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THIRD DIVISION

[G.R. No. 195615. April 21, 2014]

BANK OF COMMERCE, *petitioner, vs.* **RADIO PHILIPPINES NETWORK, INC., INTERCONTINENTAL BROADCASTING CORPORATION, and BANAHAW BROADCASTING CORPORATION, THRU BOARD OF ADMINISTRATOR, and SHERIFF BIENVENIDO S. REYES, JR., Sheriff, Regional Trial Court of Quezon City, Branch 98,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; FAILURE TO FIRST FILE A MOTION FOR RECONSIDERATION IS USUALLY A FATAL OMISSION; VALID JUSTIFICATIONS FOR SKIPPING THE FILING OF A MOTION FOR RECONSIDERATION EXIST IN CASE AT BAR.— Section 1, Rule 65 of the Rules of Court provides that a petition for *certiorari* may only be filed when there is no plain, speedy, and adequate remedy in the course of law. Since a motion for reconsideration is generally regarded as a plain, speedy, and adequate remedy, the failure to first take recourse to is usually regarded as fatal omission. x x x In this case, the records amply show that Bancommerce's action fell within the recognized exceptions to the need to file a motion for reconsideration before filing a petition for *certiorari*. First. The filing of a motion for reconsideration would be redundant since actually the RTC's August 18, 2010 Order amounts to a denial of Bancommerce motion for reconsideration of the February 19, 2010 Order which granted the application for the issuance of the alias writ. Significantly, the *alias* writ of execution itself, the quashal of which was sought by Bancommerce two times (*via* a motion to quash the writ and a supplemental motion to quash the writ) derived its existence from the RTC's February 19, 2010 Order. Another motion for reconsideration would have been superfluous. The RTC had not budge on those issues in the preceding incidents. There

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was no point in repeatedly asking it to reconsider. Second. An urgent necessity for the immediate resolution of the case by the CA existed because any further delay would have greatly prejudiced Bancommerce. The Sheriff had been resolute and relentless in trying to execute the judgment and dispose of the levied assets of Bancommerce. Indeed, on April 22, 2010 the Sheriff started garnishing Bancommerce's deposits in other banks, including those in Banco de Oro-Salcedo-Legaspi Branch and in the Bank of the Philippine Islands Ayala Paseo Branch. Further, the Sheriff forcibly levied on Bancommerce's Lipa Branch cash on hand amounting to ₱1,520,000.00 and deposited the same with the Landbank. He also seized the bank's computers, printers, and monitors, causing the temporary cessation of its banking operations in that branch and putting the bank in an unwarranted danger of a run. Clearly, Bancommerce had valid justifications for skipping the technical requirement of a motion for reconsideration.

2. COMMERCIAL LAW; CORPORATIONS; MERGER; DEFINED AND EXPLAINED.— Merger is a re-organization of two or more corporations that results in their consolidating into a single corporation, which is one of the constituent corporations, one disappearing or dissolving and the other surviving. To put it another way, merger is the absorption of one or more corporations by another existing corporation, which retains its identity and takes over the rights, privileges, franchises, properties, claims, liabilities and obligations of the absorbed corporation(s). The absorbing corporation continues its existence while the life or lives of the other corporation(s) is or are terminated.

3. ID.; ID.; ID.; NO MERGER TOOK PLACE WHERE ALL THE REQUIREMENTS OF THE LAW WERE NOT COMPLIED WITH.— [I]t is clear that no merger took place between Bancommerce and TRB as the requirements and procedures for a merger were absent. A merger does not become effective upon the mere agreement of the constituent corporations. All the requirements specified in the law must be complied with in order for merger to take effect. Section 79 of the Corporation Code further provides that the merger shall be effective only upon the issuance by the Securities and Exchange Commission (SEC) of a certificate of merger. Here, Bancommerce and TRB remained separate corporations with distinct corporate personalities. What happened is that TRB sold and Bancommerce purchased identified

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recorded assets of TRB in consideration of Bancommerce's assumption of identified recorded liabilities of TRB including booked contingent accounts. There is no law that prohibits this kind of transaction especially when it is done openly and with appropriate government approval. Indeed, the dissenting opinions of Justices Jose Catral Mendoza and Marvic Mario Victor F. Leonen are of the same opinion. In strict sense, no merger or consolidation took place as the records do not show any plan or articles of merger or consolidation. More importantly, the SEC did not issue any certificate of merger or consolidation.

4. ID.; ID.; ID.; NEITHER A *DE FACTO* MERGER TOOK PLACE IN THE PRESENT CASE.— No *de facto* merger took place in the present case simply because the TRB owners did not get in exchange for the bank's assets and liabilities an equivalent value in Bancommerce shares of stock. Bancommerce and TRB agreed with BSP approval to exclude from the sale the TRB's contingent judicial liabilities, including those owing to RPN, *et al*.

5. ID.; ID.; ID.; WHERE THE TRANSACTION BETWEEN THE PARTIES DID NOT AMOUNT TO A MERGER OR *DE FACTO* MERGER BUT A MERE "SALE OF ASSETS AND ASSUMPTION OF LIABILITIES"; EFFECTS.— [S]ince the transaction between TRB and Bancommerce was neither a merger nor a *de facto* merger but a mere "sale of assets with assumption of liabilities," the next question before the Court is whether or not the RTC could regard Bancommerce as RPN, *et al*.'s judgment debtor. x x x Bancommerce cannot be considered as TRB's successor-in-interest and against which the Court's Decision of October 10, 2002 in G.R. 138510 may be enforced. Bancommerce did not hold the former TRBs assets in trust for it as to subject them to garnishment for the satisfaction of the latter's liabilities to RPN, *et al*. Bancommerce bought and acquired those assets and thus, became their absolute owner. x x x The enforcement, therefore, of the decision in the main case should not include the assets and properties that Bancommerce acquired from TRB. These have ceased to be assets and properties of TRB under the terms of the BSP-approved P & A Agreement between them. They are not TRB assets and properties in the possession of Bancommerce. To make them so would be an unwarranted departure from the CA's Decision in CA-G.R. SP 91258.

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VELASCO, JR., *J., concurring opinion:*

1. REMEDIAL LAW; JUDGMENTS; A FINAL JUDGMENT MAY BE EXECUTED ONLY AGAINST THE JUDGMENT OBLIGOR AND HIS PROPERTIES; ANY PRONOUNCEMENT AGAINST A NON-PARTY TO A CASE IS VOID FOR LACK OF JURISDICTION.— Every person must be heard and given his day in court before a judgment may be enforced against him. This rule is so elementary and basic that it is enshrined in x x x our Constitution[.] x x x Thus, the Rules of Court, in obvious fidelity to the imperatives of due process guarantee, permits only the execution of judgments against the **judgment obligor** and his properties, as plainly provided in Rule 39 of the Rules of Court [.] x x x [T]his Court has ruled that execution may issue only upon a person who is a party to the action, and not against one who did not have his day in court. x x x At present, it is plain from the foregoing recitation of facts that petitioner Bancom was never a party to the original case. It was not the respondent, not the judgment obligor, and not the person found by this Court liable to pay for any indebtedness to the private respondents. To hold Bancom liable upon execution for a liability charged against another existing entity is the height of injustice. It is best to recall that Bancom was dragged into this affray **after** the Decision of this Court in G.R. No. 138510 attained finality when private respondents conveniently, but without much of an explanation, inserted the bracketed phrase "now Bank of Commerce" after TRB's name on the caption of its motion for execution. Needless to state, this is not the lawful manner under the Rules of Court in impleading a person to a case. Jurisdiction over the person still requires the existence of a coercive process issued by the court to such party or its voluntary submission to the court. Neither had been done in this case. Note that Bancom made its entry to the case but by way of special appearance precisely to question the trial court's jurisdiction over its person. Thus, without any summons issued by the trial court, jurisdiction over Bancom's person had never been obtained by the trial court in this case. Any pronouncement against it is void for lack of jurisdiction. x x x In the execution of final and executory judgments, the trial court is bound by the terms of the decision. Thus, to order the execution against a non-party to an already concluded action is beyond the powers

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of the trial court and ergo illegal.

2. ID.; ID.; THE PRINCIPLE OF IMMUTABILITY OF A FINAL JUDGMENT MAY NOT BE CIRCUMVENTED BY THE SIMPLE EXPEDIENT OF CHANGING THE CAPTION OF THE MOTION FOR EXECUTION.— It needs to be emphasized that once a judgment becomes final and executory, that judgment may not be amended. Upon finality of the judgment, however, the courts lose the jurisdiction to amend, modify or alter the same. The judgment can neither be amended nor altered after it has become final and executory. This is the **principle of immutability of final judgment**[.] x x x Private respondents had impudently tried to circumvent the above principle by the simple expedience of changing the caption of its motion for execution. This simply cannot, and should not, be allowed. It is now up to this Court to correct the procedural misstep taken by the trial court when it allowed the crafty inclusion of a non-party to a final judgment that led to a breach of a constitutional rule on due process. This Court is duty-bound to ensure that the execution of a final decision is made within the confines of its pronouncements.

3. COMMERCIAL LAW; CORPORATIONS; WHERE ONE CORPORATION SELLS ITS ASSETS TO ANOTHER CORPORATION, THE LATTER IS NOT LIABLE FOR THE DEBTS AND LIABILITIES OF THE FORMER; RECOGNIZED EXCEPTIONS TO THE RULE, NOT PRESENT IN CASE AT BAR.— [T]he still standing rule is that where one corporation sells or transfers its assets to another corporation, the latter is not liable for the debts and liabilities of the transfer. A corporation has a personality separate and distinct from any other legal entity. Being separate entities, neither the properties nor liabilities of one can be considered the properties or liabilities of the other. Indeed, the rule against the transfer of liabilities to the purchaser corporation does not apply when any of the following conditions exists: (1) the purchaser corporation expressly or impliedly agrees to assume the debts, (2) where the transaction amounts to a consolidation or merger of the corporations, (3) when the corporation is merely a continuation of the selling corporation, and (4) where the transaction is fraudulently entered into in order to escape liability for those debts. x x x The absence of the first circumstance, the supposed assumption of debts made by Bancom, can readily be verified from the terms of the PSA

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concluded by TRB and Bancom. x x x At the time of the execution of the PSA, the liability of TRB to private respondents was the subject of an actual litigation. It is, therefore, excluded from the liabilities assumed by Bancom. At best, it is more plausible to conclude that the liability owing to private respondents is covered by the escrow fund set up by TRB with Metrobank. To find the existence of a *de facto* merger, this Court must at least ascertain the presence of the most essential element of a merger apart from compliance with the legalities set forth under the law: the dissolution of the separate judicial personality of the target corporation in fact, if not in law. It bears to stress that while this Court has recognized the existence of a *de facto* merger in this jurisdiction resulting from the transfer of assets and assumption of the liabilities of one corporation by another, the recognition had been made through the rubric of piercing the veil of corporate fiction, *i.e.*, control over both corporations is lodged in the same person/s and that control is used to commit fraud or wrong. This is usually done by the transfer of all the assets of a corporation in exchange for the stocks of another corporation. In this case, there is no indication, and the private respondents adduced no proof, that TRB and Bancom are subject to the same control and that their corporate personalities are mere instruments in committing a wrong. In fact, private respondents did not allege grounds, or ask the courts to declare the need for piercing the separate corporate veils of TRB and Bancom. x x x As neither private respondents nor TRB proffered any evidence or alleged any ground to justify the application of the doctrine of piercing the corporate veils as conduit to finding a *de facto* merger between TRB and Bancom, there is no basis to justify doing so. x x x The third exception to the rule on the non-accountability of a purchasing corporation is similarly non-existent in the present case. Once again, TRB still exists albeit under a different name—RTH. Bancom could not, therefore, be considered to have continued TRB when TRB still exists as RTH. It is axiomatic that as a corporation is imbued with legal personality, it has the right of succession and it incurs its own liabilities and is legally responsible for payment of its obligations. As to the fourth exception, We need only recall that the PSA had been given the stamp of approval by both the BSP and the BIR as a valid agreement that We cannot plausibly conclude that the same had been entered to defraud creditors. More importantly, by

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the very terms of the PSA, the transfer of the assets from TRB to Bancom had not been exchanged for assets of equal or more value. Rather, **the transfer of assets had been executed precisely in exchange for the assumption of identified debts and liabilities and not to escape liability**. That by itself negates the existence of the fourth exception, *i.e.*, the PSA had been entered into to escape the payment of debts.

MENDOZA, *J., dissenting opinion:*

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; FILING OF A MOTION FOR RECONSIDERATION IS GENERALLY A CONDITION *SINE QUA NON* FOR THE FILING OF A PETITION FOR *CERTIORARI;* PETITIONER FAILED TO JUSTIFY THE DISPENSING OF A PRIOR MOTION FOR RECONSIDERATION.— One of the requirements for the filing of a petition for *certiorari* is that there be no appeal or **any** plain, speedy and adequate remedy available in the ordinary course of law. The "plain," "speedy" and "adequate remedy" referred to in Section 1, Rule 65 of the Rules of Court is a *motion for reconsideration* of the questioned order or resolution. It means that unless a motion for reconsideration has been filed, immediate resort to a petition for *certiorari* will not lie because there is still an adequate remedy available to the aggrieved party. The Court is consistent in ruling that a motion for reconsideration is a condition *sine qua non* for the filing of a petition for *certiorari*. The said mandatory and jurisdictional procedure is meant to give the lower court or tribunal the opportunity to correct its assigned errors. Failure to file the motion before availing oneself of the special civil action for *certiorari* is a fatal infirmity. Though the rule is mandatory, the Court recognizes exceptional circumstances which may justify the dispensing of a prior motion for reconsideration. x x x Bancommerce admitted in its petition before the CA that it failed to file a motion for reconsideration of the assailed August 18, 2010 Order[.] x x x It is of my considered view that Bancommerce failed to satisfactorily prove before the CA that indeed, its non-compliance with the mandatory and jurisdictional requirement of a prior motion for reconsideration was justified. x x x Therefore, the CA did not commit any reversible error when it outrightly dismissed Bancommerce's petition for *certiorari* for non-filing of a prior

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motion for reconsideration of the assailed August 18, 2010 Order of the RTC. As correctly ruled by the CA, Bancommerce could not arrogate to itself the determination of whether a motion for reconsideration was necessary or not. It needed to expressly, clearly and satisfactorily prove that its claim fell under any of the recognized exceptions. To dispense with the requirement, there had to be a concrete, compelling and valid reason excusing it from compliance therewith.

2. COMMERCIAL LAW; CORPORATIONS; MERGER; DEFINED; REQUIREMENTS AND PROCEDURES TO BE FOLLOWED FOR A VALID AND EFFECTIVE MERGER.— A merger is "a combination of two things, especially companies, into one." Merriam Webster Dictionary defines it as "the absorption by a corporation of one or more others." Under the Philippine Law, "two or more corporations may merge into a single corporation which shall be one of the constituent corporations or may consolidate into a new single corporation which shall be the consolidated corporation." There are, however, requirements and procedures to follow before a merger takes place. The steps necessary to accomplish a merger or consolidation, as provided for in Sections 76, 77, 78, and 79 of the Corporation Code, are: (1) The board of each corporation draws up a plan of merger or consolidation. Such plan must include any amendment, if necessary, to the articles of incorporation of the surviving corporation, or in case of consolidation, all the statements required in the articles of incorporation of a corporation. (2) Submission of plan to stockholders or members of each corporation for approval. A meeting must be called and at least two (2) weeks' notice must be sent to *all* stockholders or members, personally or by registered mail. A summary of the plan must be attached to the notice. Vote of two-thirds of the members or of stockholders representing two-thirds of the outstanding capital stock will be needed. Appraisal rights, when proper, must be respected. (3) Execution of the formal agreement, referred to as the articles of merger or consolidation, by the corporate officers of each constituent corporation. These take the place of the articles of incorporation of the consolidated corporation, or amend the articles of incorporation of the surviving corporation. (4) Submission of said articles of merger or consolidation to the SEC for approval. (5) If necessary, the

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SEC shall set a hearing, notifying all corporations concerned at least two weeks before. (6) Issuance of certificate of merger or consolidation. Only after these requirements have been complied with and a certificate of merger or consolidation has been issued by the SEC shall the merger or consolidation be effective.

3. ID.; ID.; ID.; CIRCUMSTANCES SHOWING *DE FACTO* MERGER BETWEEN TWO CORPORATIONS, PRESENT IN CASE AT BAR.— After a careful scrutiny of the records, the surrounding circumstances in the case show that, in effect, although without an outright declaration of such, a *"de facto"* merger existed between TRB and Bancommerce. *First,* the PSA involved substantially all the assets and liabilities of TRB. The PSA clearly included TRB's banking goodwill, its bank premises, its licenses to operate its head office and branches, its leasehold rights, patents, trademarks or copyrights used in connection with its business or products. *Second,* in one of the cases it initiated with respect to the rights and interests of TRB, an *Ex-Parte* Petition for Issuance of Writ of Possession, before the **same RTC**, **Branch 98**, Bancommerce qualified TRB with the words **"now known as Bancommerce**." Justice and fair play dictate that Bancommerce is estopped from denying that it did identify TRB as such. Nobody but Bancommerce itself inserted the description. It would be unfair to allow Bancommerce to avail of such description or qualification when it would be to its advantage, and to disavow it when it would be no longer convenient. *Third,* the BSP, through its Deputy Governor Alberto V. Reyes, even issued the Circular Letter (Series of 2002) advising all banks and non-bank financial intermediaries that the **banking activities** and **transactions** of TRB and Bancommerce were **consolidated** and that the latter **continued** the **operations of the former**. Section 40 of the Corporation Code laid out the procedure and requirements when a corporation sells or otherwise disposes of all or substantially all of its assets. It provides that a sale or other disposition shall be deemed to cover substantially all the corporate property and assets, **if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purposes for which it was incorporated.** The sale or disposition of all of substantially all of the corporate assets *may have the effect of a merger or*

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consolidation. Corollarily, Section 40 will not apply if the sale was necessary in the usual and regular course of business. The facts obtaining in the case, however, clearly showed that the sale was not in pursuance of the usual and regular banking business of TRB. The sale, in fact, rendered TRB incapable of carrying out the purpose of its organization. While there may be no merger/consolidation in its strictest sense, it is my studied opinion that the **end result of the affair** that took place between TRB and Bancommerce amounted to a merger of assets where the existence of TRB as a banking entity ceased while that of Bancommerce continued. Essentially, Bancommerce is continuing the operations of the former.

4. REMEDIAL LAW; JUDGMENTS; EXECUTION; A WRIT OF EXECUTION MAY BE ENFORCED AGAINST A PRIVY OR SUCCESSOR-IN-INTEREST OF THE JUDGMENT DEBTOR; PRINCIPLE, APPLIED.— It has been established that the existence of TRB as a banking entity ceased by virtue of the PSA. It cannot be denied either that Bancommerce has continued its operations as early as July 2002. Thus, even though Bancommerce was not a party in the main case, the writ of execution may be enforced against it. It has been the consistent ruling of the Court that although it is true that a writ of execution can only be issued against a party and not against one who did not have his day in court, one who is privy or a successor-in-interest of the judgment debtor can be reached by the order of execution. The specific words in the two cases read: No man shall be affected by any proceeding to which he is a stranger. **Strangers** to a case are not bound by judgment rendered by the court. In the same manner, an execution can be issued only against a party and not against one who did not have his day in court. x x x However, **one who is a privy to the judgment debtor can be reached by an order of execution**[.] x x x Bancommerce cannot insist that TRB's assets in its custody and possession cannot be the subject of an execution on the flimsy excuse that it is not a party. Granting that there has been no *de facto* merger or consolidation, the undeniable fact is that Bancommerce has TRB's assets, commingled or not, and the rules provide that **these can be reached by levy or garnishment.** The Rules of Court, moreover, do not require that the garnishee be served with summons or impleaded in the case in order to make him liable. x x x

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Bancommerce became TRB's successor-in-interest. The PSA clearly led to a transfer of interest from TRB to Bancommerce. As previously mentioned, Bancommerce acquired assets from TRB, which conveyance was effected while the case was pending and which transaction appears not to have been made known to TRB's creditors. These properties can still be reached by execution to satisfy the judgment in favor of the respondent networks.

