies through competitive public bidding. Act No. 82, approved on January 31, 1901, and Act No. 83, approved on February 6, 1901, required the municipal and provincial governments, respectively, to hold competitive public biddings in the making of contracts for public works and the purchase of office supplies.
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> On June 21, 1901, the Philippine Commission, through Act No. 146, created the Bureau of Supply and with its creation, public bidding became a popular policy in the purchase of supplies, materials and equipment for the use of the national government, its subdivisions and instrumentalities. On February 3, 1936, then President Manuel L. Quezon issued Executive Order No. 16 declaring as a matter of general policy that government contracts for public service or for furnishing supplies, materials and equipment to the government should be subjected to public bidding. The requirement of public bidding was likewise imposed for public works of construction or repair pursuant to the Revised Administrative Code of 1917.
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> Then President Diosdado Macapagal, in Executive Order No. 40 dated June 1, 1963, reiterated the directive that no government contract for public service or for furnishing supplies, materials and equipment to the government or any of its branches, agencies or instrumentalities, should be entered into without public bidding except for very extraordinary reasons to be determined by a Committee constituted thereunder. Then President Ferdinand Marcos issued PD 1594 prescribing guidelines for government infrastructure projects and Section 4 thereof stated that they should generally be undertaken by contract after competitive public bidding.
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> Then President Corazon Aquino issued Executive Order No. 301 (1987) prescribing guidelines for government negotiated contracts. Pertinently, Section 62 of the Administrative Code of 1987 reiterated the

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[30] *National Power Corp. v. Civil Service Commission*, 679 Phil. 487, 490-491 (2012).
[31] 544 Phil. 645 (2007).

> requirement of competitive public bidding in government projects. In 1990, Congress passed RA 6957, which authorized the financing, construction, operation and maintenance of infrastructure by the private sector. RA 7160 was likewise enacted by Congress in 1991 and it contains provisions governing the procurement of goods and locally-funded civil works by the local government units.
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> Then President Fidel Ramos issued Executive Order No. 302 (1996), providing guidelines for the procurement of goods and supplies by the national government. Then President Joseph Ejercito Estrada issued Executive Order No. 201 (2000), providing additional guidelines in the procurement of goods and supplies by the national government. Thereafter, he issued Executive Order No. 262 (2000) amending EO 302 (1996) and EO 201 (2000).
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> On October 8, 2001, President Gloria Macapagal-Arroyo issued EO 40, the law mainly relied upon by the respondents, entitled Consolidating Procurement Rules and Procedures for All National Government Agencies, Government-Owned or Controlled Corporations and Government Financial Institutions, and Requiring the Use of the Government Procurement System. It accordingly repealed, amended or modified all executive issuances, orders, rules and regulations or parts thereof inconsistent therewith.
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> On January 10, 2003, President Arroyo signed into law RA 9184. It took effect on January 26, [2003], or fifteen days after its publication in two newspapers of general circulation. x x x
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> In addition to these laws, RA 4860, as amended, must be mentioned as Section 4 thereof provides that "[i]n the contracting of any loan, credit or indebtedness under this Act, the President of the Philippines may, when necessary, agree to waive or modify the application of any law granting preferences or imposing restrictions on international competitive bidding x x x Provided, finally, That the method and procedure in the comparison of bids shall be the subject of agreement between the Philippine Government and the lending institution."[32]

Evidently, with respect to the government procurement of goods, services, or infrastructure, competitive public bidding is the mandated general rule. Only in very exceptional circumstances may competitive public bidding be set aside.

In *Land Transportation Franchising and Regulatory Board v. Stronghold Insurance Co., Inc.*,[33] it was explained that when there is a

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[32] Id. at 679-683.
[33] 718 Phil. 660 (2013).

contractual stipulation, such as right of first refusal, that contravenes or negates the requirement of public bidding, such stipulation is not favorably looked upon and strictly construed, *viz.*:

> **In the field of public contracts, these stipulations are weighed with the taint of invalidity for contravening the policy requiring government contracts to be awarded through public bidding. Unless clearly falling under statutory exceptions, government contracts for the procurement of goods or services are required to undergo public bidding "to protect the public interest by giving the public the best possible advantages [through] open competition."** The inclusion of a right of first refusal in a government contract executed post-bidding, as here, negates the essence of public bidding because the stipulation "gives the winning bidder an x x x advantage over the other bidders who participated in the bidding x x x." Moreover, a "right of first refusal," or "right to top," whether granted to a bidder or non-bidder, discourages other parties from submitting bids, narrowing the number of possible bidders and thus preventing the government from securing the best bid.
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> These clauses escape the taint of invalidity only in the narrow instance where the right of first refusal (or "right to top") is founded on the beneficiary's "interest on the object over which the right of first refusal is to be exercised" (such as a "tenant with respect to the land occupied, a lessee *vis-à-vis* the property leased, a stockholder as regards shares of stock, and a mortgagor in relation to the subject of the mortgage") and the government stands to benefit from the stipulation. Thus, we upheld the validity of a "right to top" clause allowing a private stockholder in a corporation to top by 5% the highest bid for the shares disposed by the government in that corporation. Under the joint venture agreement creating the corporation, a party had the right of first refusal in case the other party disposed its shares. The government, the disposing party in the joint venture agreement, [benefited] from the 5% increase in price under the "right to top," on outcome better than the right of first refusal.[34] (emphasis supplied)

In *Power Sector Assets and Liabilities Management Corp. v. Pozzolanic Philippines, Inc.*,[35] the right of first refusal granted to a private entity against the property of the State was not recognized because it violated the general rule of requiring competitive public bidding in the award of government contracts. It was therein underscored that the right of first refusal of the private entity had no leg to stand on as the latter did not have any actual interest on the object over which the right of first refusal was supposed to be exercised. "[T]here is no basis whatsoever for the grant to respondent [or the private entity] of the right of first refusal with respect to the fly ash of NPC power plants since the right to purchase at the time of

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[34] Id. at 672-674.
[35] Supra note 26.

bidding is that which is precisely the bidding subject, not yet existent much more vested in respondent."[36]

Similarly, in *Land Transportation Franchising and Regulatory Board v. Stronghold Insurance Co., Inc.*,[37] the right to match, which is a modification of the right of first refusal, was not recognized by the Court. It was underscored therein that said right cannot be effectuated because there is no "object" over which the private entity can claim an interest. In other words, the private entity did not have interest on the object over which the purported right was to be exercised.

More recently, in *Osmeña III v. Power Sector Assets and Liabilities Management Corp.*,[38] the right to top, which is another variation of the right of first refusal, was also not recognized in favor of a private entity, SPC Power Corporation *(SPC)*, against the government. The rule on competitive public bidding was likewise not followed therein. It was highlighted that SPC's right to top is void for lack of a valid interest or right to the object over which the right of first refusal was to be exercised. The Court explained that the property subject of the right to top was outside the leased premises and referred not only to land, but to any property within the vicinity of the leased premises, including the entire power plant complex and the land on which it is built. Evidently, the right to top is greatly excessive compared to the object over which the said right was supposed to be exercised.

In contrast, in *JG Summit Holdings, Inc. v. Court of Appeals*,[39] the Court applied the exception to the rule. It recognized that a private entity had a right to first refusal, without requiring public bidding. Nevertheless, it was emphasized therein that the right of first refusal was based on an existing interest in the joint venture, particularly, Kawasaki being a shareholder in the same joint venture.

Hence, the Court should thoroughly examine the purported right of first refusal granted by LRTA to Joy Mart in the 1983 Deed of Sale, for the latter's sale of a 403.8-sq. m. lot, with the highest degree of scrutiny. As stated above, in a government contract, competitive public bidding is the mandatory general rule. In this case, the right of first refusal would allow Joy Mart unfettered right to develop the consolidated block, totalling 2,014 sq. m., without the benefit of any public bidding. As Joy Mart claims, it should have been offered the right to develop the whole consolidated block,

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[36] Id. at 758.
[37] Supra note 33.
[38] Supra note 29.
[39] 458 Phil. 581 (2003).

which includes the 553.2 sq. m. granted to Phoenix, even though it was Phoenix that participated and won the competitive public bidding.