5. ID.; ID.; ID.; THE OPTION TO CHOOSE WHICH PROPERTY IS TO BE LEVIED FIRST BELONGS TO THE JUDGMENT DEBTOR, IF HE FAILED TO EXERCISE SUCH OPTION HE IS DEEMED TO HAVE WAIVED SUCH RIGHT AND THE OPTION SHALL BE EXERCISED BY THE JUDGMENT CREDITOR; PRINCIPLE, APPLIED.— "The option under Section 9(b), Rule 39 of the Revised Rules of Court is granted to a judgment obligor before the sheriff levies its properties and not after." "(T)he sheriff is required to first demand of the judgment obligor the immediate payment of the full amount stated in the writ of execution before a levy can be made. The sheriff shall demand such payment either in cash, certified bank check or any other mode of payment acceptable to the judgment obligee. If the judgment obligor cannot pay by these methods immediately or at once, he can exercise his option to choose which of his properties can be levied upon. **If he does not exercise this option immediately or when he is absent or cannot be located, he waives such right,** and the sheriff can now first levy his personal properties, if any, and then the real properties if the personal properties are insufficient to answer for the judgment." In this case, as the records show, Bancommerce (**TRB is "now known as Bancommerce")** refuses to cooperate and disclose TRB's assets in its possession, erroneously asserting that it is a stranger. In this situation, **as transferee of all the rights and assets of TRB**, Bancommerce is deemed to have waived that right and the choice shall be exercised by the judgment obligees, which in this case are the respondent networks.

6. ID.; ID.; ID.; UNJUSTIFIED DELAY IN THE EXECUTION OF A FINAL JUDGMENT BY AVAILING OF THE STRANGER THEORY IN THE CASE TO PROTECT ITSELF AMOUNTS TO DENIAL OF JUSTICE TO THE WINNING PARTY.— Bancommerce has done nothing but forestall the execution of

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a final and executory decision by incessantly carping that it is a stranger to the case. It cannot resist the execution by availing of the stranger theory as a shield to protect what TRB owned and which it now owns. Its dilatory tactics resulted in the frustration of the respondent networks. Bancommerce should have observe honesty and good faith by cooperating and informing the trial court of the assets of TRB, where they are and their status – whether commingled or set aside. Because of its obstinate refusal, the RTC could only assume that they have been comingled. Verily, by the unjustified delay in the execution of a final judgment in their favor, the respondent networks have suffered an injustice. The Court views with disfavor the tactics employed by Bancommerce to frustrate the execution of a final decision and order. Once a judgment has become final, the winning party be not, through a mere subterfuge, deprived of the fruits of the verdict. Courts must guard against any scheme calculated to bring about that result and must frown upon any attempt to prolong controversies.

LEONEN, *J., dissenting opinion:*

1. COMMERCIAL LAW; CORPORATIONS; A CORPORATION WHICH PURCHASES SUBSTANTIALLY ALL THE ASSETS OF ANOTHER CORPORATION IS LIABLE TO PAY THE JUDGMENT DEBT OF THE SELLER CORPORATION WHEN IT IMPLIEDLY ACCEPTS SUCH OBLIGATION BY MAKING IT APPEAR BEFORE THE THIRD PARTIES THAT IT STEPPED INTO THE SHOES OF THE SELLER CORPORATION.— While, it is uncertain whether respondents' claim was explicitly assumed by petitioner Bancommerce under the Purchase and Sale Agreement, the circumstances of this case point to no other conclusion than an implied assumption of all liabilities by purchaser corporation, petitioner Bancommerce. Unlike the jurisprudence cited earlier, the present case involves a *bank* that transferred all or substantially all of its assets, including its branching licenses, to petitioner Bancommerce — the *bank* that will now continue its operations as recognized by the Bangko Sentral ng Pilipinas. The banking industry is imbued with great trust and confidence not only by its clients but by the general public. When banks make mistakes, the wrongful dishonor of a check for example, this causes "embarrassment if not also financial loss and perhaps even civil and criminal

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litigation" on the part of the depositor. Consequently, those in the banking business are heavily regulated, burdened with the highest standards of integrity and performance. This court has awarded exemplary damages to plaintiffs who have suffered from the failure of banks to exercise such level of diligence in its affairs, considering that "[t]he business of banking is impressed with public interest and great reliance is made on the bank's sworn profession of diligence and meticulousness in giving irreproachable service." On this note, a purchaser bank which has made it appear to third parties that it has stepped into the shoes of the seller bank must be deemed to have assumed the debts and liabilities of such seller bank. By presenting itself as the former Traders Royal Bank, petitioner Bancommerce impliedly novated existing contracts of Traders Royal Bank by admitting to the parties involved and the public in general that it is now the entity to reckon with.

2. ID.; ID.; TRANSFER OF THE ENTIRE BUSINESS ENTERPRISE.— Under Section 40 of the Corporation Code, when the transaction amounts to a sale of "all or substantially all of [the corporation's] property and assets," the ratificatory vote of the stockholders representing at least two-thirds of the outstanding capital stock is required. This transaction involves a transfer of the entire business enterprise as no such ratificatory vote is required "if the proceeds of the sale or other disposition of such property and assets [would] be appropriated *for the conduct of its remaining business*." In such transactions, the purchaser corporation is now the one continuing the seller corporation's original business. Consequently, as far as the selling corporation is concerned, there is no more business remaining. x x x As seen in Article III, paragraph 2 of the Purchase and Sale Agreement quoted above, Traders Royal Bank transferred its branching licenses to petitioner Bancommerce and surrendered its commercial banking license to Bangko Sentral ng Pilipinas. In fact, Bangko Sentral issued a circular letter, series of 2002, "advising all banks and non-bank financial intermediaries that the banking activities and transactions of TRB and Bancommerce were consolidated and that the latter continued the operations of the former." Thus, Traders Royal Bank no longer exists as

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a commercial bank while petitioner Bancommerce to whom Traders Royal Bank transferred substantially all of its assets including its branching licenses will continue its operations. While Traders Royal Bank continues to exist as a separate corporation, it is no longer doing its original business of commercial banking. It is now a holding company, and it is petitioner Bancommerce that is continuing its original banking business.

APPEARANCES OF COUNSEL

Rodrigo Berenguer & Guno and *Siguion Reyna Montecillo & Ongsiako* for petitioner.

Mercado Aguillardo and *Aceron Law Firm* for respondents.

D E C I S I O N

ABAD, *J.*:

In late 2001 the Traders Royal Bank (TRB) proposed to sell to petitioner Bank of Commerce (Bancommerce) for ₱10.4 billion its banking business consisting of specified assets and liabilities. Bancommerce agreed subject to prior Bangko Sentral ng Pilipinas' (BSP's) approval of their Purchase and Assumption (P & A) Agreement. On November 8, 2001 the BSP approved that agreement subject to the condition that Bancommerce and TRB would set up an escrow fund of ₱50 million with another bank to cover TRB liabilities for contingent claims that may subsequently be adjudged against it, which liabilities were excluded from the purchase.

Specifically, the BSP Monetary Board Min. No. 58 (MB Res. 58) decided as follows:

1. To approve the revised terms sheet as finalized on September 21, 2001 granting certain incentives pursuant to Circular No. 237, series of 2000 to serve as a basis for the final Purchase and Assumption (P & A) Agreement between the Bank of Commerce (BOC) and Traders Royal Bank (TRB); subject to inclusion of the following provision in the P & A:

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> The parties to the P & A had considered other potential liabilities against TRB, and to address these claims, the parties have agreed to set up an escrow fund amounting to Fifty Million Pesos (₱50,000,000.00) in cash to be invested in government securities to answer for any such claim that shall be judicially established, which fund shall be kept for 15 years in the trust department of any other bank acceptable to the BSP. Any deviation therefrom shall require prior approval from the Monetary Board.
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> x x x x x x x x x

Following the above approval, on November 9, 2001 Bancommerce entered into a P & A Agreement with TRB and acquired its specified assets and liabilities, excluding liabilities arising from judicial actions which were to be covered by the BSP-mandated escrow of ₱50 million.

To comply with the BSP mandate, on December 6, 2001 TRB placed ₱50 million in escrow with Metropolitan Bank and Trust Co. (Metrobank) to answer for those claims and liabilities that were excluded from the P & A Agreement and remained with TRB. Accordingly, the BSP finally approved such agreement on July 3, 2002.

Shortly after or on October 10, 2002, acting in G.R. 138510, *Traders Royal Bank v. Radio Philippines Network (RPN), Inc.*, this Court ordered TRB to pay respondents RPN, Intercontinental Broadcasting Corporation, and Banahaw Broadcasting Corporation (collectively, RPN, *et al.*) actual damages of ₱9,790,716.87 plus 12% legal interest and some amounts. Based on this decision, RPN, *et al.* filed a motion for execution against TRB before the Regional Trial Court (RTC) of Quezon City. But rather than pursue a levy in execution of the corresponding amounts on escrow with Metrobank, RPN, *et al.* filed a Supplemental Motion for Execution[1] where they described TRB as "now Bank of Commerce" based on the assumption that TRB had been merged into Bancommerce.

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[1] *Rollo*, pp. 111-115.

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On February 20, 2004, having learned of the supplemental application for execution, Bancommerce filed its Special Appearance with Opposition to the same[2] questioning the jurisdiction of the RTC over Bancommerce and denying that there was a merger between TRB and Bancommerce. On August 15, 2005 the RTC issued an Order[3] granting and issuing the writ of execution to cover any and all assets of TRB, "including those subject of the merger/consolidation in the guise of a Purchase and Sale Agreement with Bank of Commerce, and/or against the Escrow Fund established by TRB and Bank of Commerce with the Metropolitan Bank and Trust Company."

This prompted Bancommerce to file a petition for *certiorari* with the Court of Appeals (CA) in CA-G.R. SP 91258 assailing the RTC's Order. On December 8, 2009 the CA[4] denied the petition. The CA pointed out that the Decision of the RTC was clear in that Bancommerce was not being made to answer for the liabilities of TRB, but rather the assets or properties of TRB under its possession and custody.[5]

In the same Decision, the CA modified the Decision of the RTC by deleting the phrase that the P & A Agreement between TRB and Bancommerce is a farce or "a mere tool to effectuate a merger and/or consolidation between TRB and BANCOM." The CA Decision partly reads:

x x x x x x x x x

We are not prepared though, unlike the respondent Judge, to declare the PSA between TRB and BANCOM as a farce or "a mere tool to effectuate a merger and/or consolidation" of the parties to the PSA.

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[2] *Id*. at 116-118.

[3] *Id*. at 119-127.

[4] Penned by Associate Justice Francisco P. Acosta, with Associate Justices Juan Q. Enriquez, Jr., Priscilla Baltazar-Padilla and Michael P. Elbinias, concurring and Associate Justice Pampio Abarintos, dissenting; *id*. at 98-110.

[5] *Id*. at 107-108.

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There is just a dearth of conclusive evidence to support such a finding, at least at this point. Consequently, the statement in the dispositive portion of the assailed August 15, 2005 Order referring to a merger/consolidation between TRB and BANCOM is deleted.[6]

x x x x x x x x x

WHEREFORE, the herein consolidated Petitions are DENIED. The assailed Orders dated August 15, 2005 and February 22, 2006 of the respondent Judge, are AFFIRMED with the MODIFICATION that the pronouncement of respondent Judge in the August 15, 2005 Order that the PSA between TRB and BANCOM is a farce or "a mere tool to effectuate a merger and/or consolidation between TRB and BANCOM" is DELETED.

SO ORDERED.[7]

On January 8, 2010 RPN, *et al.* filed with the RTC a motion to cause the issuance of an *alias* writ of execution against Bancommerce based on the CA Decision. The RTC granted[8] the motion on February 19, 2010 on the premise that the CA Decision allowed it to execute on the assets that Bancommerce acquired from TRB under their P & A Agreement.

On March 10, 2010 Bancommerce sought reconsideration of the RTC Order considering that the December 8, 2009 CA Decision actually declared that no merger existed between TRB and Bancommerce. But, since the RTC had already issued the *alias* writ on March 9, 2010 Bancommerce filed on March 16, 2010 a motion to quash the same, followed by supplemental motion[9] on April 29, 2010.

On August 18, 2010 the RTC issued the assailed Order[10] denying Bancommerce pleas and, among others, directing the release to the Sheriff of Bancommerce's "garnished monies

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[6] *Id*. at 108.

[7] *Id*. at 109.

[8] *Id*. at 136-138.

[9] *Id*. at 180-188.

[10] *Id*. at 208-220.

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and shares of stock or their monetary equivalent" and for the sheriff to pay 25% of the amount "to the respondents' counsel representing his attorney's fees and ₱200,000.00 representing his appearance fees and litigation expenses" and the balance to be paid to the respondents after deducting court dues.

Aggrieved, Bancommerce immediately elevated the RTC Order to the CA *via* a petition for *certiorari* under Rule 65 to assail the Orders dated February 19, 2010 and August 18, 2010. On November 26, 2010 the CA[11] dismissed the petition outright for the supposed failure of Bancommerce to file a motion for reconsideration of the assailed order. The CA denied Bancommerce's motion for reconsideration on February 9, 2011, prompting it to come to this Court.

The issues this case presents are:

1. Whether or not the CA gravely erred in holding that Bancommerce had no valid excuse in failing to file the required motion for reconsideration of the assailed RTC Order before coming to the CA; and

2. Whether or not the CA gravely erred in failing to rule that the RTC's Order of execution against Bancommerce was a nullity because the CA Decision of December 8, 2009 in CA-G.R. SP 91258 held that TRB had not been merged into Bancommerce as to make the latter liable for TRB's judgment debts.

Direct filing of the petition for certiorari by Bancommerce

Section 1, Rule 65 of the Rules of Court provides that a petition for *certiorari* may only be filed when there is no plain, speedy, and adequate remedy in the course of law. Since a motion for reconsideration is generally regarded as a plain, speedy, and adequate remedy, the failure to first take recourse to is usually regarded as fatal omission.

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[11] Penned by Associate Justice Celia C. Librea-Leagogo, with Associate Justices Remedios A. Salazar-Fernando and Michael P. Elbinias, concurring; *id.* at 59-62.

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But Bancommerce invoked certain recognized exceptions to the rule.[12] It had to forego the filing of the required motion for reconsideration of the assailed RTC Order because a) there was an urgent necessity for the CA to resolve the questions it raised and any further delay would prejudice its interests; b) under the circumstances, a motion for reconsideration would have been useless; c) Bancommerce had been deprived of its right to due process when the RTC issued the challenged order *ex parte*, depriving it of an opportunity to object; and d) the issues raised were purely of law.

In this case, the records amply show that Bancommerce's action fell within the recognized exceptions to the need to file a motion for reconsideration before filing a petition for *certiorari.*

First. The filing of a motion for reconsideration would be redundant since actually the RTC's August 18, 2010 Order amounts to a denial of Bancommerce motion for reconsideration of the February 19, 2010 Order which granted the application for the issuance of the *alias* writ. Significantly, the alias writ of execution itself, the quashal of which was sought by Bancommerce two times (*via* a motion to quash the writ and a supplemental motion to quash the writ) derived its existence from the RTC's February 19, 2010 Order. Another motion for reconsideration would have been superfluous. The RTC had not budge on those issues in the preceding incidents. There was no point in repeatedly asking it to reconsider.

Second. An urgent necessity for the immediate resolution of the case by the CA existed because any further delay would have greatly prejudiced Bancommerce. The Sheriff had been resolute and relentless in trying to execute the judgment and dispose of the levied assets of Bancommerce. Indeed, on April 22, 2010 the Sheriff started garnishing Bancommerce's deposits in other banks, including those in Banco de Oro-Salcedo-Legaspi Branch and in the Bank of the Philippine Islands Ayala Paseo Branch.

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[12] See *Republic v. Bayao*, G.R. No. 179492, June 5, 2013, 697 SCRA 313, 323.

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Further, the Sheriff forcibly levied on Bancommerce's Lipa Branch cash on hand amounting to ₱1,520,000.00 and deposited the same with the Landbank. He also seized the bank's computers, printers, and monitors, causing the temporary cessation of its banking operations in that branch and putting the bank in an unwarranted danger of a run. Clearly, Bancommerce had valid justifications for skipping the technical requirement of a motion for reconsideration.

Merger and De Facto Merger

Merger is a re-organization of two or more corporations that results in their consolidating into a single corporation, which is one of the constituent corporations, one disappearing or dissolving and the other surviving. To put it another way, merger is the absorption of one or more corporations by another existing corporation, which retains its identity and takes over the rights, privileges, franchises, properties, claims, liabilities and obligations of the absorbed corporation(s). The absorbing corporation continues its existence while the life or lives of the other corporation(s) is or are terminated.[13]

The Corporation Code requires the following steps for merger or consolidation:

(1) The board of each corporation draws up a plan of merger or consolidation. Such plan must include any amendment, if necessary, to the articles of incorporation of the surviving corporation, or in case of consolidation, all the statements required in the articles of incorporation of a corporation.

(2) Submission of plan to stockholders or members of each corporation for approval. A meeting must be called and at least two (2) weeks' notice must be sent to *all* stockholders or members, personally or by registered mail. A summary of the plan must be attached to the notice. Vote of two-thirds of the members or of stockholders representing two-thirds of the outstanding capital stock will be needed. Appraisal rights, when proper, must be respected.

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[13] Agpalo, Ruben E., *Comments on the Corporation Code of the Philippines* (1993), citing SEC Opinion dated June 11, 1986, The SEC Quarterly Bulletin, Vol. XX, Nos. 1 and 2, March-June 1986, pp. 97-98.

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(3) Execution of the formal agreement, referred to as the articles of merger o[r] consolidation, by the corporate officers of each constituent corporation. These take the place of the articles of incorporation of the consolidated corporation, or amend the articles of incorporation of the surviving corporation.

(4) Submission of said articles of merger or consolidation to the SEC for approval.

(5) If necessary, the SEC shall set a hearing, notifying all corporations concerned at least two weeks before.

(6) Issuance of certificate of merger or consolidation.[14]

Indubitably, it is clear that no merger took place between Bancommerce and TRB as the requirements and procedures for a merger were absent. A merger does not become effective upon the mere agreement of the constituent corporations.[15] All the requirements specified in the law must be complied with in order for merger to take effect. Section 79 of the Corporation Code further provides that the merger shall be effective only upon the issuance by the Securities and Exchange Commission (SEC) of a certificate of merger.

Here, Bancommerce and TRB remained separate corporations with distinct corporate personalities. What happened is that TRB sold and Bancommerce purchased identified recorded assets of TRB in consideration of Bancommerce's assumption of identified recorded liabilities of TRB including booked contingent accounts. There is no law that prohibits this kind of transaction especially when it is done openly and with appropriate government approval. Indeed, the dissenting opinions of Justices Jose Catral Mendoza and Marvic Mario Victor F. Leonen are of the same opinion. In strict sense, no merger or consolidation took place as the records do not show any plan or articles of merger or consolidation. More importantly, the SEC did not issue any certificate of merger or consolidation.

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[14] *Mindanao Savings and Loan Association, Inc. v. Willkom*, G.R No. 178618, October 20, 2010, 634 SCRA 291, 302.

[15] *Associated Bank v. Court of Appeals*, 353 Phil. 702, 712 (1998).

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The dissenting opinion of Justice Mendoza finds, however, that a "*de facto*" merger existed between TRB and Bancommerce considering that (1) the P & A Agreement between them involved substantially all the assets and liabilities of TRB; (2) in an *Ex Parte* Petition for Issuance of Writ of Possession filed in a case, Bancommerce qualified TRB, the petitioner, with the words "now known as Bancommerce"; and (3) the BSP issued a Circular Letter (series of 2002) advising all banks and non-bank financial intermediaries that the banking activities and transaction of TRB and Bancommerce were consolidated and that the latter continued the operations of the former.