I find that the purported right of first refusal granted to Joy Mart is ineffective to acquire the right to develop the whole 2,014-sq. m. consolidated block which includes the 553.2-sq. m. portion granted to Phoenix.

As discussed above, the right of first refusal is valid only when **a party in whose favor the right is granted has an interest on the object over which the right of first refusal is to be exercised.** In other words, the grantee of the right of first refusal must have an interest on the subject property over which the right of first refusal is to be exercised. Again, the basis of the right of first refusal of the grantee is its existing interest over the subject property, whether it be a right of ownership, possession, or encumbrance. If the grantee of the right of first refusal does not have any existing interest on the subject property, there is no basis for the exercise of such right.

Here, before the 1983 Deed of Sale was executed, Joy Mart had ownership and possession of a 403.8-sq. m. portion of the consolidated block.[40] However, when Joy Mart executed the 1983 Deed of Sale in favor of LRTA, which contained the purported right of first refusal, it conveyed the said property to LRTA. Thus, upon the execution of said deed, Joy Mart no longer had any right whatsoever over the subject property, including the 403.8-sq. m. portion of the consolidated block. It no longer had any interest over the said property, be it of ownership, possession, encumbrance, or even the right to the fruits or rentals therefrom. The CA found Joy Mart to have even waived its leasehold rights on the adjacent lots in favor of the government, through LRTA, in the 1983 Deed of Sale.[41]

The purported right of first refusal of Joy Mart in the 1983 Deed of Sale has no leg to stand on because it had no interest over the subject property on which the said right depends. Joy Mart no longer had interest over the 403.8-sq. m. portion of the consolidated block. The right of first refusal cannot be validly exercised since the party in whose favor the purported right was granted had no interest on the object over which the said right of refusal was to be exercised.

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[40] *Rollo* (G.R. No. 211281), p. 78.
[41] Id. at 35.

In fact, the lack of interest over the consolidated block became more apparent when, after more than a year since the execution of the 1983 Deed of Sale, Joy Mart had to enter into a sublease agreement, on June 18, 1984, for the 1,141.2-sq. m. portion of the consolidated block from PGHFI,[42] which was eventually increased to 1,461.7 sq. m. However, it must be noted that even with the sublease, Joy Mart still did not have any interest in the remaining 553.2-sq. m. portion granted to Phoenix through public bidding in 1986, whether in the form of ownership, possession, or encumbrance.

Further, Joy Mart's claim that the 1983 Deed of Sale of the 403.8-sq. m. portion gave it the right of first refusal to redevelop the entire consolidated block is unmeritorious. To put things into perspective, the consolidated block consists of 2,014 sq. m., while the 1983 Deed of Sale only pertains to a 403.8-sq. m. portion. Pursuant to the 1983 Deed of Sale, Joy Mart conceded all interest over the 403.8-sq. m. portion; hence, it would be illogical if the same contract would give Joy Mart unfettered right to the entire 2,014-sq. m. property, which at that time, Joy Mart no longer had interest in. Joy Mart cannot extend its rights beyond the subject property covered by the 1983 Deed of Sale.

In addition, in its Complaint for Specific Performance, Injunction, and Damages,[43] Joy Mart seeks to acquire the right to redevelop the remaining 553.2-sq. m. portion of the consolidated block granted to Phoenix. However, Joy Mart no longer has any interest on the said portion. It neither has ownership nor possession over the specific 553.2-sq. m. portion of the consolidated block, such portion being excluded from the lease of Joy Mart. As discussed above, the right of first refusal cannot be exercised when there is no existing interest on the subject property. Such right must be based on an actual interest over the property, and it cannot stand alone.

In fine, the general rule prevails in this case. Competitive public bidding is mandatory in government contracts. In the field of public contracts, stipulations are weighed with the taint of invalidity for contravening the policy requiring government contracts to be awarded through public bidding. The right of first refusal invoked by Joy Mart is doubtful because it did not have any interest on the subject property, consisting of 403.80 sq. m., due to the execution of the 1983 Deed of Sale. Thus, such right of first refusal cannot be invoked by Joy Mart, disregarding the rule on public bidding, to redevelop the entire consolidated block to the detriment of those who participated in the said competitive public bidding, Phoenix being one.

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[42] Id. at 11.
[43] Id. at 57-69.

The subsequent acts of Joy Mart are inconsistent with its claim of right of first refusal.

There is an ambiguity in the whereas clause invoked by Joy Mart in its 1983 Deed of Sale. According to the Dissenting Opinion, the purported right of first option could be treated as a right of first refusal. However, as thoroughly discussed above, such position is untenable.

The whereas clause does not provide the manner by which Joy Mart would exercise its "first option in the redevelopment of the consolidated block."[44] As such, there could be numerous outcomes from that phrase of the whereas clause. It may imply that the right of possession of the consolidated block would temporarily be given to Joy Mart for redevelopment, and after completing the redevelopment, possession of the said block would be returned to the State. Another interpretation is that the right of possession of the consolidated block would be given to Joy Mart and, upon completion of the consolidated block, Joy Mart would have the right to operate the property, and only upon realizing profit shall the property be returned to the State. Again, ambiguities in the 1983 Deed of Sale do not settle the manner by which such right of first option shall be exercised.

The consideration in exchange for the right of first option, too, is unclear. The whereas clause only provides that Joy Mart "should be given the first option in the redevelopment of the consolidated block, notwithstanding the compensation for their property."[45] Whether separate compensation was given by Joy Mart to the State for the consideration of such right of first option, or whether the consideration was already incorporated in the purchase price given by the State to Joy Mart in exchange for the property, is not clear in the text of the 1983 Deed of Sale.

In *Abad v. Goldloop Properties, Inc.*,[46] the Court held that when there is ambiguity in the contract, which can be subject to two or more interpretations, the court should step in to interpret the same:

> The cardinal rule in the interpretation of contracts is embodied in the first paragraph of Article 1370 of the Civil Code: "[i]f the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control." This provision is akin to the "plain meaning rule" applied by Pennsylvania courts, which assumes that the intent of the parties to an instrument is "embodied in the

[44] Id. at 79.
[45] Id.
[46] 549 Phil. 641 (2007).

> writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement." It also resembles the "four corners" rule, a principle which allows courts in some cases to search beneath the semantic surface for clues to meaning. A court's purpose in examining a contract is to interpret the intent of the contracting parties, as objectively manifested by them. The process of interpreting a contract requires the court to make a preliminary inquiry as to whether the contract before it is ambiguous. A contract provision is ambiguous if it is susceptible of two reasonable alternative interpretations. Where the written terms of the contract are not ambiguous and can only be read one way, the court will interpret the contract as a matter of law. If the contract is determined to be ambiguous, then the interpretation of the contract is left to the court, to resolve the ambiguity in the light of the intrinsic evidence.[47]

In this case, the above-cited provision is subject to different interpretations, thus, the proper interpretation of the contract can be determined by the Court. Further, Articles 1370 and 1371 of the New Civil Code provide:

> Article 1370. If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control.
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> If the words appear to be contrary to the evident intention of the parties, the latter shall prevail over the former.
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> Article 1371. In order to judge the intention of the contracting parties, **their contemporaneous and subsequent acts shall be principally considered.** (emphasis supplied)

In this case, I find the subsequent acts of Joy Mart, after execution of the 1983 Deed of Sale, contrary to its claim of having a right of first refusal over the entire consolidated block. I agree with the *ponencia* that "[i]t bears repeating that Joy Mart and Isetann's act of entering into a sublease agreement with PGHFI on February 22, 1983 was a positive and express admission and acknowledgment on their part that they did not have a valid or legally enforceable right of first option. If they had such a right, Joy Mart would not have agreed to enter into the sublease and instead would have asserted its claim."[48]

Indeed, if Joy Mart claims having right of first refusal over the consolidated block by virtue of the 1983 Deed of Sale, then it should have invoked the same to exercise its right to redevelop the same. Joy Mart could

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[47] Id. at 654.
[48] *Ponencia*, p. 15.

have simply raised its purported right of first refusal at the first instance when LRTA sought to develop the property. Glaringly, on February 1, 1984, when LRTA executed a lease agreement with PGHFI, where the latter leased the whole consolidated block of LRTA's 2,014-sq. m. property,[49] Joy Mart did not lift a finger. It did not assert, against LRTA, having a purported right of first refusal against the entire block.