The idea of a *de facto* merger came about because, prior to the present Corporation Code, no law authorized the merger or consolidation of Philippine Corporations, except insurance companies, railway corporations, and public utilities.[16] And, except in the case of insurance corporations, no procedure existed for bringing about a merger.[17] Still, the Supreme Court held in *Reyes v. Blouse*,[18] that authority to merge or consolidate can be derived from Section 28½ (now Section 40) of the former Corporation Law which provides, among others, that a corporation may "sell, exchange, lease or otherwise dispose of all or substantially all of its property and assets" if the board of directors is so authorized by the affirmative vote of the stockholders holding at least two-thirds of the voting power. The words "or otherwise dispose of," according to the Supreme Court, is very broad and in a sense, covers a merger or consolidation.

But the facts in *Reyes* show that the Board of Directors of the Corporation being dissolved clearly intended to be merged into the other corporations. Said this Court:

It is apparent that the purpose of the resolution is not to dissolve the [company] but merely to transfer its assets to a new corporation

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[16] Campos, Jose Jr., *The Corporation Code: Comments, Notes and Selected Cases* (1990).

[17] *Id*.

[18] 91 Phil. 305 (1952).

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in exchange for its corporation stock. This intent is clearly deducible from the provision that the [company] will not be dissolved but will continue existing until its stockholders decide to dissolve the same. This comes squarely within the purview of Section 28½ of the corporation law which provides, among others, that a corporation may sell, exchange, lease, or otherwise dispose of all its property and assets, including its good will, upon such terms and conditions as its Board of Directors may deem expedient when authorized by the affirmative vote of the shareholders holding at least 2/3 of the voting power. [The phrase] "or otherwise dispose of" is very broad and in a sense covers a merger or consolidation."[19]

In his book, Philippine Corporate Law,[20] Dean Cesar Villanueva explained that under the Corporation Code, "a *de facto* merger can be pursued by one corporation **acquiring all or substantially all of the properties of another corporation in exchange of shares of stock of the acquiring corporation**. The acquiring corporation would end up with the business enterprise of the target corporation; whereas, the target corporation would end up with basically its only remaining assets being the shares of stock of the acquiring corporation." (Emphasis supplied)

No *de facto* merger took place in the present case simply because the TRB owners did not get in exchange for the bank's assets and liabilities an equivalent value in Bancommerce shares of stock. Bancommerce and TRB agreed with BSP approval to exclude from the sale the TRB's contingent judicial liabilities, including those owing to RPN, *et al.*[21]

The Bureau of Internal Revenue (BIR) treated the transaction between the two banks purely as a sale of specified assets and liabilities when it rendered its opinion[22] on the tax consequences of the transaction given that there is a difference in tax treatment between a sale and a merger or consolidation.

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[19] *Id*. at 309.

[20] 2001 ed., p. 616.

[21] *Rollo*, pp. 93-97.

[22] *Id*.

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Indubitably, since the transaction between TRB and Bancommerce was neither a merger nor a *de facto* merger but a mere "sale of assets with assumption of liabilities," the next question before the Court is whether or not the RTC could regard Bancommerce as RPN, *et al.*'s judgment debtor.

It is pointed out that under common law,[23] if one corporation sells or otherwise transfers all its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor if it has acted in good faith and has paid adequate consideration for the assets, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporations; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.[24]

But, in the first place, common law has no application in this jurisdiction where existing statutes governing the situation are in place. Secondly, none of the cited exceptions apply to this case.

1. Bancommerce agreed to assume those liabilities of TRB that are specified in their P & A Agreement. That agreement specifically excluded TRB's contingent liabilities that the latter might have arising from pending litigations in court, including the claims of respondent RPN, *et al*. The pertinent provision of the P & A provides:

Article II

CONSIDERATION: ASSUMPTION OF LIABILITIES

In consideration of the sale of identified recorded assets and properties covered by this Agreement, BANCOMMERCE shall assume identified recorded TRB's liabilities including booked contingent liabilities as listed and referred to in its Consolidated Statement of Condition as of August 31, 2001, in the total amount of PESOS: TEN

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[23] *Supra* note 16.

[24] *Edward J. Nell Company v. Pacific Farms, Inc.*, 122 Phil. 825, 827 (1965).

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BILLION FOUR HUNDRED ONE MILLION FOUR HUNDRED THIRTY SIX THOUSAND (₱10,410,436,000.00), provided that the liabilities so assumed shall not include:

x x x x x x x x x

2. Items in litigation, both actual and prospective, against TRB which include but not limited to the following:

2.1 Claims of sugar planters for alleged undervaluation of sugar export sales x x x;

2.2 Claims of the Republic of the Philippines for peso-denominated certificates supposed to have been placed by the Marcos family with TRB;

2.3 Other liabilities not included in said Consolidated Statement of Condition; and

2.4 Liabilities accruing after the effectivity date of this Agreement that were not incurred in the ordinary course of business.[25] (Underscoring supplied)

2. As already pointed out above, the sale did not amount to merger or *de facto* merger of Bancommerce and TRB since the elements required of both were not present.

3. The evidence in this case fails to show that Bancommerce was a mere continuation of TRB. TRB retained its separate and distinct identity after the purchase. Although it subsequently changed its name to Traders Royal Holding's, Inc. such change did not result in its dissolution. "The changing of the name of a corporation is no more than creation of a corporation than the changing of the name of a natural person is the begetting of a natural person. The act, in both cases, would seem to be what the language which we use to designate it imports—a change of name and not a change of being."[26] As such, Bancommerce and TRB remained separate corporations.

4. To protect contingent claims, the BSP directed Bancommerce and TRB to put up ₱50 million in escrow with

[25] *Rollo*, pp. 80-81.

[26] *Philippine First Insurance Co., Inc. v. Hartigan*, G.R. No. L-26370, July 31, 1970, 34 SCRA 252, 266.

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another bank. It was the BSP, not Bancommerce that fixed the amount of the escrow. Consequently, it cannot be said that the latter bank acted in bad faith with respect to the excluded liabilities. They did not enter into the P & A Agreement to enable TRB to escape from its liability to creditors with pending court cases.

Further, even without the escrow, TRB continued to be liable to its creditors although under its new name. Parenthetically, the P & A Agreement shows that Bancommerce acquired greater amount of TRB liabilities than assets. Article II of the P & A Agreement shows that Bancommerce assumed total liabilities of ₱10,401,436,000.00 while it received total assets of only ₱10,262,154,000.00. This proves the arms-length quality of the transaction.

The dissenting opinion of Justice Mendoza cites certain instances indicating the existence of a *de facto* merger in this case. One of these is the fact that the P & A Agreement involved substantially all the assets and liabilities of TRB. But while this is true, such fact alone would not prove the existence of a *de facto* merger because a corporation "does not really lose its juridical entity"[27] on account of such sale. Actually, the law allows a corporation to "sell, lease, exchange, mortgage, pledge or otherwise dispose of all or substantially all of its properties and assets including its goodwill" to another corporation.[28] This is not merger because it recognizes the separate existence of the two corporations that transact the sale.

The dissenting opinion of Justice Mendoza claims that another proof of a *de facto* merger is that in a case, Bancommerce qualified TRB in its *Ex Parte* Petition for Issuance of Writ of Possession with the words "now known as Bancommerce." But paragraph 3 of the *Ex Parte* Petition shows the context in which such qualification was made. It reads:[29]

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[27] *Supra* note 20 at 246.

[28] Corporation Code of the Philippines, Sec. 40.

[29] CA *rollo* (CA-G.R. SP 91258), p. 233.

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3. On November 09, 2001, Bank of Commerce and Traders Royal Bank executed and signed a Purchase and Sale Agreement. The account of the mortgagor was among those acquired under the agreement. Photocopy of the agreement is hereto attached as Annex "A".

It is thus clear that the phrase "now known as Bank of Commerce" used in the petition served only to indicate that Bancommerce is now the former property owner's creditor that filed the petition for writ of possession as a result of the P & A Agreement. It does not indicate a merger.

Lastly, the dissenting opinion of Justice Mendoza cited the Circular Letter (series of 2002) issued by the BSP advising all banks and non-bank financial intermediaries that the banking activities and transaction of TRB and Bancommerce were consolidated and that the latter continued the operations of the former as an indication of a *de facto* merger. The Circular Letter[30] reads:

CIRCULAR LETTER
(series of 2002)

TO: ALL BANK AND NON-BANK

FINANCIAL INTERMEDIARIES

The Securities and Exchange Commission approved on August 15, 2002 the Amendment of the Articles of Incorporation and By-Laws of Traders Royal Bank on the deletion of the term "banks" and "banking" from the corporate name and purpose, pursuant to the purchase of assets and assumption of liabilities of Traders Royal Bank by Bank of Commerce. Accordingly, the bank franchise of Traders Royal Bank has been automatically revoked and Traders Royal Bank has ceased to operate as a banking entity.

Effective July 3, 2002, the banking activities and transactions of Bank of Commerce and Traders Royal Bank have been consolidated and the former has carried their operations since then.

For your information and guidance.

(Sgd.)
ALBERTO V. REYES
Deputy Governor

[30] *Id*. at 20.

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Indeed, what was "consolidated" per the above letter was the banking activities and transactions of Bancommerce and TRB, not their corporate existence. The BSP did not remotely suggest a merger of the two corporations. What controls the relationship between those corporations cannot be the BSP letter circular, which had been issued without their participation, but the terms of their P & A Agreement that the BSP approved through its Monetary Board.

Also, in a letter dated November 2, 2005 Atty. Juan De Zuñiga, Jr., Assistant Governor and General Counsel of the BSP, clarified to the RTC the use of the word "merger" in their January 29, 2003 letter. According to him, the word "merger" was used "in a very loose sense x x x and merely repeated, for convenience" the term used by the RTC.[31] It further stated that "Atty. Villanueva did not issue any legal pronouncement in the said letter, which is merely transmittal in nature. Thus it cannot, by any stretch of construction, be considered as binding on the BSP. What is binding to the BSP is MB Res. 58 referring to the aforementioned transaction between TRB and Bancommerce as a purchase and assumption agreement."[32]

Since there had been no merger, Bancommerce cannot be considered as TRB's successor-in-interest and against which the Court's Decision of October 10, 2002 in G.R. 138510 may be enforced. Bancommerce did not hold the former TRBs assets in trust for it as to subject them to garnishment for the satisfaction of the latter's liabilities to RPN, *et al.* Bancommerce bought and acquired those assets and thus, became their absolute owner.

The CA Decision in CA-G.R. SP 91258

According to the dissenting opinion of Justice Mendoza, the CA Decision dated December 8, 2009 did not reverse the RTC's

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[31] *Id.* at 259-260.

[32] *Id.*

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Order causing the issuance of a writ of execution against Bancommerce to enforce the judgment against TRB. It also argues that the CA did not find grave abuse of discretion on the RTC's part when it issued its August 15, 2005 Order granting the issuance of a writ of execution. In fact, it affirmed that order. Moreover, it argued that the CA's modification of the RTC Order merely deleted an opinion there expressed and not reversed such order.

But it should be the substance of the CA's modification of the RTC Order that should control, not some technical flaws that are taken out of context. Clearly, the RTC's basis for holding Bancommerce liable to TRB was its finding that TRB had been merged into Bancommerce, making the latter liable for TRB's debts to RPN, *et al*. The CA clearly annulled such finding in its December 8, 2009 Decision in CA-G.R. SP 91258, thus:

> WHEREFORE, the herein consolidated Petitions are DENIED. The assailed Orders dated August 15, 2005 and February 22, 2006 of the respondent Judge, are AFFIRMED with the MODIFICATION that the pronouncement of respondent Judge in the August 15, 2005 Order that the PSA between TRB and BANCOM is a farce or "a mere tool to effectuate a merger and/or consolidation between TRB and BANCOM" is DELETED.
>
> SO ORDERED.[33]

Thus, the CA was careful in its decision to restrict the enforcement of the writ of execution only to "TRB's properties found in Bancommerce's possession." Indeed, the CA clearly said in its decision that it was not Bancommerce that the RTC Order was being made to answer for TRB's judgment credit but "the assets/properties of TRB in the hands of BANCOM." The CA then went on to state that it is not prepared, unlike the RTC, to declare the P & A Agreement but a farce or a "mere tool to effectuate a merger and/or consolidation." Thus, the CA deleted the RTC's reliance on such supposed merger or consolidation between the two as a basis for its questioned order.

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[33] *Rollo*, p. 109.

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The enforcement, therefore, of the decision in the main case should not include the assets and properties that Bancommerce acquired from TRB. These have ceased to be assets and properties of TRB under the terms of the BSP-approved P & A Agreement between them. They are not TRB assets and properties in the possession of Bancommerce. To make them so would be an unwarranted departure from the CA's Decision in CA-G.R. SP 91258.

WHEREFORE, the petition is **GRANTED**. The assailed Resolution of November 26, 2010 and the Resolution of February 9, 2011 of the Court of Appeals both in CA-G.R. SP 116704 are **REVERSED and SET ASIDE**. Accordingly, the assailed Orders dated February 19, 2010 and August 18, 2010, the *Alias* Writ of Execution dated March 9, 2010, all issued by the Regional Trial Court and all orders, notices of garnishment/levy, or notices of sale and any other action emanating from the Orders dated February 19, 2010 and August 18, 2010 in Civil Case Q-89-3580 are **ANNULLED and SET ASIDE**. The Temporary Restraining Order issued by this Court on April 13, 2011 is hereby made **PERMANENT**.

SO ORDERED.

Peralta, J., concurs.

Velasco, Jr. (Chairperson), J., see concurring opinion.

Mendoza and *Leonen, JJ.*, see dissenting opinion.

CONCURRING OPINION

VELASCO, JR., *J.*:

I concur in the *ponencia* of our esteemed colleague Justice Roberto A. Abad.

The nascent complaint with the Quezon City Regional Trial Court was filed by private respondents Radio Philippines Network, Inc. (RPN), Intercontinental Broadcasting Corporation (IBC) and Banahaw Broadcasting Corporation (BBC) against

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Traders Royal Bank (TRB) and Security Bank and Trust Company, Inc. (SBTC). On February 17, 1995, the trial court rendered a Decision holding both defendants liable to the private respondents.

On appeal, the CA absolved SBTC from any liability and held TRB solely liable to private respondents for damages and costs of suit. The dispositive portion of the April 30, 1999 Decision of the CA in CA-G.R. CV No. 54656 reads, thus:

> WHEREFORE, the appealed decision is AFFIRMED with modification in the sense that appellant SBTC is hereby absolved from any liability. **Appellant TRB is solely liable to the appellees** for the damages and costs of suit specified in the dispositive portion of the appealed decision. Costs against appellant TRB. (Emphasis and underscoring supplied.)

TRB assailed the CA Decision by way of Petition for Review on *Certiorari* filed before this Court, entitled *Traders Royal Bank v. Radio Philippines Network, Inc., Intercontinental Broadcasting Corporation and Banahaw Broadcasting Corporation, through the Board of Administrators, and Security Bank and Trust Company*, and docketed as G.R. No. 138510.

Pending the resolution of the Petition for Review, TRB entered into a Purchase and Sale Agreement (PSA) with Bank of Commerce (Bancom) on November 9, 2001.[1] Under the PSA, Bancom acquired identified assets of TRB valued at ₱10,262,154,000.00 in consideration of Bancom's assumption of TRB's identified liabilities amounting to ₱10,410,436,000.00. Articles II and III of the PSA read:

> ARTICLE II
>
> CONSIDERATION: ASSUMPTION OF LIABILITIES
>
> In consideration of the sale of identified recorded assets and properties covered by this Agreement, **BANCOMMERCE shall assume identified recorded TRB's liabilities including booked**

[1] *Rollo*, pp. 79-92.

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contingent liabilities as listed and referred to in its Consolidated Statement of Conditions as of August 31, 2001 in the total amount of PESOS: TEN BILLION FOUR HUNDRED ONE MILLION FOUR HUNDRED THIRTY SIX THOUSAND (₱10,401,436,000.00), provided that **the liabilities so assumed shall not include:**

1. Liability for the payment of compensation, retirement pay, separation benefits and any labor benefit whatsoever arising from incidental to, or connected with employment in, or rendition of employee services to TRB, whether permanent, regular, temporary, casual or contractual.

2. **Items in litigation, both actual and prospective, against TRB** which include but are not limited to the following:

   2.1. (Portion of the machine copy submitted to the Court unreadable) x x x particularly the case entitled *Lopez, et al. vs. Traders Royal Bank, et al.,* docketed as Civil Case No. 00 (unreadable), Bacolod Regional Trial Court, Branch 41, and *Lacson, et al. vs. Benedicto, et al.,* originally docketed as Civil Case No. 95-9137, Bacolod Regional Trial Court, Branch 44 now pending appeal before the Supreme Court under S.C. G.R. No. 141508, and other related cases which might be filed in connection therewith;

   2.2. Claims of the Republic of the Philippines for peso-denominated certificates supposed to have been placed by the Marcos family with TRB;

   2.3. **Other liabilities not included in said Consolidated Statement of Condition**; and

   2.4. Liabilities accruing after the effectivity date of this Agreement that were not incurred in the ordinary course of business.

ARTICLE III

EFFECTS AND CONSEQUENCES

The effectivity of this Agreement shall have the following effects and consequences:

1. BANCOMMERCE and TRB shall continue to exist as separate corporations with distinct personalities;

2. With the transfer of its branching licenses to BANCOMMERCE and upon surrender of its commercial

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license to BSP, TRB shall exist as an ordinary corporation placed outside the supervisory jurisdiction of BSP. To this end, TRB shall cause the amendment of its articles and by-laws to delete the terms "bank" and "banking" from its corporate name and purpose.

3. There shall be no employer-employee relationship between BANCOMMERCE and the personnel and officers of TRB.[2]

The *Bangko Sentral ng Pilipinas* (BSP) approved the PSA on the condition that, to answer for any claim that shall be judicially established, the parties must set up an escrow fund amounting to ₱50 million to be kept for 15 years. In compliance with the condition, TRB deposited ₱50 million with the Metropolitan Bank and Trust Company (Metrobank) to answer for claims and liabilities of TRB not covered by its PSA with Bancom.

Further, pursuant to the terms of the PSA, TRB amended its articles of incorporation to change its name to **Royal Traders Holding Co. Inc. (RTH)** and to delete the business of banking in its enumerated purposes.[3]

On October 10, 2002, this Court rendered a Decision in G.R. No. 138510 and modified the CA Decision in CA-G.R. CV No. 54656 by deleting the award of exemplary damages in favor of private respondents but granting them attorney's fees. Otherwise, all other aspects of the CA Decision were retained and affirmed. The Decision became final and executory on April 9, 2003. Significantly, there was absolutely no mention of Bancom as the party liable to pay the judgment debt.

In moving for the execution of the final judgment on July 18, 2003, however, private respondents captioned its motion for execution with "Radio Philippines Network Inc., Intercontinental Broadcasting Corporation, and Banahaw Broadcasting Corporation, thru Board Administrator vs. **Traders Royal Bank**

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[2] *Id*. at 80-81; emphasis supplied.

[3] *Id*. at 253-266, Certificate of Filing of Amended Articles of Incorporation dated August 15, 2002.

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(TRB) [now Bank of Commerce] and Security Bank and Trust Company (SBTC)."[4]

RTH opposed the execution contending that the execution of the final judgment should be stayed because, as admitted by the private respondents' counsel in open court, TRB has no more assets and had been merged with Bancom. For its part, Bancom filed a Special Appearance[5] similarly opposing the motion for execution on the grounds that (1) the trial court has no jurisdiction over it as it was only in the title of the Motion for Execution that it was included as a party; and (2) there was no merger between TRB and Bancom as the latter only acquired certain assets and assumed certain liabilities of TRB.

Learning of the escrow fund set up with Metrobank, private respondents also moved for the issuance of a *subpoena duces tecum* requiring Metrobank to bring the statement of the escrow fund that was established by TRB. The trial court granted the motion. In compliance with the subpoena, Metrobank submitted a Cash Transaction Report showing that the fund had already been depleted as of August 2003 with five (5) withdrawals of practically the entire fund made on the same day – June 20, 2003.

On October 1, 2004, the trial court issued a subpoena directing (1) Bancom to bring "the list of assumed identified recorded assets and liabilities of TRB" under the PSA; and (2) Metrobank to bring any and all documents relative to the alleged withdrawals from the Escrow Fund.

Bancom and Metrobank separately filed a motion to quash the subpoena. On August 15, 2005, the trial court issued an Order[6] granting private respondents' motion for execution. It reads:

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[4] *Id*. at 111-115, Supplemental Motion for Execution dated January 20, 2004; emphasis supplied.

[5] *Id*. at 116-118.

[6] *Id*. at 119-127.

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WHEREFORE, premises considered, plaintiffs' [RPN, IBC and BBC's] motion for execution dated 18 July 2003 and supplemental motion for execution dated 20 January 2004, are GRANTED. Accordingly, let a Writ of Execution be issued to execute the judgment, as modified, **against any and all assets of TRB found anywhere in the Philippines, including those subject of the merger/consolidation in the guise of the Purchase and Sale Agreement with Bank of Commerce, and/or against the Escrow Fund established by TRB and Bank of Commerce with the Metropolitan Bank and Trust Company.**

SO ORDERED.[7]

Assailing the August 15, 2005 Order, Bancom and Metrobank filed separate petitions for *certiorari* with the Court of Appeals docketed as CA-G.R. SP No. 91258 and CA-G.R. SP No. 94171, respectively. The petitions were consolidated by the appellate court.

On December 8, 2009, the Court of Appeals rendered a Decision[8] holding, *viz*:

x x x The Order was so worded that it was *not* BANCOM itself that was being made to answer but the assets/properties of TRB in the hands of BANCOM.

We are not prepared though, unlike respondent Judge, to declare the PSA between TRB and BANCOM as a farce or "*a mere tool to effectuate a merger and/or consolidation*" of the parties to the PSA. <u>There is just a dearth of conclusive evidence to support such finding</u>, at least at this point. Consequently, the statement in the dispositive portion of the assailed August 15, 2005 Order referring to a merger/consolidation between TRB and BANCOM be deleted.

With the failure of petitioners METROBANK and BANCOM to prove that the ₱50 million Escrow Fund established by TRB was disbursed pursuant to the conditions of the Escrow Agreement, private respondents RPN, IBC and BBC, as judgment creditors as TRB, had the right to claim that the Escrow Fund exists and

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[7] *Id*. at 127.

[8] *Id*. at 98-109. Penned by Associate Justice Francisco P. Acosta, with Justices Juan Q. Enriquez, Pampio A. Abarintos, Priscilla Baltazar-Padilla, and Michael P. Elbinias concurring, Division of Five of the Tenth Division.

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remained undiminished. There can be no legal objection then to the August 15, 2005 Order of the respondent Judge directing the issuance of a writ of execution against the Escrow Fund with which private respondents can proceed to fully satisfy the judgment in their favor.

x x x x x x x x x

WHEREFORE, the herein consolidated Petitions are *DENIED*. The assailed Orders dated August 15, 2005 and February 22, 2006 of the respondent Judge, are *AFFIRMED* with *MODIFICATION* that the pronouncement of respondent Judge in the August 15, 2005 Order that the PSA between TRB and Bancom is a "farce or a mere tool to effectuate a merger and/or consolidation between TRB and BANCOM" is deleted.[9]

While Metrobank assailed the foregoing CA Decision via a petition for review on *certiorari* docketed as G.R. No. 190517 with this Court, Bancom did not pursue a further review of the CA Decision.

Thus, as to be expected, the private respondents filed with the RTC an *Ex-Parte* Urgent Motion (for issuance of an *Alias* Writ of Execution) on January 8, 2010.

On February 19, 2010, the RTC granted the Ex-Parte Urgent Motion[10] and ordered the issuance of an Alias Writ of Execution in favor of private respondents.

On March 2, 2010, Bancom received a copy of the granting order and so filed an Urgent Motion for Reconsideration on March 10, 2010.[11]

It appears, however, that an *Alias* Writ of Execution had already been issued on March 9, 2010.[12] Thus, Bancom filed a Motion to Quash the *Alias* Writ of Execution on March 16,

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[9] *Id*. at 108-109; emphasis supplied.

[10] *Id*. at 136-138; 149-151.

[11] *Id*. at 139-143.

[12] *Id*. at 144-146.

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2010[13] and Supplemental Motion (to Motion to Quash *Alias* Writ of execution) on April 19, 2010.[14]

On November 3, 2010, Bancom received a copy of the August 18, 2010 Order[15] of the RTC denying Bancom's Urgent Motion for Reconsideration, Motion to Quash and Supplemental Motion to Quash.

Bancom forthwith filed a petition for *certiorari*[16] with the CA assailing the February 19, 2010 and August 18, 2010 Orders of the trial court.

In a Resolution dated November 26, 2010,[17] however, the appellate court dismissed Bancom's petition outright for its supposed failure to file a motion for reconsideration.[18] Its motion for reconsideration having been denied by the appellate court,[19] Bancom came to this Court on a petition for review claiming that the CA erred in dismissing its petition for *certiorari* outright and in sustaining the orders of the trial court allowing the final judgment rendered against TRB to be executed against Bancom, a stranger to the original case.

The assailed resolutions of the Court of Appeals should be overturned and the execution of the final judgment against Bancom should be invalidated, as the *ponencia* did.

Every person must be heard and given his day in court before a judgment may be enforced against him. This rule is so elementary and basic that it is enshrined in the first section of the Bill of Rights of our Constitution:

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[13] *Id*. at 152-156.

[14] *Id*. at 180-187.

[15] *Id*. at 208-221.

[16] *Id*. at 221-249.

[17] *Id*. at 59-62. Penned by Associate Justice Celia C. Librea-Leagogo with Associate Justices Remedios A. Salazar-Fernando and Michael P. Elbinias, concurring, Second Division.

[18] *Id*. at 63-72.

[19] *Id*. at 74-78, in a Resolution dated February 9, 2011.

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SECTION 1. **No person shall be deprived of** life, liberty or **property without due process of law**, nor shall any person be denied the equal protection of the laws. (Emphasis supplied.)

Thus, the Rules of Court, in obvious fidelity to the imperatives of due process guarantee, permits only the execution of judgments against the **judgment obligor** and his properties, as plainly provided in Rule 39 of the Rules of Court:

SECTION 8. Issuance, form, and contents of a writ of execution. – The writ of execution shall: (1) issue in the name of the Republic of the Philippines from the court which granted the motion; (2) state the name of the court, **the case number and title,** the dispositive part of the subject judgment or order; and (3) require the sheriff or other proper officer to whom it is directed to **enforce the writ according to its terms, in the manner hereinafter provided**:

(a) If the execution be against the property of the judgment obligor, to satisfy the judgment, with interest, **out of the real or personal property of such judgment obligor**;

(b) **If it be against real or personal property** in the hand of personal representatives, heirs, devisees, legatees, tenants, or trustees, **of the judgment obligor**, to satisfy the judgment, with interest, out of such property;

x x x x x x x x x

SECTION 9. Execution of judgments for money, how enforced. – (a) Immediate payment on demand. – The officers shall enforce an execution of a judgment for money **by demanding from the judgment obligor** the immediate payment of the full amount stated in the writ of execution and all lawful fees. **The judgment obligor shall pay** in cash, certified bank check payable to the judgment obligee, or any other form of payment acceptable to the latter, the amount of the judgment debt under proper receipt directly to the judgment obligee or his authorized representative if present at the time of payment. x x x

If the judgment obligee or his authorized representative is not present to receive payment, **the judgment obligor shall deliver the aforesaid payment to the executing sheriff.** x x x

x x x x x x x x x

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(b) Satisfaction by levy. **If the judgment obligor cannot pay** all or part of the obligation in cash, certified bank check or other mode of payment acceptable to the judgment obligee, the officer shall levy upon the properties of the judgment obligor of every kind and nature whatsoever which may be disposed of for value and otherwise exempt from execution x x x.

(c) Garnishment of debts and credits. – **The officer may levy on debts due the judgment obligor** and other credits, including bank deposits, financial interests, royalties, commissions and other personal property not capable of manual delivery in the possession or control of third parties. x x x (emphasis supplied)

Thus, this Court has ruled that execution may issue only upon a person who is a party to the action, and not against one who did not have his day in court. In *Atilano v. Asaali*,[20] We held thus:

> It is well-settled that no man shall be affected by any proceeding to which he is a stranger, and strangers to a case are not bound by a judgment rendered by the court. Execution of a judgment can only be issued against one who is a party to the action, and not against one who, not being a party thereto, did not have his day in court. Due process dictates that a court decision can only bind a party to the litigation and not against innocent third parties.

At present, it is plain from the foregoing recitation of facts that petitioner Bancom was never a party to the original case. It was not the respondent, not the judgment obligor, and not the person found by this Court liable to pay for any indebtedness to the private respondents. To hold Bancom liable upon execution for a liability charged against another existing entity is the height of injustice.

It is best to recall that Bancom was dragged into this affray **after** the Decision of this Court in G.R. No. 138510 attained finality when private respondents conveniently, but without much

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[20] G.R. No. 174982, September 10, 2012, 680 SCRA 345, 351; *citing Fermin v. Hon. Antonio Esteves*, G.R. No. 147977, March 26, 2008, 549 SCRA 424, 428; *Panotes v. City Townhouse Development Corporation*, G.R. No. 154739, January 23, 2007, 512 SCRA 269; *Mariculum Mining Corporation v. Brion*, G.R. Nos. 157696-97, February 9, 2006, 482 SCRA 8.

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of an explanation, inserted the bracketed phrase "now Bank of Commerce" after TRB's name on the caption of its motion for execution. Needless to state, this is not the lawful manner under the Rules of Court in impleading a person to a case. Jurisdiction over the person still requires the existence of a coercive process issued by the court to such party or its voluntary submission to the court. Neither had been done in this case.[21] Note that Bancom made its entry to the case but by way of special appearance precisely to question the trial court's jurisdiction over its person. Thus, without any summons issued by the trial court, jurisdiction over Bancom's person had never been obtained by the trial court in this case. Any pronouncement against it is void for lack of jurisdiction.

What is more, with respect to the liability owing to private respondents, what had attained finality and had been rendered executory is the judgment of this Court declaring TRB liable to private respondents. By the principle of the finality of judgment, this is what the trial court should have executed. Nothing more.

In the execution of final and executory judgments, the trial court is bound by the terms of the decision.[22] Thus, to order the execution against a non-party to an already concluded action is beyond the powers of the trial court and ergo illegal.

It needs to be emphasized that once a judgment becomes final and executory, that judgment may not be amended. Upon finality of the judgment, however, the courts lose the jurisdiction to amend, modify or alter the same. The judgment can neither be amended nor altered after it has become final and executory.[23] This is the **principle of immutability of final judgment**, which We emphasized in *Fermin v. Esteves*:[24]

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[21] *Veneracion v. Mancilla*, G.R. No. 158238, July 20, 2006, 495 SCRA 712, 726.

[22] *Doliente v. Blanco*, No. L-3525, November 29, 1950.

[23] *Aguila v. Baldovizo*, G.R. No. 163186, February 28, 2007 517 SCRA 91, 97.

[24] G.R. No. 147977, March 26, 2008, 549 SCRA 424, 428-429, 431-432.

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The generally accepted principle is that no man shall be affected by any proceeding to which he is a stranger, and strangers to a case are not bound by a judgment rendered by the court. Execution of a judgment can only be issued against one who is a party to the action, and not against one who, not being a party in the case, did not have his day in court. Due process requires that a court decision can only bind a party to the litigation and not against one who did not have his day in court.

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The Court recognizes the finality of the trial court's Decision in Civil Case No. 925-R x x x. Since petitioners are not parties to Civil Case No. 925-R, respondent has to file the proper action against petitioners to enforce his property rights within the bounds of the law and our rules. Petitioner's right to possession, if any, should be threshed out in a proper court proceeding.

Private respondents had impudently tried to circumvent the above principle by the simple expedience of changing the caption of its motion for execution. This simply cannot, and should not, be allowed.

It is now up to this Court to correct the procedural misstep taken by the trial court when it allowed the crafty inclusion of a non-party to a final judgment that led to a breach of a constitutional rule on due process. This Court is duty-bound to ensure that the execution of a final decision is made within the confines of its pronouncements. In *QBE Insurance v. Laviña*,[25] this Court admonished the respondent for issuing a writ of execution beyond the bounds of the decision and against a stranger to a case, *viz*:

It must be noted that **QBE Insurance was not a party to Civil Case No. 68287 wherein the writ of execution was issued.** Neither was it included in the Writ of Execution issued by Judge Laviña.

Generally accepted is the principle that no man shall be affected by any proceeding to which he is a stranger, and strangers to a case are not bound by judgment rendered by the court. In the same manner **an execution can be issued only against a party and not against one**

[25] A.M. No. RTJ-06-1971, October 17, 2007, 536 SCRA 372.

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who did not have his day in court. In *Lorenzana v. Cayetano*, this Court held that only real parties-in-interest in an action are bound by judgment therein and by writs of execution and demolition issued pursuant thereto.

Indeed, a judgment cannot bind persons who are not parties to the action. It is elementary that strangers to a case are not bound by the judgment rendered by the court and such judgment is not available as an adjudication either against or in favor of such other person. A decision of a court will not operate to divest the rights of a person who has not and has never been a party to a litigation, either as plaintiff or as defendant. **Verily, execution of a judgment can only be issued against one who is a party to the action, and not against one who, not being a party to the action, has not yet had his day in court. That execution may only be effected against the property of the judgment debtor, who must necessarily be a party to the case.**

The writ of execution must conform to the judgment which is to be executed, as it may not vary the terms of the judgment it seeks to enforce. Nor may it go beyond the terms of the judgment which is sought to be executed. **Where the execution is not in harmony with the judgment which gives it life and exceeds it, it has pro tanto no validity. To maintain otherwise would be to ignore the constitutional provision against depriving a person of his property without due process of law.**[26]

In this case, to repeat for added emphasis, this Court found **TRB** liable to private respondents. Now, **TRB still exists**, albeit as **Royal Traders Holding Co. Inc**. There is, therefore, no rhyme or reason for looking elsewhere for the satisfaction of its liability.

It should be noted, however, that the said PSA was executed by TRB and Bancom in November 2001, more than **a year before** the finality of this Court's judgment against TRB. The private respondents had all the opportunity to apprise this Court of the existence of such PSA and the consequences it may have. Private respondents also had more than adequate time to annotate its claim on the properties of TRB that were the subject of the PSA. It did neither of these things. Instead, after

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[26] *Id*. at 385-386; emphasis supplied.

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the execution of the PSA, its approval by the BSP and the Bureau of Internal Revenue (BIR), and the finality of the judgment against TRB, the private respondents simply inserted the phrase "Traders Royal Bank (TRB) [now Bank of Commerce]" on the caption of its motion for execution. Even this phrase is not accurate.

First, as stated before, Traders Royal Bank still exists and is now known as Royal Traders Holding Co. Inc., not Bank of Commerce. *Second*, the terms of the PSA do not justify a finding that TRB is "now Bank of Commerce." It is clear from the provisions of the PSA that "BANCOMMERCE and TRB shall continue to exist as separate corporations with distinct personalities." *Third*, **the still standing rule is that where one corporation sells or transfers its assets to another corporation, the latter is not liable for the debts and liabilities of the transfer**.[27] A corporation has a personality separate and distinct from any other legal entity. Being separate entities, neither the properties nor liabilities of one can be considered the properties or liabilities of the other.

Indeed, the rule against the transfer of liabilities to the purchaser corporation does not apply when any of the following conditions exists: (1) the purchaser corporation expressly or impliedly agrees to assume the debts, (2) where the transaction amounts to a consolidation or merger of the corporations, (3) when the corporation is merely a continuation of the selling corporation, and (4) where the transaction is fraudulently entered into in order to escape liability for those debts.[28]

Even if this Court is inclined to verify the existence of these circumstances (in violation of the principle of immutability of

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[27] *Philippine National Bank and National Sugar Development Corporation v. Andrada Electric and Engineering Company*, G.R. No. 142936, April 17, 2002, 381 SCRA 244; *Jiao, et al. v. NLRC*, G.R. No. 182331, April 18, 2012, 670 SCRA 184.

[28] *The Edward J. Nell Company v. Pacific Farms, Inc.*, No. L-20850, November 29, 1965, 15 SCRA 415, 417; citing Fletcher Cyclopedia Corporations, Vol. 15, Sec. 7122, pp. 160-161.

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judgments, in disregard of the trial court's want of jurisdiction over Bancom, and contrary to the principle that this Court is not a trier of facts), a closer look will reveal that none of these exceptional circumstances is availing.

The absence of the first circumstance, the supposed assumption of debts made by Bancom, can readily be verified from the terms of the PSA concluded by TRB and Bancom. Unlike in *Caltex (Phils.), Inc. v. PNOC Shipping & Transport Corp.*,[29] where the agreement entered by PNOC Shipping & Transport Corporation (PSTC) with LUSTEVECO "specifically mentions the case between LUSTEVECO and Caltex, docketed as AC-G.R. CV No. 62613, then pending before the IAC," under the PSA, Bancom categorically assumed only **identified** and **limited** liabilities. Among those clearly **excluded from the assumed liabilities are "[i]tems in litigation, both actual and prospective, against TRB.**" At the time of the execution of the PSA, the liability of TRB to private respondents was the subject of an actual litigation. It is, therefore, excluded from the liabilities assumed by Bancom. At best, it is more plausible to conclude that the liability owing to private respondents is covered by the escrow fund set up by TRB with Metrobank.

To find the existence of a *de facto* merger, this Court must at least ascertain the presence of the most essential element of a merger apart from compliance with the legalities set forth under the law: the dissolution of the separate judicial personality of the target corporation in fact, if not in law. It bears to stress that while this Court has recognized the existence of a *de facto* merger in this jurisdiction resulting from the transfer of assets and assumption of the liabilities of one corporation by another, the recognition had been made through the rubric of piercing the veil of corporate fiction,[30] i.e., control over both corporations is lodged in the same person/s and that control is used to commit

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[29] 530 Phil. 149, 158 (2006).

[30] Aquino, Timoteo B., *Philippine Corporate Law Compendium*, 2006 ed., p. 375.

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fraud or wrong.[31] This is usually done by the transfer of all the assets of a corporation in exchange for the stocks of another corporation.[32]

In this case, there is no indication, and the private respondents adduced no proof, that TRB and Bancom are subject to the same control and that their corporate personalities are mere instruments in committing a wrong. In fact, private respondents did not allege grounds, or ask the courts to declare the need for piercing the separate corporate veils of TRB and Bancom.

It is axiomatic that he who alleges an affirmative event, like the existence of the supposed merger in this case, must show proof in support thereof. Here, the burden to explain and to prove or disprove the existence of the merger should be with private respondents. If a shift of the burden of proof is at all justified, the shift should be taken against TRB, not Bancom, as it was TRB that advanced the existence of this supposed "supervening event" and it is TRB that will in effect be exonerated from satisfying the judgment against it.

In *Pacific Mills, Inc. v. NLRC,*[33] this Court directed the party alleging a supervening event that may affect the execution of a judgment to prove the same by sufficient evidence:

> There can be no question that the supervening events cited by petitioner would certainly affect the computation of the award in the decision of the NLRC. It is the duty of the NLRC to consider the same and inquire into the correctness of the execution, as such supervening events may affect such execution.
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> x x x x x x x x x

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[31] See *"G" Holdings, Inc. v. National Mines and Allied Workers Union Local 103*, G.R. No. 160236, October 16, 2009, 604 SCRA 73; citing *Concept Builders, Inc. v. National Labor Relations Commission*, G.R. No. 108734, May 29, 1996, 257 SCRA 149, 159.