Instead, Joy Mart did the opposite. It conceded that it did not have any interest over the consolidated block. Joy Mart had to enter in a sublease agreement on June 18, 1984 with PGHFI for the 1,141.2-sq. m. portion of the consolidated block,[50] which was eventually increased to 1,461.7 sq. m. It was only upon this sublease that Joy Mart regained any sort of interest, particularly, the right to possession, over a portion of the consolidated block. For an entity which purportedly had a right to redevelop the entire 2,014-sq. m. property upon the execution of the 1983 Deed of Sale, it is bewildering that Joy Mart had to sublease the same property on which it allegedly had an interest on. These acts are definitely inconsistent with one another.

I likewise share the view of the *ponencia* that Joy Mart's "successive inactions had already demonstrated either admission and acknowledgment of the lack of a first refusal option, a renunciation, waiver or abandonment thereof or, at the very least, estoppel *in pais*."[51] Estoppel is a doctrine that prevents a person from adopting an inconsistent position, attitude, or action if it will result in injury to another. One who, by his acts, representations or admissions, or by his own silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, can no longer deny the existence of such fact as it will prejudice the latter.[52]

Joy Mart's conduct of subleasing a substantial portion of the consolidated block from PGHFI on June 18, 1984, which included payment of rentals, is contradictory to its claim of having the right to redevelop the entire consolidated block upon execution of the 1983 Deed of Sale.

SM Land, Inc. v. Bases Conversion and Development Authority[53] *(SMLI v. BCDA) is not applicable.*

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[49] *Rollo* (G.R. No. 211281), p. 11.
[50] Id.
[51] *Ponencia*, p. 16.
[52] *De los Santos v. Vibar*, 580 Phil. 393, 404 (2008).
[53] 741 Phil. 269 (2014).

The Dissenting Opinion relied on *SMLI v. BCDA* to justify that the government may be estopped from conducting public bidding.[54] It was underscored therein that the Court should not allow the government to deal dishonorably or capriciously with its citizens.[55]

I respectfully disagree that *SMLI v. BCDA* is applicable.

In that case, BCDA opened for disposition and development its Bonifacio South Property, a 33.1-hectare expanse located in Taguig City. SMLI submitted an unsolicited proposal for the development of the lot through a public-private joint venture agreement. The unsolicited proposal, with guaranteed secured payments, amounted to ₱32,501.00/sq. m. for a total of ₱22.6 Billion. Thereafter, BCDA created a Joint Venture Selection Committee *(JV-SC)*. Through a letter dated May 12, 2010, BCDA communicated to SMLI its acceptance of the unsolicited proposal.[56]

Afterwards, the JV-SC and SMLI embarked on a series of detailed negotiations and, on July 23, 2010, SMLI submitted its final revised proposal with guaranteed secured payments amounting to a total of ₱25.9 Billion. Afterwards, a certification of successful negotiations (Certification) was issued by BCDA, stating that SMLI's proposal shall be submitted to competitive challenge. Pursuant to the preparations of the competitive challenge, SMLI posted a security bond in the amount of ₱187 Million, under NEDA JV Guidelines.[57]

However, after two years, BCDA did not proceed with the competitive challenge. In response, SMLI proposed to increase the total secured payments to ₱22.436 Billion in over 15 years with an upfront payment of ₱3 Billion, and increase the net present value of the property to ₱38,500.00/sq. m. However, BCDA moved for the termination of the competitive challenge and, instead, proposed to submit the development project to competitive public bidding. Hence, SMLI challenged BCDA's cancellation of the competitive challenge.[58]

The Court held, among others, that BCDA erred in not proceeding with the competitive challenge. It was underscored therein that under the NEDA JV Guidelines, once the original proponent (SMLI), hurdled the first two stages of the Swiss Challenge Framework provided, which consists of

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[54] Dissenting Opinion, p. 13.
[55] Id. at 15.
[56] *SM Land, Inc. v. Bases Conversion and Development Authority*, supra note 53 at 282.
[57] Id. at 282-283.
[58] Id. at 283-285.

the submission and evaluation of the unsolicited proposal and the conduct of detailed negotiations, it was mandatory to conduct the third stage – the competitive challenge. Thus, the efforts of SMLI, including the posting of the ₱187 Million security, cannot simply be set aside by BCDA. Likewise, it was therein emphasized that the government was estopped from reneging the accepted unsolicited proposal of SMLI as the latter had already invested time, effort, and resources in the study and formulation of the proposal, in the adjustment thereof, as well as in the negotiations. The Court concluded that BCDA cannot unjustly enrich itself through the efforts of SMLI.[59]

The present case is in stark contrast with *SMLI v. BCDA*. Firstly, the process contemplated in *SMLI v. BCDA* is a Swiss Challenge, which is a hybrid mechanism between the direct negotiation approach and competitive bidding, recognized under NEDA JV Guidelines. It provides for clear guidelines and safeguards to ensure that the government will not be prejudiced with the offer coming from private entities and the best proposal attained. There are several detailed steps in the Swiss Challenge, which require the thorough investigation, study, and negotiations of unsolicited proposals from private entities.

On the other hand, in the case at bench, there are no clear guidelines upon which the 1983 Deed of Sale was based. It merely stated "upon recommendation of the Special Panel created by the LRT Committee on Land and Property Acquisition [the vendee] agrees that the owners of Isetann and as Lessee of the President Hotel ... (Joy Mart Consolidated Corp.) should be given the first option in the redevelopment of the consolidated block, notwithstanding the compensation for their property." Evidently, there is no clear legal rule or guideline upon which the purported whereas clause was sourced. Without any guiding principle to determine whether the alleged right of first refusal was legal, beneficial to the government, and protected against irregularity, the validity of such whereas clause is suspect.

Second, in *SMLI v. BCDA*, therein private entity exerted time, effort, and resources in preparation for the competitive challenge. Particularly, SMLI posted a security bond in the amount of ₱187 Million, under NEDA JV Guidelines, pursuant to the competitive challenge.

In contrast, here, it is doubtful that Joy Mart even exerted any effort and resource to secure the whereas clause in the 1983 Deed of Sale. As discussed above, there is an *iota* of evidence said deed of sale provided the consideration given by Joy Mart in exchange for the whereas clause.

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[59] Id. at 309-310.

Notably, even the CA could not categorically state the consideration given by Joy Mart in exchange for the grant of the purported right of first refusal in the whereas clause. The CA merely surmised that the grant of the said right in favor of Joy Mart "is, in a way, the government's show of gratitude for the former's act of voluntarily cooperating with the government in its pursuit to establish an LRT system." Obviously, the "gratitude" and "cooperation" of Joy Mart cannot be construed on the same level as the efforts, time, negotiations, and ₱187 Million security bond posted by the private entity in *SMLI v. BCDA*.

Conclusion

A vested right is defined as one which is absolute, complete and unconditional, to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency.[60] In this case, I do not find that the purported right of first option under the whereas clause of the 1983 Deed of Sale can be treated as a vested right in favor of Joy Mart. There are a lot of impediments to the said right, such as its violation of the mandatory policy on competitive public bidding; lack of interest on the object, on which the alleged right of first refusal is based; the subsequent acts of Joy Mart, which run contrary to its purported right; and lack of concrete consideration in exchange for such right of first option.

If the whereas clause in the 1983 Deed of Sale does not provide a vested right in favor of Joy Mart against LRTA, then what is it? In my view, due to its multiple defects, it should be treated plainly as a whereas clause – a preambulatory clause that cannot impose a binding obligation or limitation on the contracting parties; it is not an essential part of an act, nor does it enlarge nor confer powers.[61]

I vote to **GRANT** the petition of the Light Rail Transit Authority in G.R. No. 211281 and **DENY** the petition of Joy Mart Consolidated, Inc. in G.R. No. 212602.

ALEXANDER G. GESMUNDO
Chief Justice

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[60] *Bernabe v. Alejo*, 424 Phil. 933, 940-941 (2002).
[61] *Kuwait Airways Corp. v. Philippine Airlines, Inc.*, 605 Phil. 474, 487 (2009).