[32] See *Philippine National Bank v. Hydro Resources Contractors Corporation*, G.R. Nos. 167530, 167561 & 167603, March 13, 2013, 693 SCRA 294.

[33] 206 Phil. 135, 137-138 (1990).

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WHEREFORE, the petition is GRANTED. The questioned orders of the National Labor Relations Commission dated May 5, 1989 and June 20, 1989 are both set aside. The said Commissioner is directed to immediately give petitioner its day in court to present its evidence on the supervening events that would affect the award and thereafter to immediately recompute the award for private respondents on the basis of the judgment which should be promptly satisfied. No costs. (emphasis supplied)

As neither private respondents nor TRB proffered any evidence or alleged any ground to justify the application of the doctrine of piercing the corporate veils as conduit to finding a *de facto* merger between TRB and Bancom, there is no basis to justify doing so.

In fact, in Our November 13, 2013 Decision in G.R. No. 180529 entitled *Commissioner of Internal Revenue v. Bank of Commerce*,[34] where the same PSA between TRB and Bancom had been scrutinized to resolve the issue of whether Bancom can be held liable for the liabilities of TRB, sustaining the findings of the BIR and Court of Tax Appeals (CTA), this Court categorically ruled in the negative, *viz:*

As the CTA En Banc stated in its Amended Decision, **the issue boils down to whether or not BOC is liable for the deficiency DST of TRB** for taxable year 1999.

[T]he CTA 1st Division's Resolution in Traders Royal Bank, explicitly addressed the issue of merger between BOC and TRB. The CTA 1st Division, **relying on the provisions in both the Purchase and Sale Agreement and the Tax Code, determined that the agreement did not result in a merger**, to wit:

x x x x x x x x x

Thus, when the CTA *En Banc* took into consideration the above ruling in its Amended Decision, it necessarily affirmed the findings of the CTA 1st Division and found them to be correct**. This Court likewise finds the foregoing ruling to be correct**. **The CTA 1st Division was spot on when it interpreted the Purchase and Sale Agreement to be just that and not a merger.**

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[34] G.R. No. 180529, November 13, 2013.

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The Purchase and Sale Agreement, the document that is supposed to have tied BOC and TRB together, was replete with provisions that clearly stated the intent of the parties and the purpose of its execution, *viz*:

1. Article I of the Purchase and Sale Agreement set the terms of the assets sold to BOC, while Article II was about the consideration for those assets. Moreover, it was explicitly stated that liabilities not included in the Consolidated Statement of Condition were excluded from the liabilities BOC was to assume, to wit:

x x x x x x x x x

Moreover, the second whereas clause, which served as the premise for the subsequent terms in the agreement, stated that **the sale of TRB's assets to BOC were in consideration of BOC's assumption of some of TRB's liabilities**, *viz:*

x x x x x x x x x

The clear terms of the above agreement did not escape the CIR itself when it issued BIR Ruling No. 10-2006, wherein it was concluded that **the Purchase and Sale Agreement did not result in a merger between BOC and TRB.**

x x x x x x x x x

A perusal of BIR Ruling No. 10-2006 will show **that the CIR ruled on the issue of merger without any reference to TRB's subject tax liabilities**. The relevant portions of such ruling are quoted below:

One distinctive characteristic for a merger to exist under the second part of [Section 40(C)(b) of the 1997 NIRC] is that, it is not enough for a corporation to acquire all or substantially all the properties of another corporation but it is also necessary that such acquisition is solely for stock of the absorbing corporation. Stated differently, the acquiring corporation will issue a block of shares equal to the net asset value transferred, which stocks are in turn distributed to the stockholders of the absorbed corporation in proportion to the respective share.

After a careful perusal of the facts presented as well as the details of the instant case, it is observed by this Office that **the transaction was purely concerning acquisition and assumption by [BOC] of the recorded liabilities of TRB. The [Purchase and Sale] Agreement did not mention with respect to the issuance of shares of stock of**

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[BOC] in favor of the stockholders of TRB. Such transaction is absent of the requisite of a stock transfer and same belies the existence of a merger. As such, this Office considers the Agreement between [BOC] and TRB as one of "a sale of assets with an assumption of liabilities rather than 'merger'."

x x x x x x x x x

Clearly, **the CIR, in BIR Ruling No. 10-2006, ruled on the issue of merger without taking into consideration TRB's pending tax deficiencies. The ruling was based on the Purchase and Sale Agreement, factual evidence on the status of both companies, and the Tax Code provision on merger**. The CIR's knowledge then of TRB's tax deficiencies would not be material as to affect the CIR's ruling. **The resolution of the issue on merger depended on the agreement between TRB and BOC, as detailed in the Purchase and Sale Agreement,** and not contingent on TRB's tax liabilities.

In *Chinese Young Men's Christian Association of The Philippine Islands Doing Business Under The Name Of Manila Downtown YMCA v. Remington Steel Corporation*,[35] this Court explained the concept of *stare decisis et non quieta movere*, thus:

Under the doctrine, when the Supreme Court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same.

The doctrine of *stare decisis* is based upon the legal principle or rule involved and not upon judgment which results therefrom. In this particular sense *stare decisis* differs from *res judicata* which is based upon the judgment.

The doctrine of *stare decisis* is one of policy grounded on the necessity for securing certainty and stability of judicial decisions, thus:

> Time and again, the court has held that it is a very desirable and necessary judicial practice that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases in

[35] G.R. No. 159422, March 28, 2008, 550 SCRA 180, 197-198.

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> which the facts are substantially the same. *Stare decisis et non quieta move*re. Stand by the decisions and disturb not what is settled. *Stare decisis* simply means that for the sake of certainty, a conclusion reached in one case should be applied to those that follow if the facts are substantially the same, even though the parties may be different. It proceeds from the first principle of justice that, absent any powerful countervailing considerations, like cases ought to be decided alike. Thus, where the same questions relating to the same event have been put forward by the parties similarly situated as in a previous case litigated and decided by a competent court, the rule of *stare decisis* is a bar to any attempt to relitigate the same issue.

Based on the foregoing, the issue of existence of merger, whether *de jure* or *de facto*, between TRB and Bancom under the PSA is now foreclosed. As the issue in G.R. No. 180529 is substantially similar, if not identical, to the issue in the present case, Our ruling therein bars, following the *stare decisis* rule, any attempt to re-litigate the issue already decided therein.

The third exception to the rule on the non-accountability of a purchasing corporation is similarly non-existent in the present case. Once again, TRB still exists albeit under a different name––RTH. Bancom could not, therefore, be considered to have continued TRB when TRB still exists as RTH. It is axiomatic that as a corporation is imbued with legal personality, it has the right of succession and it incurs its own liabilities and is legally responsible for payment of its obligations.[36]

As to the fourth exception, We need only recall that the PSA had been given the stamp of approval by both the BSP and the BIR[37] as a valid agreement that We cannot plausibly

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[36] *Philippine National Bank v. Hydro Resources Contractors Corporation*, G.R. Nos. 167530, 167561 & 167603, March 13, 2013, 693 SCRA 294; citing Rands, William, Domination of a Subsidiary by a Parent, 32 Ind. L. Rev. 421, 423 (1999), citing Philip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573, 575-576 (1986) and Stephen Presser, Thwarting the Killing of the Corporation: Limited Liability, Democracy and Economics, 87 NW. U. L. Rev. 148, 155 (1992).

[37] *Rollo*, pp. 93-97. *See* BIR Revenue Ruling 4010-2006 dated October 6, 2006.

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conclude that the same had been entered to defraud creditors. More importantly, by the very terms of the PSA, the transfer of the assets from TRB to Bancom had not been exchanged for assets of equal or more value. Rather, **the transfer of assets had been executed precisely in exchange for the assumption of identified debts and liabilities and not to escape liability**. That by itself negates the existence of the fourth exception, *i.e.,* the PSA had been entered into to escape the payment of debts.

Considering the absence of any of the recognized circumstances that would justify the execution of a final judgment against a non-party to the case, it is my considered view that the CA should have exercised its sound judicial discretion when it dismissed petitioner's *certiorari* action. The appellate court should have carefully weighed the issues presented and grievances presented by petitioner *vis-à-vis* the supposed procedural defect of its petition. The CA should have ruled in the interest of substantial justice and petitioner's constitutionally-guaranteed right to due process and relaxed the general rule requiring the filing of a motion for reconsideration in order to prevent an apparent mockery of justice in this case.

In fact, the CA need not have resorted to the exceptions to the rule requiring the filing of a motion for reconsideration because **petitioner did file a motion for reconsideration.** A scrutiny of the records will immediately reveal that the petition for *certiorari* interposed with the appellate court principally questioned the February 19, 2010 order of the trial court, which granted the private respondents' *ex-parte* urgent motion for the issuance of an *alias* writ of execution. Before filing a petition for *certiorari* immediately assailing this order, Bancom filed an Urgent Motion for Reconsideration, which was in turn denied by the trial court's August 18, 2010 Order. There was, therefore, no need for Bancom to file yet another motion for reconsideration before it can lodge a petition for *certiorari* with the appellate court.

For all the foregoing, I vote to **GRANT** the petition, **SET ASIDE** the November 26, 2010 and February 9, 2011 Resolutions

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of the Court of Appeals, and **NULLIFY** the *Alias* Writ of Execution issued by the Regional Trial Court as mandated in its February 19, 2010 and August 18, 2010 Orders.

DISSENTING OPINION

MENDOZA, *J.*:

With all due respect to my colleagues, I register my dissent from the majority decision that the writ of execution may not be enforced against petitioner Bancommerce.

It is my considered view that an injustice has been committed against the respondents, Radio Philippines Network, Inc. Intercontinental Broadcasting Corporation, and Banahaw Broadcasting Corporation *(respondent networks)*.

The Facts:

The petition stemmed from the decision of the Court in G.R. No. 138510, dated October 10, 2002, entitled *Traders Royal Bank v. Radio Philippines Network, Inc., Intercontinental Broadcasting Corporation and Banahaw Broadcasting Corporation, through the Board of Administrators, and Security Bank and Trust Company*,[1] which became final and executory on April 9, 2003. As recited by the Court in the said case, the facts are as follows:

> On April 15, 1985, the Bureau of Internal Revenue *(BIR)* assessed plaintiffs Radio Philippines Network, Inc., *(RPN)*, Intercontinental Broadcasting Corporation *(IBC)* and Banahaw Broadcasting Corporation *(BBC)* of their tax obligations for the taxable years 1978 to 1983.
>
> On March 25, 1987, Mrs. Lourdes C. Vera *(Mrs. Vera)*, plaintiffs' comptroller, sent a letter to the BIR requesting settlement of the plaintiff's tax obligations.
>
> The BIR granted the request and, accordingly, on June 26, 1986, plaintiffs purchased from defendant Traders Royal Bank *(TRB)* three

[1] 439 Phil. 475-486 (2002).

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(3) manager's checks to be used as payment for their tax liabilities, to wit:

Check Number	Amount
30652	₱4,155,835.00
30650	₱3,949,406.12
30796	₱1,685,475.75

Defendant TRB, through Aida Nuñez, TRB Branch Manager at Broadcast City Branch, turned over the checks to Mrs. Vera who was supposed to deliver the same to the BIR in payment of plaintiffs' taxes.

Sometime in September 1988, the BIR again assessed plaintiffs for their tax liabilities for the years 1979-82. It was then they discovered that the three (3) manager's checks (Nos. 30652, 30650 and 30796) intended as payment for their taxes were never delivered nor paid to the BIR by Mrs. Vera. Instead, the checks were presented for payment by unknown persons to defendant Security Bank and Trust Company *(SBTC)*, Taytay Branch, as shown by the bank's routing symbol transit number (BRSTN 01140027) or clearing code stamped on the reverse sides of the checks.

Meanwhile, for failure of the plaintiffs to settle their obligations, the BIR issued warrants of levy, distraint and garnishment against them. Thus, they were constrained to enter into a compromise and paid BIR ₱18,962,225.25 in settlement of their unpaid deficiency taxes.

Thereafter, plaintiffs sent letters to both defendants, demanding that the amounts covered by the checks be reimbursed or credited to their account. The defendants refused, hence, the instant suit.[2]

On February 17, 1995, the Regional Trial Court, Branch 98, Quezon City *(RTC)*, rendered its judgment in Civil Case No. Q-89-3580, entitled *Radio Philippines Network, Inc., et al. v. Traders Royal Bank, et al.* favoring the plaintiffs Radio Philippines Network, Inc. *(RPN)*, International Broadcasting Corporation *(IBC)* and Banahaw Broadcasting Corporation *(BBC)* and adjudging the defendants, Traders Royal Bank *(TRB)* and Security Bank and Trust Company *(SBTC)*, liable in the total

[2] *Id.* at 479-480.

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amount of ₱9,790,716.87 plus 12% legal interest among others. The dispositive portion reads:

> WHEREFORE, in view of the foregoing considerations, judgment is hereby rendered in favor of plaintiffs and against the defendants by:
>
> a) Condemning the defendant Traders Royal Bank to pay actual damages in the sum of Nine Million Seven Hundred Ninety Thousand and Seven Hundred Sixteen Pesos and Eighty Seven Centavos (₱9,790,716.87) broken down as follows:
>
> | | | |
> |---|---|---|
> | 1) To plaintiff RPN-9 | - | ₱4,155,835.00 |
> | 2) To plaintiff IBC-13 | - | ₱3,949,406.12 |
> | 3) To plaintiff BBC-2 | - | ₱1,685,475.75 |
>
> plus interest at the legal rate from the filing of this case in court;
>
> b) Condemning the defendant Security Bank and Trust Company, being the collecting bank, to reimburse the defendant Traders Royal Bank, all the amounts which the latter would pay to the aforenamed plaintiffs;
>
> c) Condemning both defendants to pay to each of the plaintiffs the sum of Three Hundred Thousand (₱300,000.00) Pesos as exemplary damages and attorney's fees equivalent to twenty-five percent of the total amount recovered; and
>
> d) Costs of suit.
>
> SO ORDERED.[3]

On appeal, the CA, in its April 30, 1999 Decision *affirmed with modification* the RTC decision by declaring TRB solely liable for damages and costs of the suit and absolving SBTC from liability.[4]

The Court, in its October 10, 2002 Decision, *modified* the CA decision by deleting the award of exemplary damages, but granting the prayer for the payment of attorney's fees. The

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[3] As quoted in the RTC Order, dated August 15, 2005, *rollo*, pp. 119-127.

[4] *Id*. at 99.

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Court ruled that "where a check is drawn payable to the order of one person, and is presented for payment by another and purports upon its face to have been duly indorsed by the payee of the check, it is the primary duty of petitioner (TRB) to know that the check was duly indorsed by the original payee and, where it pays the amount of the check to a third person who has forged the signature of the payee, the loss falls upon petitioner (TRB) who cashed the check. Its only remedy is against the person to whom it paid the money."[5]

The Court likewise noted that one of the subject checks was crossed, hence, TRB was duty-bound to ascertain the indorser's title to the check or the nature of his possession.[6] By encashing, in favor of unknown persons, the checks which on their face were payable to the BIR, a government agency which could only act through its agents, TRB did so at its peril and must suffer the consequences of the unauthorized or wrongful endorsement.[7]

Meanwhile, on November 9, 2001, petitioner Bancommerce and TRB entered into a purchase and sale agreement *(PSA)*.[8] Bancommerce acquired identified assets and assumed identified liabilities of TRB (later known as Royal Traders Holding Co., Inc.) in the total amount of ₱10,410,436,000.00. The Bangko Sentral ng Pilipinas *(BSP)* approved the PSA on the condition, among others, that the parties would set up an escrow fund amounting to ₱50 million to be kept for 15 years in the trust department of any other bank acceptable to the BSP. To comply therewith, TRB executed the Escrow Agreement whereby it deposited the amount of ₱50 million to Metropolitan Bank and Trust Co. *(Metrobank)* to answer for any claims and liabilities of TRB which were not covered by the PSA. On July 3, 2002, the BSP finally approved the PSA.

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[5] *Traders Royal Bank v. Radio Philippines Network, Inc.*, *supra* note 3, at 482.

[6] *Id*. at 483.

[7] *Id*.

[8] *Rollo,* pp. 79-92.

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After the October 10, 2002 decision of the Court became final and executory on April 9, 2003, RPN, IBC and BBC filed a motion for execution of judgment with the RTC followed by a Supplemental Motion for Execution[9] wherein the name of TRB was captioned "now Bank of Commerce" based on the assumption that TRB and Bancommerce had merged.

On February 20, 2004, Bancommerce filed its Special Appearance with Opposition to the Supplemental Motion for Execution[10] questioning the jurisdiction of the RTC over Bancommerce and denying the merger or consolidation between TRB and Bancommerce.

On August 15, 2005, the RTC issued the Order[11] granting and issuing the writ of execution to execute the judgment against any and all assets of TRB, including those subject of the merger/consolidation between TRB and Bancommerce. The RTC, in effect, stated that there was a merger between TRB and Bancommerce.

Bancommerce elevated the matter to the CA *via* consolidated petitions for *certiorari*. The CA, in its Decision,[12] dated December 8, 2009, denied the petition. It ruled that the RTC did not commit grave abuse of discretion when it issued the subpoena directing Bancommerce to bring to the court the list of the assumed identified assets and liabilities of TRB under the PSA. The CA stated that the order was clear that it was not Bancommerce which was being made to answer for the liabilities of TRB, but the assets/properties of TRB under its possession and custody. The dispositive portion reads:

WHEREFORE, the herein consolidated petitions are DENIED. The assailed Orders dated August 15, 2005 and February 22, 2006 of the

[9] *Id*. at 111-115.

[10] *Id*. at 116-118.

[11] *Id*. at 119-127.

[12] Penned by Associate Justice Francisco P. Acosta, with Associate Justices Juan Q. Enriquez, Jr., Priscilla Baltazar-Padilla and Michael P. Elbinias, concurring and Associate Justice Pampio A. Abarintos, dissenting. *id*. at 98-110.

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respondent Judge, are AFFIRMED with the MODIFICATION that the pronouncement of respondent Judge in the August 15, 2005 Order that the PSA between TRB and BANCOM is a farce or "a mere tool to effectuate a merger and/or consolidation between TRB and BANCOM" is DELETED.

SO ORDERED.[13]

Thereafter, RPN, IBC and BBC filed their *Ex-Parte* Motion for Issuance of an *Alias* Writ of Execution which was granted by the RTC in its Order,[14] dated February 19, 2010.

On March 10, 2010, Bancommerce filed its Urgent Motion for Reconsideration,[15] dated March 9, 2010, contending that the RTC could not issue a writ of execution against it inasmuch as the December 8, 2009 Decision of the CA had declared that there was no merger and/or consolidation between Bancommerce and TRB. An alias writ of execution,[16] however, had already been issued on March 9, 2010.

Bancommerce filed the Motion to Quash Alias Writ of Execution[17] and its Supplemental Motion[18] on March 16, 2010 and April 29, 2010, respectively.

On August 18, 2010, the RTC issued the assailed order,[19] the dispositive portion of which reads:

WHEREFORE, premises considered, this Court hereby resolves to:

1. DENY the Urgent Motion for Reconsideration (of the Order dated February 19, 2010) filed by the Bank of Commerce on March 10, 2010;

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[13] *Id*. at 109.

[14] *Id*. at 136-138.

[15] *Id*. at 139-141.

[16] *Id*. at 144-146.

[17] *Id*. at 152-156.

[18] *Id*. at 180-188.

[19] *Id*. at 208-220.

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2. DENY the Motion to Quash *Alias* Writ of Execution filed by the BOC on March 16, 2010 and Supplemental Motion filed on April 29, 2010; and

3. GRANT the Urgent Motion to Quash *Alia*s Writ of Execution filed by Metrobank and Trust Company (MBTC for brevity) on March 12, 2010.

4. TAKES NOTE and **GRANTS** the Urgent *Ex-Parte* Manifestation and Motion (re: Notice of Attorney's Lien), *Ex-Parte* Urgent Omnibus Motion and its Supplement filed by the plaintiffs' counsel on April 7, 2010, May 7, 2010 and May 31, respectively.

Accordingly, this Court now directs the following banks to release the garnished monies and shares of stock or their monetary equivalent due to the plaintiffs to Mr. Bienvenido Reyes, Jr., Sheriff of this Court, who shall deposit the same with the Office of the Clerk of Court, Regional Trial Court, Quezon City:

a. Bank of the Philippine Islands – Paseo de Roxas Branch – Account No. 0033-2032-09 – Two Million Five Hundred Forty Two Thousand Nine Hundred Eleven Pesos and Twenty Four Centavos (₱2,542,911.24);

b. Banco de Oro – Salcedo-Legaspi Sts. Branch – Nine Million Eight Hundred Ninety Thousand Seven Hundred Sixteen Pesos and Eighty Seven [centavos] (₱9,890,716.87); and

c. Hongkong Shanghai Banking Corporation – The Fort Branch – 3909 PLDT Shares of Stock – Nine Million Seven Hundred Ninety Two Thousand Forty Five Pesos (₱9,792,045.00);

Further, the Clerk of Court of the Regional Trial Court, Quezon City, is directed to release the aforementioned amounts in the following manner:

a. To plaintiffs' counsel, twenty five percent (25%) thereof, representing his attorney's fees and ₱200,000.00 representing his appearance fees and litigation expenses, as set forth in the Notice of Lien, dated August 29, 2007, and Manifestation and Motion, dated March 25, 2010; and

b. To the plaintiffs, the balance of the said garnished amounts, less any and all fees which by law may be due to the court or the Branch Sheriff.

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SO ORDERED.[20]

Bancommerce elevated the matter to the CA *via* a petition for *certiorari*, with prayer for the issuance of a temporary restraining order and/or a writ of preliminary injunction under Rule 65 of the Rules of Court, seeking to annul and set aside the Orders, dated February 19, 2010 and August 18, 2010, issued by the RTC in Civil Case No. Q-89-3580. In the assailed Resolution, dated November 26, 2010, the CA *outrightly dismissed* the petition for failure to file a motion for reconsideration of the assailed orders, which was a condition *sine qua non* for the filing of a petition for *certiorari*.

Bancommerce filed a motion for reconsideration which the CA subsequently denied in its Resolution, dated February 9, 2011. The CA said that Bancommerce failed to show that its immediate filing of the petition for *certiorari* fell under any of the exceptions to the rule requiring the filing of a motion for reconsideration and that there was a concrete, compelling and valid reason to dispense with the filing of the said motion. Moreover, the CA added:

> At any rate, We take note that as stated in the Decision dated 08 December 2009 of this Court (Division of Five of the Tenth Division) entitled "*Bank of Commerce vs. Hon. Evelyn Corpus-Cabochan, etc. et al.; Metropolitan Bank and Trust Co. v. Hon. Evelyn Corpus-Cabochan, etc. et al.", docketed as CA-G.R. SP Nos. 91258 & 94171,* which has become final on 27 December 2009 as averred by herein petitioner, *viz*:
>
> > *"The High Court's Decision in G.R. No. 138510 in favor of the private respondents had become final and executory as early as April 9, 2003, After more than six (6) years, the said judgment still await implementation. This is so unfortunate. Execution of a judgment is the fruit and end of the suit, and is the life of the law. It is in the interest of justice that we write finis to this litigation."*[21]
>
> [Italicization in the original]

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[20] *Id*. at 218-220.

[21] *Id*. at 77.

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Hence, the petition of Bancommerce presenting the following:

ISSUES

1. THE COURT OF APPEALS DECIDED IN A WAY PROBABLY NOT IN ACCORD WITH LAW OR WITH THE APPLICABLE DECISIONS OF THIS HONORABLE COURT WHEN IT DISMISSED BANCOMMERCE'S PETITION FOR *CERTIORARI* UNDER RULE 65 BASED ON TECHNICAL AND MISTAKEN NOTION THAT BANCOMMERCE FAILED TO FILE A MOTION FOR RECONSIDERATION OF THE RTC ORDERS THEREIN ASSAILED;

2. THE COURT OF APPEALS DECIDED IN A WAY PROBABLY NOT IN ACCORD WITH LAW OR WITH THE APPLICABLE DECISIONS OF THIS HONORABLE COURT WHEN IT DISREGARDED THE MERITS OF BANCOMMERCE'S CAUSE, TO WIT:

A. THE RTC, IN ISSUING ITS 19 FEBRUARY 2010 AND 18 AUGUST 2010 ORDERS AND 9 MARCH 2010 *ALIAS* WRIT OF EXECUTION, DEPRIVED BANCOMMERCE, WITHOUT LEGAL BASIS, OF ITS PROPERTIES/ASSETS WITHOUT DUE PROCESS OF LAW CONSIDERING THAT BANCOMMERCE'S SAID PROPERTIES/ ASSETS CANNOT INDISCRIMINATELY BE EXECUTED UPON TO PAY TRB'S JUDGMENT DEBT;

B. FURTHER, THE RTC, IN ISSUING SAID ORDERS AND *ALIAS* WRIT, DEPRIVED BANCOMMERCE, WITHOUT LEGAL BASIS, OF ITS PROPERTIES/ASSETS ACQUIRED PURSUANT TO ITS PURCHASE AND SALE AGREEMENT (PSA) WITH TRB, WITHOUT DUE PROCESS OF LAW, CONSIDERING THAT THE VALIDITY OF THIS PSA HAS BEEN CONFIRMED BY THE BIR, BSP AND THE COURT OF APPEALS WITH FINALITY; AND

C. FINALLY, THE RTC IN SAID ORDERS AND *ALIAS* WRIT ACTED WITHOUT AUTHORITY WHEN IT IGNORED THE MODIFICATION AND VARIED THE WELL-DEFINED PARAMETERS OF THE EXECUTION OF THE MAIN CASE (AS RULED BY THE COURT OF APPEALS IN ITS 8 DECEMBER 2009 DECISION IN CA-G.R. SP NOS. 91258) ADJUDGING THAT ONLY TRB ASSETS CAN BE THE SUBJECT OF EXECUTION.

Synthesized, the fundamental issues to be resolved by the Court are as follows:

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1. Whether or not Bancommerce's immediate filing of the petition for *certiorari* before the CA was justified.

2. Whether or not a merger/consolidation took place between TRB and Bancommerce.

3. Whether or not the CA reversed the decision of the trial court.

4. Whether or not the RTC committed grave abuse of discretion in issuing the August 18, 2010 Order.

My positions on the foregoing issues are the following:

A] Procedural Issue

Rule 65 of the Rules of Court provides that:

> SECTION 1. *Petition for certiorari*.—When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

One of the requirements for the filing of a petition for *certiorari* is that there be no appeal or **any** plain, speedy and adequate remedy available in the ordinary course of law. The "plain," "speedy" and "adequate remedy" referred to in Section 1, Rule 65 of the Rules of Court is a *motion for reconsideration* of the questioned order or resolution.[22] It means that unless a motion for reconsideration has been filed, immediate resort to a petition for *certiorari* will not lie because there is still an adequate remedy available to the aggrieved party.

The Court is consistent in ruling that a motion for reconsideration is a condition *sine qua non* for the filing of a

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[22] *Metro Transit Organization, Inc. v.* ***Piglas NFWU-KMU,*** 574 Phil. 481 (2008).

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petition for *certiorari*. The said mandatory and jurisdictional procedure[23] is meant to give the lower court or tribunal the opportunity to correct its assigned errors.[24] Failure to file the motion before availing oneself of the special civil action for *certiorari* is a fatal infirmity.[25]

Though the rule is mandatory, the Court recognizes exceptional circumstances which may justify the dispensing of a prior motion for reconsideration. These exceptions are:

(a) where the order is a patent nullity, as where the court *a quo* has no jurisdiction;

(b) where the questions raised in the *certiorari* proceedings have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court;

(c) where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the petition is perishable;

(d) where, under the circumstances, a motion for reconsideration would be useless;

(e) where petitioner was deprived of due process and there is extreme urgency for relief;

(f) where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial court is improbable;

(g) where the proceedings in the lower court are a nullity for lack of due process;

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[23] *Salinas v. Digital Telecommunications Philippines, Inc.*, 545 Phil. 670, 674 (2007), citing *Escorpizo v. University of Baguio*, 366 Phil. 166 (1999).

[24] *Ermita v. Aldecoa-Delorino*, G.R. No. 177130, June 7, 2011, 651 SCRA 128, 138, citing *People v. Duca*, G.R. No. 171175, October 30, 2009, 603 SCRA 159.

[25] *Republic v. Pantranco North Express, Inc.*, G.R. No. 178593, February 15, 2012, 666 SCRA 199, 207.

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(h) where the proceeding was *ex parte* or in which the petitioner had no opportunity to object; and,

(i) where the issue raised is one purely of law or public interest is involved.[26]

Bancommerce admitted in its petition[27] before the CA that it failed to file a motion for reconsideration of the assailed August 18, 2010 Order for reasons stated as follows:

1. there is an urgent necessity for the resolution of the questions raised in this petition and any further delay would prejudice the interests of the petitioner;
2. under the circumstances, a motion for reconsideration would be useless;
3. petitioner was deprived of due process and there is extreme urgency for relief;
4. the proceedings was *ex-parte* or one in which the petitioner had no opportunity to object; and
5. the issues raised are purely of law;[28]

It is of my considered view that Bancommerce failed to satisfactorily prove before the CA that indeed, its non-compliance with the mandatory and jurisdictional requirement of a prior motion for reconsideration was justified. The Court, in *Republic v. Pantranco North Express, Inc.*,[29] reiterated its long-standing ruling that:

It must be emphasized that **a writ of *certiorari* is a prerogative writ, never demandable as a matter of right, never issued except in the exercise of judicial discretion**. Hence, he who seeks a writ of *certiorari* must apply for it only in the manner and strictly in accordance with the provisions of the law and the Rules. Petitioner

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[26] *Id.,* citing *Sim v. National Labor Relations Commission,* 560 Phil. 762 (2007).

[27] *Rollo,* pp. 221-252.

[28] *Id*. at 224-225.

[29] *Supra* note 27.

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may not arrogate to himself the determination of whether a motion for reconsideration is necessary or not. To dispense with the requirement of filing a motion for reconsideration, petitioner must show a concrete, compelling, and valid reason for doing so, which petitioner failed to do. Thus, the Court of Appeals correctly dismissed the petition.[30]

Therefore, the CA did not commit any reversible error when it outrightly dismissed Bancommerce's petition for *certiorari* for non-filing of a prior motion for reconsideration of the assailed August 18, 2010 Order of the RTC. As correctly ruled by the CA, Bancommerce could not arrogate to itself the determination of whether a motion for reconsideration was necessary or not.[31] It needed to expressly, clearly and satisfactorily prove that its claim fell under any of the recognized exceptions. To dispense with the requirement, there had to be a concrete, compelling and valid reason excusing it from compliance therewith.[32]

Despite the same, the CA resolved the petitioner's Motion for Reconsideration by covering its merits and consequently refused to grant it, taking into account the fact that as of that time, 6 years had already elapsed since the Court's decision became final and executory, without it having been executed.[33]

B] Substantive Issue

Existence of Merger

Bancommerce insists that it has not merged with TRB. It avers that the BIR issued a ruling stating that its office considered the PSA between Bancommerce and TRB as "a sale of assets with an assumption of liabilities" rather than a "merger."[34] Further, it points out that the December 8, 2009 CA decision

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[30] *Id*., citing *Sim v. National Labor Relations Commission*, 560 Phil. 762 (2007), citing *Cervantes v. Court of Appeals*, 512 Phil. 210 (2005).

[31] *Rollo*, p. 60.

[32] *Id*. at 76.

[33] *Id*. at 77.

[34] *Id*. at 34.

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ordered the deletion in the RTC decision of the statement that the PSA was a farce and a mere tool to effectuate a merger. The specific words in the dispositive portion of the said decision state:

> x x x the pronouncement of respondent Judge in the August 15, 2005 Order that the PSA between TRB and BANCOM is a farce or "a mere tool to effectuate a merger and/or consolidation between TRB and BANCOM" is ***DELETED***.

Bancommerce is of the view that, with the deletion of the abovementioned phrase, the CA, in effect, overturned the RTC. Thus, Bancommerce concludes that the writ of execution issued by the RTC could not be enforced against it.

It also banks on the opinion of the Commission of Internal Revenue *(CIR)*, which it claims is entitled to respect,[35] as stated in *Protectors Services, Inc. v. Court of Appeals*,[36] which, in part, reads:

> These rulings were made by the CIR in the exercise of his power to "make judgments or opinions in connection with the implementation of the provisions of the internal revenue code." The opinions and rulings of officials of the government called upon to execute or implement administrative laws, command respect and weight.

In a letter,[37] dated October 6, 2006, the CIR replied to the letter of Bancommerce requesting for a ruling on its taxability relative to the PSA with TRB. The CIR then ruled that the PSA was one of sale of assets with assumption of liabilities rather than a merger. It stated that "the transaction between TRB and Bancommerce is not a merger within the contemplation of Section 40(C)(6)(b) of the Tax Code of 1997."[38]

It should be noted, however, that the judgment or opinion was issued only for purposes of determining the tax liability of

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[35] *Id*. at 690.

[36] 386 Phil. 611, 626 (2000).

[37] *Rollo*, pp. 93-97.

[38] *Id*. at 97.

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Bancommerce. It did not, in any way, conclusively rule that, the transaction between TRB and Bancommerce, by virtue of the PSA, was a sale. In fact, the CIR ruling itself expressly stated that:

> This ruling is being issued on the basis of the foregoing facts as represented. However, **if upon investigation**, it will be disclosed that the **facts** are **different**, then this ruling shall be considered **null** and **void**.[39] [Emphases supplied]

Bancommerce, therefore, cannot rely on the CIR ruling in arguing that there was no merger. The determination of whether or not the transaction was a sale is not within the competence of the CIR. It is ultimately the courts which have jurisdiction over actions involving such issues.[40]

The question now is: was there a merger between TRB and Bancommerce?

A merger is "a combination of two things, especially companies, into one."[41] Merriam Webster Dictionary defines it as "the absorption by a corporation of one or more others."[42] Under the Philippine Law, "two or more corporations may merge into a single corporation which shall be one of the constituent corporations or may consolidate into a new single corporation which shall be the consolidated corporation."[43]

There are, however, requirements and procedures to follow before a merger takes place. The steps necessary to accomplish a merger or consolidation, as provided for in Sections 76, 77, 78, and 79 of the Corporation Code, are:

(1) The board of each corporation draws up a plan of merger or

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[39] *Id*.

[40] Batas Pambansa Blg. 129, as amended.

[41] Oxford Dictionaries, http://oxforddictionaries.com/definition/english/merger.

[42] Merriam Webster Dictionary, http://www.merriam-webster.com/dictionary/merger.

[43] Sec. 76, Corporation Code of the Philippines.

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consolidation. Such plan must include any amendment, if necessary, to the articles of incorporation of the surviving corporation, or in case of consolidation, all the statements required in the articles of incorporation of a corporation.

(2) Submission of plan to stockholders or members of each corporation for approval. A meeting must be called and at least two (2) weeks' notice must be sent to *all* stockholders or members, personally or by registered mail. A summary of the plan must be attached to the notice. Vote of two-thirds of the members or of stockholders representing two-thirds of the outstanding capital stock will be needed. Appraisal rights, when proper, must be respected.

(3) Execution of the formal agreement, referred to as the articles of merger or consolidation, by the corporate officers of each constituent corporation. These take the place of the articles of incorporation of the consolidated corporation, or amend the articles of incorporation of the surviving corporation.

(4) Submission of said articles of merger or consolidation to the SEC for approval.

(5) If necessary, the SEC shall set a hearing, notifying all corporations concerned at least two weeks before.

(6) Issuance of certificate of merger or consolidation.[44]

Only after these requirements have been complied with and a certificate of merger or consolidation has been issued by the SEC shall the merger or consolidation be effective.[45]

Guided by the foregoing, I submit that, in a strict sense, no merger or consolidation took place. Records do not show any plan or articles of merger or consolidation. More importantly, there was no issuance by the SEC of any certificate of merger or consolidation in favor of Bancommerce. What TRB and Bancommerce executed was a "Purchase and Sale Agreement." There can be no issuance of a merger certificate by virtue of a sale agreement. If only for those facts alone, indeed, TRB

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[44] *Mindanao Savings and Loan Association, Inc. v. Willkom*, G.R. No. 178618, October 20, 2010, 634 SCRA 291, 301-302.

[45] *Id*.

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and Bancommerce did not merge or consolidate.

It is incumbent, however, to reflect and analyze why the RTC found the existence of a merger while the CA opined that there was "just a dearth of conclusive evidence to support such a finding."

After a careful scrutiny of the records, the surrounding circumstances in the case show that, in effect, although without an outright declaration of such, a "*de facto*" merger existed between TRB and Bancommerce.

First, the PSA involved substantially all the assets and liabilities of TRB. The PSA clearly included TRB's banking goodwill, its bank premises, its licenses to operate its head office and branches, its leasehold rights, patents, trademarks or copyrights used in connection with its business or products.[46]

Second, in one of the cases it initiated with respect to the rights and interests of TRB, an *Ex-Parte* Petition for Issuance of Writ of Possession, before the **same RTC**, **Branch 98**, Bancommerce qualified TRB with the words **"now known as Bancommerce**."[47] Justice and fair play dictate that Bancommerce is estopped from denying that it did identify TRB as such. Nobody but Bancommerce itself inserted the description. It would be unfair to allow Bancommerce to avail of such description or qualification when it would be to its advantage, and to disavow it when it would be no longer convenient.

Third, the BSP, through its Deputy Governor Alberto V. Reyes, even issued the Circular Letter (Series of 2002) advising all banks and non-bank financial intermediaries that the **banking activities** and **transactions** of TRB and Bancommerce were **consolidated** and that the latter **continued** the **operations of the former**.[48]

Section 40 of the Corporation Code laid out the procedure and requirements when a corporation sells or otherwise disposes

[46] *Rollo,* p. 80.

[47] LRC Case No. Q-16457, *id.* at 354-356 and 564-565.

[48] *Id.* at 123.

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of all or substantially all of its assets. It provides that a sale or other disposition shall be deemed to cover substantially all the corporate property and assets, **if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purposes for which it was incorporated.** The sale or disposition of all of substantially all of the corporate assets *may have the effect of a merger or consolidation*.[49] Corollarily, Section 40 will not apply if the sale was necessary in the usual and regular course of business.[50] The facts obtaining in the case, however, clearly showed that the sale was not in pursuance of the usual and regular banking business of TRB. The sale, in fact, rendered TRB incapable of carrying out the purpose of its organization. While there may be no merger/consolidation in its strictest sense, it is my studied opinion that the **end result of the affair** that took place between TRB and Bancommerce amounted to a merger of assets where the existence of TRB as a banking entity ceased while that of Bancommerce continued. Essentially, Bancommerce is continuing the operations of the former.

Enforcement of Writ of Execution

Bancommerce contends that it is not the judgment debtor, but TRB, and that it was only arbitrarily dragged into the execution proceedings. Such being the case, execution may not be enforced against it.

The *ponencia* fails to persuade.

It has been established that the existence of TRB as a banking entity ceased by virtue of the PSA. It cannot be denied either that Bancommerce has continued its operations as early as July 2002. Thus, even though Bancommerce was not a party in the main case, the writ of execution may be enforced against it. It has been the consistent ruling of the Court that although it is true that a writ of execution can only be issued against a party and not against one who did not have his day in court,

[49] Ladia, Ruben C., *The Corporation Code of the Philippines* (2007), p. 266.

[50] *Id*.

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one who is privy or a successor-in-interest of the judgment debtor can be reached by the order of execution.[51] The specific words in the two cases read:

> No man shall be affected by any proceeding to which he is a stranger. **Strangers** to a case are not bound by judgment rendered by the court. In the same manner, an execution can be issued only against a party and not against one who did not have his day in court. Only real parties in an action are bound by judgment therein and by writs of execution and demolition issued pursuant thereto. However, **one who is a privy to the judgment debtor can be reached by an order of execution** . . . [Emphases and underscoring supplied]

Further, attention is directed to the pronouncement of the CA in its December 8, 2009 Decision that the RTC order was so worded that it was *not* Bancommerce itself "that was being made to answer *but the assets/properties of TRB in the hands of BANCOM*."[52] The CA made it crystal clear that **Bancommerce was not being made liable for TRB's obligations.**

This is so because when the RTC issued a *subpoena duces tecum,* it required Bancommerce to merely bring the **list of assumed identified assets and liabilities of TRB under the PSA.** Bancommerce, instead of complying with the order, filed a motion to quash the subpoena on the specious ground that the respondent networks *failed to show the relevancy* of the said list. As correctly ruled by the CA, had Bancommerce just complied with the subpoena, it could have cleared the issue of whether TRB's liability to the respondent networks was not among those that Bancommerce assumed under the PSA.[53] **From Bancommerce's adamant refusal to comply with the order of the trial court, a presumption arises that a disclosure of the identified assets and liabilities would be prejudicial to its interests.** The RTC, thus, cannot be

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[51] *Church Assistance Program, Inc. v. Hon. Sibulo,* 253 Phil. 404, 410 (1989); and *Vda. De Medina v. Judge Cruz,* 244 Phil. 40 (1988).

[52] *Rollo,* p. 108.

[53] *Id*. at 107.

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faulted for granting and issuing the writ of execution.

More importantly, it cannot be argued that the assets and properties of TRB, which were transferred to Bancommerce, ceased to be such under the terms of the BSP-approved PSA between them.[54] There was nothing in the PSA which provided that said assets and properties of TRB would cease to exist. **Assets do not simply evaporate.** In case of transfers, they remain part and parcel of the assets of the transferee, whether commingled or not. In other words, they represent a certain percentage of the transferee's assets.

It is to be emphasized that the October 10, 2002 Decision of the Court in *Traders Royal Bank v. RPN,* which was the subject of the RTC Order of Execution, dated August 15, 2005, was already final and executory. The CA even reiterated such fact in its December 8, 2009 decision affirming with modification the said RTC order, which likewise became final and executory.

Bancommerce cannot insist that TRB's assets in its custody and possession cannot be the subject of an execution on the flimsy excuse that it is not a party. Granting that there has been no *de facto* merger or consolidation, the undeniable fact is that Bancommerce has TRB's assets, commingled or not, and the rules provide that **these can be reached by levy or garnishment.** The Rules of Court, moreover, do not require that the garnishee be served with summons or impleaded in the case in order to make him liable. In the case of *Perla Compania de Seguros v. H. Ramolete*,[55] it was clearly written:

> In order that the trial court may validly acquire jurisdiction to bind the person of the garnishee, it is not necessary that summons be served upon him. The garnishee need not be impleaded as a party to the case. **All that is necessary** for the trial court lawfully to bind the person of the garnishee or any person who has in his possession

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[54] Abad, Dissenting Opinion, p. 13.

[55] G.R. No. 60887, November 13, 1991, 203 SCRA 487.

[56] *Id*. at 491.

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credits belonging to the judgment debtor is **service** upon him of the **writ of garnishment**.[56] [Emphases supplied]

Further, Section 19, Rule 3 of the Rules of Court provides that:

> Sec. 19. *Transfer of interest.* – In case of any transfer of interest, **the action may be continued by or against the original party**, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Bancommerce became TRB's successor-in-interest. The PSA clearly led to a transfer of interest from TRB to Bancommerce. As previously mentioned, Bancommerce acquired assets from TRB, which conveyance was effected while the case was pending and which transaction appears not to have been made known to TRB's creditors. These properties can still be reached by execution to satisfy the judgment in favor of the respondent networks. The Court, in *NPC Drivers and Mechanics Association v. NPC*,[57] explained that:

> On PSALM's contention that since it was not a party to the case and that the petitioners are not its employees, the properties that it acquired from NPC cannot be levied, is untenable. The issue here is about PSALM's assets that were acquired from NPC. As explained above, PSALM took ownership over most of NPC's assets. There was indeed a **transfer of interest** over these assets – from NPC to PSALM – by operation of law. These properties may be used to satisfy our judgment. This being the case, petitioners may go after such properties. The fact that PSALM is a non-party to the case will not prevent the levying of the said properties, including their fruits and proceeds. However, PSALM should not be denied due process. The levying of said properties and their fruits/proceeds, if still needed in case NPC's properties are insufficient to satisfy our judgment, is without prejudice to PSALM's participation in said proceedings. Its participation therein is necessary to prevent the levying of properties other than that it had acquired from NPC. Such a proceeding is to be conducted in the proper forum where petitioners may take the appropriate action.

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[57] G.R. No. 156208, December 2, 2009, 606 SCRA 409.

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> Section 19, Rule 3 of the 1997 Revised Rules of Civil Procedure reads:
>
> Sec. 19. *Transfer of interest*. – In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Under this section, the Court may, upon motion, direct the person to whom the interest is transferred to be substituted in the action or joined with the original party. In petitioners' Manifestation with Urgent Omnibus Motions dated 9 February 2009, they **prayed that the properties acquired by PSALM from NPC be also levied/ garnished. We consider this prayer to be tantamount to a motion to join PSALM as a party-respondent in this case in so far as to the properties, and any income arising therefrom, that PSALM acquired from NPC.** It is in this light that we order the Clerk of Court of this division to implead or join PSALM as a party-respondent in this case. As above-explained, PSALM shall not be denied due process for it can participate in the proper forum by preventing the levying of properties other than that it had acquired from NPC.[58]

Also, the Court, in *Col. Francisco dela Merced v. GSIS*,[59] reiterated the principle that a final judgment against a party is binding on his privies and successors-in-interest. It went on further saying that:

In *Cabresos v. Judge Tiro*,[60] the Court upheld the respondent judge's issuance of an *alias* writ of execution against the successors-in-interest of the losing litigant **despite the fact that these successors-in-interest were <u>not mentioned</u> in the judgment and <u>were never parties to the case.</u>** The Court explained that an action is **binding on the <u>privies</u>** of the litigants even if such privies are not literally parties to the action. Their inclusion in the writ of execution does not vary or exceed the terms of the judgment.

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[58] *Id*. at 438-440.

[59] G.R. No. 167140, November 23, 2011, 661 SCRA 83.

[60] 248 Phil. 633 (1988).

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Moreover, granting that Bancommerce is not a party in the case between TRB and the respondent networks, the sale between TRB and Bancommerce should and must not, in any way, prejudice any creditors of the former. In the case cited by Justice Leonen in his separate dissenting opinion, *Caltex (Philippines), Inc. vs. PNOC Shipping and Transport Corporation*,[61] it was ruled:

> **While the Corporation Code allows the transfer of all or substantially all the properties and assets of a corporation, the transfer should not prejudice the creditors of the assignor. The only way the transfer can proceed without prejudice to the creditors is to hold the assignee liable for the obligations of the assignor.** The acquisition by the assignee of all or substantially all of the assets of the assignor necessarily includes the assumption of the assignor's liabilities, unless the creditors who did not consent to the transfer choose to rescind the transfer on the ground of fraud. **To allow an assignor to transfer all its business, properties and assets without the consent of its creditors and without requiring the assignee to assume the assignor's obligations will defraud the creditors. The assignment will place the assignor's assets beyond the reach of its creditors.**[62]

Royal Traders Holding Co., Inc.

The *ponencia* stressed that TRB still exists, albeit a change of name into Royal Traders Holding Co., Inc. *(RTHCI)*. Granting that it is so and that RTHCI has identifiable assets, which claim does not clearly appear on record as all of TRB's assets have been transferred to Bancommerce, respondent networks can still proceed against the assets of TRB in Bancommerce or in the hands of other entities. The rule is that "(e)very prevailing party to a suit enjoys the corollary right to the fruits of the judgment and, thus, court rules provide a procedure to ensure that every favorable judgment is fully satisfied. This procedure can be found in Rule 39 of the Revised Rules of Court on execution of judgment. The said Rule provides that in the event

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[61] G.R. No. 150711, 530 Phil. 149 (2006).

[62] *Caltex (Philippines), Inc. vs. PNOC Shipping and Transport Corporation*, 530 Phil. 149 (2006). pp. 159-160.

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that the judgment obligor cannot pay the monetary judgment in cash, the court, through the sheriff, **may levy or attach properties belonging to the judgment obligor** to secure the judgment."[63] Section 9(b), Rule 39 of the Revised Rules of Court, which provides:

> Section 9(b) *Satisfaction by levy*. - If the judgment obligor cannot pay all or part of the obligation in cash, certified bank check or other mode of payment acceptable to the judgment obligee, **the officer shall levy upon the properties of the judgment obligor of every kind and nature whatsoever which may be disposed of for value** and not otherwise exempt from execution giving the latter the option to immediately choose which property or part thereof may be levied upon, sufficient to satisfy the judgment. If the judgment obligor does not exercise the option, the officer shall first levy on the personal properties, if any, and then on the real properties if the personal properties are insufficient to answer for the judgment.
>
> The sheriff shall sell only a sufficient portion of the personal or real property of the judgment obligor which has been levied upon.
>
> When there is more property of the judgment obligor than is sufficient to satisfy the judgment and lawful fees, he must sell only so much of the personal or real property as is sufficient to satisfy the judgment and lawful fees.

"The option under Section 9(b), Rule 39 of the Revised Rules of Court is granted to a judgment obligor before the sheriff levies its properties and not after."[64] "(T)he sheriff is required to first demand of the judgment obligor the immediate payment of the full amount stated in the writ of execution before a levy can be made. The sheriff shall demand such payment either in cash, certified bank check or any other mode of payment acceptable to the judgment obligee. If the judgment obligor cannot pay by these methods immediately or at once, he can exercise his option to choose which of his properties can be levied upon. **If he does not exercise this option immediately or when he is absent or cannot be located, he waives**

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[63] *Solar Sources v. Inland Trailways*, 579 Phil. 548 (2008).

[64] *Id*.

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such right, and the sheriff can now first levy his personal properties, if any, and then the real properties if the personal properties are insufficient to answer for the judgment."[65]

In this case, as the records show, Bancommerce (**TRB is "now known as Bancommerce")**[66] refuses to cooperate and disclose TRB's assets in its possession, erroneously asserting that it is a stranger. In this situation, **as transferee of all the rights and assets of TRB**, Bancommerce is deemed to have waived that right and the choice shall be exercised by the judgment obligees, which in this case are the respondent networks. In this connection, it must be remembered that the PSA involved substantially **all the assets and liabilities of TRB**. The PSA clearly **included** TRB's **banking goodwill, its bank premises, its licenses to operate its head office and branches, its leasehold rights, patents, trademarks or copyrights used in connection with its business or products**.[67]

Under the PSA, Bancommerce is the entity continuing the original banking business of TRB. It is not RTHCI. It is simply unacceptable that TRB merely changed its name to RTHCI. The changing of name was due to the fact that the nature and purpose for which TRB was originally incorporated already ceased. It must be stressed that the BSP even issued the Circular Letter (Series of 2002) advising all banks and non-bank financial intermediaries that the **banking activities** and **transactions** of TRB and Bancommerce were **consolidated** and that the latter **continued** the **operations of the former**.[68]

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[65] *Villarin v. Munasque*, 587 Phil. 257 (2008).

[66] LRC Case No. Q-16457, *rollo*, pp 354-356 and 564-565. In one of the cases Bancommerce initiated with respect to the rights and interests of TRB, an Ex-Parte Petition for Issuance of Writ of Possession, before the **same RTC**, **Branch 98**, it qualified TRB with the words **"now known as Bancommerce**."

[67] *Rollo*, p. 80.

[68] *Rollo*, at 123.

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For said reason, the writ of execution can be enforced against it. Generally, where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, **except**: 1) where the purchaser expressly or impliedly agrees to assume such debts; 2) where the transaction amounts to a consolidation or merger of the corporations; 3) **where the purchasing corporation is merely a continuation of the selling corporation**; and 4) where the transaction is entered into fraudulently in order to escape liability for such debts.[69]

No Reversal by the CA

Consequently, once a judgment becomes final and executory, all the issues between the parties are deemed resolved and laid to rest. All that remains is the execution of the decision which is a matter of right. The prevailing party is entitled to a writ of execution, the issuance of which is the trial court's ministerial duty.[70]

The CA decision, dated December 8, 2009, which Bancommerce itself claimed to be already final and executory, stated that it did not find grave abuse of discretion on the part of the RTC in issuing the August 15, 2005 Order granting the issuance of a writ of execution. In fact, it **affirmed** the said order of the trial court. The modification made by the CA was **a mere deletion of an opinion** and **not a reversal** of the RTC ruling. Otherwise, the CA could have so expressly stated in no uncertain terms. The deletion of the said pronouncement did not affect the RTC order of execution against any and all assets of TRB found anywhere in the Philippines, including those subject of the PSA.

Justice Denied

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[69] *Edward J. Nell Company vs. Pacific Farms, Inc.*, 122 Phil 825, 827 (1965).

[70] *Anama v. PSB*, G.R. No. 187021, January 25, 2012, 293 SCRA 293, 307, citing *National Power Corporation v. Spouses Lorenzo L. Laohoo*, G.R. No. 151973, July 23, 2009, 593 SCRA 564, 580.

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Bancommerce has done nothing but forestall the execution of a final and executory decision by incessantly carping that it is a stranger to the case. It cannot resist the execution by availing of the stranger theory as a shield to protect what TRB owned and which it now owns. Its dilatory tactics resulted in the frustration of the respondent networks. Bancommerce should have observe honesty and good faith by cooperating and informing the trial court of the assets of TRB, where they are and their status – whether commingled or set aside. Because of its obstinate refusal, the RTC could only assume that they have been commingled.

Verily, by the unjustified delay in the execution of a final judgment in their favor, the respondent networks have suffered an injustice. The Court views with disfavor the tactics employed by Bancommerce to frustrate the execution of a final decision and order. Once a judgment has become final, the winning party be not, through a mere subterfuge, deprived of the fruits of the verdict.[71] Courts must guard against any scheme calculated to bring about that result and must frown upon any attempt to prolong controversies.[72] As the Court has written in the case of *Anama v. PSB,*[73]

> Just as a losing party has the right to file an appeal within the prescribed period, the winning party also has the correlative right to enjoy the finality of the resolution of his case by the execution and satisfaction of the judgment, which is the "life of the law." To frustrate it by dilatory schemes on the part of the losing party is to frustrate all the efforts, time and expenditure of the courts. It is in the interest of justice that this Court should write finis to this litigation.

In view of the foregoing, I vote to **DENY** the petition as well as to **LIFT** the Temporary Restraining Order issued by the Court on April 13, 2011.

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[71] *University of the Philippines v. Hon. Dizon*, G.R. No. 171182, August 23, 2012, 679 SCRA 54, 84.

[72] *Marmosy Trading, Inc. v. Court of Appeals*, G.R. No. 170515, May 6, 2010, 620 SCRA 315, 326.

[73] *Supra* note 69, at 308, citing *Bernardo De Leon v. Public Estates Authority*, G.R. No. 181970, August 3, 2010, 626 SCRA 547, 565-566.

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DISSENTING OPINION

LEONEN, *J.*:

A corporation which purchases all or substantially all of the assets of another corporation should be liable to satisfy the execution of a judgment debt against the seller corporation when it impliedly accepts such obligations. The obligation is impliedly accepted if the purchasing corporation made it appear to third parties that it stepped into the shoes of the seller corporation. This is especially true in the case of banks that take on the license of a predecessor bank. This is required by equity to safeguard against fraud of creditors as well as the principle of economy of judgments.

The petition[1] arises from this court's final and executory decision dated October 10, 2002 in *Traders Royal Bank v. Radio Philippines Network, Inc., Intercontinental Broadcasting Corporation and Banahaw Broadcasting Corporation, through the Board of Administrators, and Security Bank and Trust Company,* docketed as G.R. No. 138510.

Respondents sought the execution of the judgment claim against petitioner Bancommerce with pleading entitled "*Radio Philippines Network, Inc., Intercontinental Broadcasting Corporation and Banahaw Corporation thru Board of Administrators versus Traders Royal Bank (TRB) [now Bank of Commerce] and Security Bank and Trust Corporation (SBTC).*"[2] In a pleading for another case involving the rights of Traders Royal Bank, petitioner Bancommerce also qualified Traders Royal Bank with the phrase, "now known as Bancommerce."[3]

For its part, petitioner Bancommerce denied the existence of any merger with Traders Royal Bank. It also questioned the

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[1] The petition was filed pursuant to Rule 45 of the Rules of Court.

[2] *Rollo,* p. 100, Court of Appeals decision.

[3] LRC Case No. Q-16457, *rollo,* pp. 354-356 and 564-565.

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trial court's jurisdiction over its person.[4]

The trial court granted respondents' motion for execution on August 15, 2005.[5] It later denied petitioner Bancommerce's urgent motion for reconsideration, motion to quash *alias* writ of execution, and supplemental motion.[6] The Court of Appeals outrightly dismissed petitioner Bancommerce's petition for certiorari for failure to file a motion for reconsideration. Hence, the present petition was filed.

Petitioner Bancommerce contends that "[it] was arbitrarily dragged in the execution proceedings"[7] when respondents named it as Traders Royal Bank's successor-in-interest.[8] It argues, among others, that "no merger/consolidation has been settled both at the administrative level [Bureau of Internal Revenue] and at the judicial level."[9]

Respondents counter that "petitioner refused to divulge the assets taken and liabilities assumed, even when subpoenaed, producing the *presumption* that they are adverse to petitioner if produced x x x."[10] Moreover, petitioner Bancommerce admitted its obligation when it offered in settlement a real property in Parañaque valued at 35,200,000.00.[11]

I disagree with the *ponencia* in its finding that respondents may not enforce the execution of its judgment claim against petitioner Bancommerce.

When a corporation sells or transfers all of its assets to another, the purchaser corporation is not liable for the debts of the seller as a general rule.

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[4] *Rollo*, p. 100, Court of Appeals decision.

[5] *Id*. at 102.

[6] *Id*. at 218-220, Regional Trial Court order dated August 18, 2010.

[7] *Id*. at 688, petitioner's memorandum.

[8] *Id*. at 689.

[9] *Id*.

[10] *Id*. at 616, respondent's memorandum.

[11] *Id*. at 618.

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Article 1311 of the Civil Code provides that "[c]ontracts take effect only between the parties, their assigns and heirs x x x." This principle of relativity explains the general rule that the purchaser corporation is not liable for the debts of the seller corporation.[12] However, before this general rule can apply, we have to first determine whether any of the exceptions are present and have been established.

In 1965, *Edward J. Nell Company v. Pacific Farms, Inc.*[13] discussed this rule as follows:

> Generally where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporations; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.[14]

This rule was reiterated in the 2002 case of *Philippine National Bank v. Andrada Electric & Engineering Company*[15] and the 2007 case of *McLeod v. National Labor Relations Commission*[16] where this court held that "a corporation that purchases the assets of another will not be liable for the debts of the selling corporation, provided the former acted in good faith and paid adequate consideration for such assets, except when any of the following circumstances is present: (1) where the purchaser expressly or impliedly agrees to assume the debts; x x x."[17]

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[12] *See also* C.VILLANUEVA, *PHILIPPINE CORPORATE LAW* 678 (2010).

[13] 122 Phil. 825 (1965) [Per *J.* Concepcion, *En Banc*].

[14] *Id.* at 827.

[15] 430 Phil. 882, 893 (2002) [Per *J.* Panganiban, Third Division].

[16] 541 Phil. 214 (2007) [Per *J.* Carpio, Second Division].

[17] *Id.* at 234.

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According to the *ponencia*, this is common law which cannot apply in our jurisdiction, and none of the exceptions are present in this case.[18]

I disagree.

Under the first exception, the purchaser corporation has agreed to assume the seller corporation's liabilities.

This may be based on Article 2047 of the Civil Code such that a non-party to an existing contract becomes (1) a guarantor when he voluntarily "binds himself to the creditor to fulfill the obligation of the principal debtor in case the latter should fail to do so"[19] or (2) a surety when he "binds himself solidarily with the principal debtor."[20] Moreover, "[s]ubstitution of the person of the debtor may be effected by *delegacion* [where] the debtor offers, and the creditor *(delegatario)*, accepts a third person who consents to the substitution and assumes the obligation. Thus, the consent of [all] three persons is necessary."[21]

In *Caltex (Phils.), Inc. v. PNOC Shipping & Transport Corp.*,[22] Caltex received a final and executory judgment against LUSTEVECO, but the judgment was not satisfied. Caltex later learned that LUSTEVECO and PNOC Shipping and Transport Corporation (PSTC) entered into an Agreement of Assumption of Obligations. Thus, it sent its demands to PSTC. This court held that Caltex may recover the judgment debt from PSTC under the terms of the Agreement of Assumption of Obligations.[23]

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[18] *Ponencia*, p. 9.

[19] *Id*.

[20] *Id*.

[21] *Aquintey v. Spouses Tibong*, 540 Phil. 422, 444 (2006) [Per J. Callejo, Sr., First Division], citing *Garcia v. Llamas*, 462 Phil. 779, 789 (2003) [Per J. Panganiban, First Division]. *See also* Article 1293 of the Civil Code: "Novation which consists in substituting a new debtor in the place of the original one, may be made even without the knowledge or against the will of the latter, but not without the consent of the creditor. x x x."

[22] 530 Phil. 149 (2006) [Per J. Carpio, Third Division].

[23] *Id*. at 156-158.

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In the present case, Article II of the Purchase and Sale Agreement[24] between petitioner Bancommerce and Traders Royal Bank enumerates the liabilities assumed by petitioner Bancommerce and those which are not:

ARTICLE II

CONSIDERATION: ASSUMPTION OF LIABILITIES

In consideration of the sale of identified recorded assets and properties covered by this Agreement, BANCOMMERCE shall assume identified recorded TRB's liabilities including booked contingent liabilities as listed and referred to in its Consolidated Statement of Condition as of August 31, 2001, in the total amount of PESOS: TEN BILLION FOUR HUNDRED ONE MILLION FOUR HUNDRED THIRTY SIX THOUSAND (₱10,401,436,000.00), provided that the liabilities so assumed shall not include:

1. Liability for the payment of compensation, retirement pay, separation benefits and any labor benefit whatsoever arising from incidental to, or connected with employment in, or rendition of employee services to TRB, whether permanent, regular, temporary, casual or contractual.

2. Items in litigation, both actual and prospective, against TRB which include but are not limited to the following:

   2.1 [x x x photocopy partly blurred]; particularly the case entitled *Lopez, et al. vs. Traders Royal Bank, et al.*, docketed as Civil Case No. 00-11178, Bacolod Regional Trial Court, Branch 41 and *Lacson, et al. vs. Benedicto, et al.*, originally docketed as Civil Case 95-9137, Bacolod Regional Trial Court, Branch 44 now pending appeal before the Supreme Court under S.C. G.R. No. 141508, and other related cases which might be filed in connection therewith;

   2.2 Claims of the Republic of the Philippines for peso-denominated certificates supposed to have been placed by the Marcos family with TRB;

   2.3 Other liabilities not included in said Consolidated Statement of Condition; and

[24] *Rollo*, pp. 79-92. A copy was attached as Annex D of the petition.

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> 1.4 Liabilities accruing after the effectivity date of this Agreement that were not incurred in the ordinary course of business.[25]

The Court of Appeals found that the lower court judge "acted correctly [in issuing] the subpoena dated October 1, 2004 directing BANCOM to bring to court *the list of the assumed identified assets and liabilities of TRB under the PSA.*"[26] However, petitioner Bancommerce did not comply with this directive and filed a motion to quash the subpoena.[27] While, it is uncertain whether respondents' claim was explicitly assumed by petitioner Bancommerce under the Purchase and Sale Agreement, the circumstances of this case point to no other conclusion than an implied assumption of all liabilities by purchaser corporation, petitioner Bancommerce.

Unlike the jurisprudence cited earlier, the present case involves a *bank* that transferred all or substantially all of its assets, including its branching licenses, to petitioner Bancommerce — the *bank* that will now continue its operations as recognized by the Bangko Sentral ng Pilipinas.[28]

The banking industry is imbued with great trust and confidence not only by its clients but by the general public.[29] When banks make mistakes, the wrongful dishonor of a check for example, this causes "embarrassment if not also financial loss and perhaps even civil and criminal litigation"[30] on the part of the depositor.

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[25] *Id.* at 80-81, Article II of the Purchase and Sale Agreement.

[26] *Id.* at 107, Court of Appeals decision, emphasis in the original.

[27] *Id.*

[28] *Rollo*, p. 123.

[29] *Citibank, N.A. v. Dinopol*, G.R. No. 188412, November 22, 2010, 635 SCRA 649, 659 [Per J. Mendoza, Second Division].

[30] *Prudential Bank v. Court of Appeals*, 384 Phil. 817, 825 (2000) [Per J. Quisumbing, Second Division], citing *Simex International (Manila), Inc. v. Court of Appeals*, 262 Phil. 387, 396 (1990) [Per J. Cruz, First Division] and *Bank of the Philippine Islands v. Intermediate Appellate Court*, G.R. No. 69162, February 21, 1992, 206 SCRA 408, 412-413 [Per J. Griño-Aquino, First Division].

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Consequently, those in the banking business are heavily regulated, burdened with the highest standards of integrity and performance.[31] This court has awarded exemplary damages to plaintiffs who have suffered from the failure of banks to exercise such level of diligence in its affairs, considering that "[t]he business of banking is impressed with public interest and great reliance is made on the bank's sworn profession of diligence and meticulousness in giving irreproachable service."[32]

On this note, a purchaser bank which has made it appear to third parties that it has stepped into the shoes of the seller bank must be deemed to have assumed the debts and liabilities of such seller bank. By presenting itself as the former Traders Royal Bank, petitioner Bancommerce impliedly novated existing contracts of Traders Royal Bank by admitting to the parties involved and the public in general that it is now the entity to reckon with.

The second exception is on mergers and consolidations.

This court has held that a sale of assets is legally distinct from a merger or consolidation.[33] Section 76 of the Corporation

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[31] Section 2 of Republic Act No. 8791, otherwise known as the General Banking Law of 2000, provides that "[t]he state recognizes the vital roleof banks in providing an environment conducive to the sustained development of the national economy and the fiduciary nature of banking that requires high standards of integrity and performance. x x x." See also *Philippine Commercial International Bank v. Court of Appeals*, 403 Phil. 361, 388 (2001) [Per *J*. Quisumbing, Second Division].

[32] *Citibank, N.A. v. Dinopol*, G.R. No. 188412, November 22, 2010, 635 SCRA 649, 658 [Per *J*. Mendoza, Second Division], citing *Solidbank Corporation/Metropolitan Bank and Trust Co. v. Sps. Tan*, 548 Phil. 672, 678 (2007) [Per *J*. Corona, First Division].

[33] *China Banking Corporation v. Dyne-Sem Electronics Corporation*, 527 Phil. 74 (2006) [Per *J*. Corona, Second Division]. *See* footnote no. 22 in 527 Phil. 74, 82 (2006) in that:

"[t]he Court of Appeals ***differentiated merger from sale of assets in this wise:*** (1) In merger, a sale of assets is always involved, while in the latter, the former is not always involved; (2) In the former, there is automatic assumption by the surviving corporation of the liabilities of the constituent

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Code expressly authorizes two or more corporations to *merge* into a single corporation, which shall be one of the constituent corporations, or to *consolidate* into a new single corporation, which shall be the consolidated corporation. A merger or consolidation "does not become effective upon the mere agreement of the constituent corporations."[34] These corporations that seek to merge or consolidate must first comply with the required procedure under the Corporation Code.

One of the legal effects of a merger or consolidation under Section 80 of the Corporation Code is the assumption *ipso jure* by the surviving or consolidated corporation of the dissolved corporation's liabilities:

x x x x x x x x x

5. The surviving or consolidated corporation shall be responsible and liable for all the liabilities and obligations of each of the constituent corporations in the same manner as if such surviving or consolidated corporation had itself incurred such liabilities or obligations; and any pending claim, action or proceeding brought by or against any of such constituent corporations may be prosecuted by or against the surviving or consolidated corporation. The rights of creditors or liens upon the property of any of such constituent corporations shall not be impaired by such merger or consolidation.

Thus, a judgment creditor can no doubt seek payment from the surviving or consolidated corporation if it can prove that a

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corporations, while in the latter, the purchasing corporation is not generally liable for the debts and liabilities of the selling corporation; (3) In the former, there is a continuance of the enterprise and of the stockholders therein though in the altered form, while in the latter, the selling corporation ordinarily contemplates liquidation of the enterprise; (4) In the former, the title to the assets of the constituent corporations is by operation of law transferred to the new corporation, while in the latter, the transfer of title is by virtue of contract; and (5) In the former, the constituent corporations are automatically dissolved, while in the latter, the selling corporation is not dissolved by the mere transfer of all its property. (citing de Leon, THE CORPORATION CODE OF THE PHILIPPINES ANNOTATED, 1989 Edition, pp. 509-510.)" (Emphasis supplied)

[34] *PNB v. Andrada Electric & Engineering Company*, 430 Phil. 882, 899 (2002) [Per *J.* Panganiban, Third Division].

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merger or consolidation has taken place.

The *ponencia* discussed that no merger took place in this case as the requirements under the Corporation Code were not met.[35] In Justice Mendoza's dissenting opinion, he agreed that "in a strict sense, no merger or consolidation took place."[36] The Securities and Exchange Commission did not issue any certificate of merger or consolidation in favor of petitioner Bancommerce.[37] Justice Mendoza then discussed how the Purchase and Sale Agreement involved substantially all of the assets and liabilities of Traders Royal Bank, and the end result "amounted to a merger of assets where the existence of [Traders Royal Bank] as a banking entity ceased while that of Bancommerce continued."[38]

This brings us to the third exception "where the purchasing corporation is merely a continuation of the selling corporation."[39]

Under Section 40 of the Corporation Code, when the transaction amounts to a sale of "all or substantially all of [the corporation's] property and assets,"[40] the ratificatory vote of the stockholders representing at least two-thirds of the outstanding capital stock is required. This transaction involves a transfer of the entire business enterprise[41] as no such ratificatory vote

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[35] *Ponencia,* pp. 6-7.

[36] Dissenting opinion of Justice Mendoza, p. 15.

[37] *Id*.

[38] *Id.* at 16.

[39] *Edward J. Nell Company v. Pacific Farms, Inc.,* 122 Phil. 825, 827 (1965) [Per J. Concepcion, En Banc]; *McLeod v. National Labor Relations Commission,* 541 Phil. 214, 234 (2007) [Per J. Carpio, Second Division].

[40] CORPORATION CODE, sec. 40.

[41] *See* C. VILLANUEVA, PHILIPPINE CORPORATE LAW 679-680, 682, 692-693 (2010) for its discussion on the ***three levels of Corporate Acquisitions and Transfers, namely:*** (1) pure assets-only transfer; (2) transfer of the business enterprise; and (3) equity transfer. It discussed that in a pure assets-only transfer, "the purchaser is only interested in the 'raw' assets and properties of the business, perhaps to be used to establish its own

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is required "if the proceeds of the sale or other disposition of such property and assets [would] be appropriated *for the conduct of its remaining business*."[42] In such transactions, the purchaser corporation is now the one continuing the seller corporation's original business. Consequently, as far as the selling corporation is concerned, there is no more business remaining.

This was partly discussed in *Caltex (Phils.), Inc. v. PNOC Shipping & Transport Corp.*[43] when this court went on to rule that even without the Agreement of Assumption of Obligations, PSTC is still liable as "[t]he acquisition by the assignee of all or substantially all of the assets of the assignor necessarily includes the assumption of the assignor's liabilities, unless the creditors who did not consent to the transfer choose to rescind the transfer on the ground of fraud."[44]

In the present case, Article III of the Purchase and Sale Agreement provides that petitioner Bancommerce and Traders Royal Bank shall continue to exist as separate corporations:

ARTICLE III

EFFECTS AND CONSEQUENCES

The effectivity of this Agreement shall have the following effects and consequences:

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business enterprise or to be used for its on-going business enterprise." In a transfer of business enterprise, "[t]he purchaser's primary interest is to obtain the 'earning capability' of the venture." An equity transfer is when "[t]he purchaser takes control and ownership of the business by purchasing the controlling shareholdings of the corporate owner." In this case, "[t]he control of the business enterprise is therefore indirect [as] the corporate owner remains the direct owner of the business, and what the purchaser has actually purchased is the ability to elect the members of the Board of Directors of the corporation which runs the business."

For the first and third type, the transferee shall not be liable for the debts and liabilities of the transferor except where the transferee expressly or impliedly agrees to assume such debts. The second type, the transfer of business enterprise, makes the transferee liable for the transferor's liabilities.

[42] CORPORATION CODE, Sec. 40; emphasis supplied.

[43] 530 Phil. 149 (2006) [Per *J.* Carpio, Third Division].

[44] *Id.* at 159-160.

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1) BANCOMMERCE and TRB shall continue to exist as separate corporations with distinct corporate personalities;

2) With the transfer of its branching licenses to BANCOMMERCE and upon surrender of its commercial banking license to BSP, TRB shall exist as an ordinary corporation placed outside the supervisory jurisdiction of BSP. To this end, TRB shall cause the amendment of its articles and by-laws to delete the terms "bank" and "banking" from its corporate name and purpose.

3) There shall be no employer-employee relationship between BANCOMMERCE and the personnel and officers of TRB.[45]

The *ponencia* discussed that after the purchase, TRB retained its separate and distinct identity, and "although it subsequently changed its name to Traders Royal Holding's Inc., (TRHI), such change did not result in its dissolution."[46] It quoted the following statement from *Phil. First Insurance Co., Inc. v. Hartigan, et al.*,[47] citing the American case, *Pacific Bank v. De Ro*:

> The changing of the name of a corporation is no more [than] the creation of a corporation than the changing of the name of a natural person is the begetting of a natural person. The act, in both cases, would seem to be what the language which we use to designate it imports – a change of name, and not a change of being.[48]

The case is about an insurance corporation named "The Yek Tong Lin Fire and Marine Insurance Co., Ltd.," which amended its articles of incorporation changing its name to "Philippine First Insurance Co., Inc."[49] In a civil case for sum of money filed by Philippine First Insurance Co., Inc., the defendants

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[45] *Rollo,* p. 81, Article III of the Purchase and Sale Agreement.

[46] *Ponencia,* p. 10. A copy of the Amended Articles of Incorporation was attached as Annex W of the petition, *rollo,* p. 253.

[47] 145 Phil. 310 (1970) [Per *J.* Barredo, *En Banc*].

[48] *Id*. at 327, citing *Pacific Bank v. De Ro,* 37 Cal. 538.

[49] *Id*. at 313-314.

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argued that "they signed said [indemnity] agreement in favor of the Yek Tong Lin Fire and Marine Insurance Co., Ltd. and not in favor of the plaintiff."[50] The facts involved only a change of corporate name. The new corporate name indicated that the corporation remained an insurance company.

The same cannot be said of the facts in the present case.

As seen in Article III, paragraph 2 of the Purchase and Sale Agreement quoted above, Traders Royal Bank transferred its branching licenses to petitioner Bancommerce and surrendered its commercial banking license to Bangko Sentral ng Pilipinas. In fact, Bangko Sentral issued a circular letter, series of 2002, "advising all banks and non-bank financial intermediaries that the banking activities and transactions of TRB and Bancommerce were consolidated and that the latter continued the operations of the former."[51]

Thus, Traders Royal Bank no longer exists as a commercial bank while petitioner Bancommerce to whom Traders Royal Bank transferred substantially all of its assets including its branching licenses[52] will continue its operations. While Traders Royal Bank continues to exist as a separate corporation, it is no longer doing its original business of commercial banking. It is now a holding company, and it is petitioner Bancommerce that is continuing its original banking business.

Thus, the first and third exceptions apply to petitioner Bancommerce.

The reason why a purchaser corporation in this type of transaction is made liable may be related to the fourth and last

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[50] *Id*. at 314.

[51] *Rollo,* p. 123.

[52] *See* Article I of the Purchase and Sale Agreement, *rollo,* p. 80.

"Said assets and properties shall be inclusive of the banking goodwill of TRB, its bank premises and licenses to operate its head office and branches, its leasehold rights, patents, trademarks or copyrights used in connection with its business or products."

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exception on fraud against creditors of the seller corporation. This was discussed in *Caltex (Phils.), Inc. v. PNOC Shipping & Transport Corp.*[53] as follows:

> x x x To allow an assignor to transfer all its business, properties and assets without the consent of its creditors and without requiring the assignee to assume the assignor's obligations will defraud the creditors. The assignment will place the assignor's assets beyond the reach of its creditors.
>
> x x x x x x x x x
>
> In *Oria v. McMicking*, the Court enumerated the badges of fraud as follows:
>
> 1. The fact that the consideration of the conveyance is fictitious or is inadequate.
> 2. ***A transfer made by a debtor after suit has been begun and while it is pending against him.***
> 3. A sale upon credit by an insolvent debtor.
> 4. Evidence of large indebtedness or complete insolvency.
> 5. ***The transfer of all or nearly all of his property by a debtor, especially when he is insolvent or greatly embarrassed financially.***
> 6. The fact that the transfer is made between father and son, when there are present other of the above circumstances.
> 7. The failure of the vendee to take exclusive possession of all the property.[54] (Emphasis supplied)

Article 1313 of the Civil Code on the general provisions for contracts clearly states that "[c]reditors are protected in cases of contracts intended to defraud them."

Since the first and third exceptions have been shown to apply against petitioner Bancommerce, it is liable to pay respondents.

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[53] *Caltex (Phils.), Inc. v. PNOC Shipping & Transport Corp.*, 530 Phil. 149 (2006) [Per *J.* Carpio, Third Division].

[54] *Id*. at 160-161, citing *Oria v. McMicking*, 21 Phil. 243, 250-251 (1912) [Per *J*. Moreland, *En Banc*].

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Moreover, this conclusion supports the principle of economy of judgments. A remand will only result in the parties being left with no more recourse, and it will prolong this case with its back and forth turn among the different levels of courts. Parties should be allowed to reasonably expect an end to their suits. Thus, courts must work toward the efficient and expeditious dispatch of cases filed before it while providing justice for the parties.

It is for these reasons that I vote to deny the petition.

FIRST DIVISION

[G.R. No. 196023. April 21, 2014]

JOSE JUAN TONG, ***ET AL.*** *petitioners, vs.* **GO TIAT KUN**, ***ET AL.***, *respondents.*

SYLLABUS

1. CIVIL LAW; CIVIL CODE; TRUST; PRINCIPLE OF RESULTING TRUST, EXPLAINED.— The principle of a resulting trust is based on the equitable doctrine that valuable consideration and not legal title determines the equitable title or interest and are presumed always to have been contemplated by the parties. They arise from the nature or circumstances of the consideration involved in a transaction whereby one person thereby becomes invested with legal title but is obligated in equity to hold his legal title for the benefit of another. On the other hand, a constructive trust, unlike an express trust, does not emanate from, or generate a fiduciary relation. Constructive trusts are created by the construction of equity in order to satisfy the demands of justice and prevent unjust enrichment. They arise contrary to intention against one who, by fraud, duress or abuse