

SUPREME COURT OF THE PHILIPPINES  
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Republic of the Philippines  
**SUPREME COURT**  
Manila

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*Wilfredo V. Lapitan*  
WILFREDO V. LAPITAN  
Division Clerk of Court  
Third Division  
OCT 08 2017

**THIRD DIVISION**

**SPOUSES ROSALINO R.  
REYES, JR. and SYLVIA S.  
REYES,**

Petitioners,

- versus -

**SPOUSES HERBERT BUN  
HONG G. CHUNG and  
WIENNA T. CHUNG,**

Respondents.

**G.R. No. 228112**

Present:

VELASCO, JR., *J.*, Chairperson,  
BERSAMIN,  
LEONEN,  
MARTIRES, and  
GESMUNDO, *JJ.*

Promulgated:

September 13, 2017

X-----*Wilfredo V. Lapitan*-----X

**DECISION**

**VELASCO, JR., *J.*:**

**Nature of the Case**

Sought to be set aside in this Petition for Review on *Certiorari*<sup>1</sup> is the November 7, 2016 Decision<sup>2</sup> of the Court of Appeals (CA) in CA-G.R. CV No. 102760. The assailed decision dismissed the appeal filed by the petitioners and upheld the September 20, 2013 Decision of the Regional Trial Court of Quezon City, Branch 226 (RTC-Br. 226) in LRC Case No. Q-13-02781, which granted the respondents' "*Ex Parte* Petition for the Issuance of Writ of Possession under Act No. 3135," as well as the January 20, 2014<sup>3</sup> and April 28, 2014<sup>4</sup> Resolutions of the same court.

**Antecedents**

Reviewed, the records yield the following relevant facts:

<sup>1</sup> Under Rule 45 of the Rules of Court.

<sup>2</sup> *Rollo*, pp. 34-49. Penned by Associate Justice Carmelita Salandanan Manahan with Associate Justices Japar B. Dimaampao and Franchito N. Diamante, concurring.

<sup>3</sup> *Id.* at 98-101. Penned by Presiding Judge Manuel B. Sta. Cruz, Jr.. In the Court of Appeals Decision dated November 7, 2016, the date stated was January 10, 2014 but the correct date is January 20, 2014, as evidenced by the copy of the Order itself that was attached in the *Rollo*.

<sup>4</sup> *Id.* at 103-105.

Petitioners spouses Rosalino Jr. and Sylvia Reyes obtained from Export and Industry Bank, Inc. (EIBI), formerly Urban Bank, Inc., a loan secured by a Deed of Real Estate Mortgage on a 1,202.60 square-meter lot at No. 59 Maranaw St., La Vista, Pansol, Quezon City (subject property). The subject property was registered in petitioners' name under Transfer Certificate of Title (TCT) No. RT-98958 (281043).

When the petitioners defaulted in the payment of their loan obligation, the subject property was extrajudicially foreclosed and sold at public auction, with EIBI as the highest bidder. The corresponding Certificate of Sale was then issued and registered with the Registry of Deeds.<sup>5</sup>

After the petitioners' failure to redeem the subject property within the one-year redemption period, the title thereto was consolidated in EIBI's name. The certificate of title in the petitioners' names was accordingly cancelled and a new certificate of title was issued to EIBI. Later, EIBI sold the subject property to LNC (SPV-AMC) Corporation (LNC). Thus, the certificate of title in the name of EIBI was likewise cancelled and a new one in the name of LNC was issued.<sup>6</sup>

In turn, by a Deed of Absolute Sale dated May 8, 2012 and a Deed of Assignment dated May 11, 2012, LNC sold and assigned to respondents spouses Herbert Bun Hong and Vienna Chung the subject property. Consequently, LNC's certificate of title was cancelled, and in lieu thereof, a new title, *i.e.*, TCT No. 004-2012005446, was issued in the respondents' names.

To acquire possession of the subject property, the respondents made several demands<sup>7</sup> on the petitioners to vacate the same and surrender its possession. The demands, however, went unheeded. Thus, on August 28, 2012, the respondents lodged a Complaint for Ejectment against the petitioners before the Metropolitan Trial Court (MeTC) of Quezon City, Branch 42, docketed as Civil Case No. 41580.

However, in a Decision dated April 11, 2013, the Complaint for Ejectment was dismissed for insufficiency of evidence. The dismissal was appealed by the respondents to RTC-Quezon City, Branch 223 (RTC-Br. 223).<sup>8</sup>

Pending resolution of the appeal, the respondents filed on August 28, 2013 an "*Ex-Parte* Petition for Issuance of Writ of Possession under Act No. 3135" before the RTC-Br. 226, docketed as LRC Case No. Q13-02781. The RTC-Br. 226 found the petition sufficient both in form and in substance,

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<sup>5</sup> Id. at 35.

<sup>6</sup> Id. at 35-36.

<sup>7</sup> The final demand was made on June 29, 2012; *id.* at 36.

<sup>8</sup> Id.



setting it for hearing on September 13, 2012 and directing the respondents to appear and show cause why the petition should be granted.<sup>9</sup>

The following day, or on August 29, 2013, the respondents withdrew their appeal before RTC-Br. 223. The trial court allowed the withdrawal per its Order dated September 4, 2013.<sup>10</sup>

Thereafter, in its **September 20, 2013 Decision**, RTC-Br. 226 granted the respondents' *Ex-Parte* Petition for Issuance of Writ of Possession. Accordingly, a notice to vacate addressed to the petitioners and a writ of possession directing the sheriff to place the respondents in possession of the subject property were issued on September 24, 2013.

Nonetheless, upon the service of the writ of possession and the notice to vacate on the petitioners, the latter refused to sign them. Several efforts to implement the writ were made thereafter, but all to no avail.<sup>11</sup>

Thus, on September 26, 2013, the respondents filed an "Urgent *Ex-Parte* Omnibus Motion" praying for the issuance of a Break Open Order to properly implement the writ of possession and to place them in possession of the subject property.

Conversely, the petitioners filed on October 22, 2013 a "Verified Urgent Motion to Quash Writ of Possession" (Motion to Quash) anchored on the following grounds: (1) RTC-Br. 226 has no jurisdiction to issue the writ of possession since the respondents did not purchase the subject property *via* a foreclosure sale under Act No. 3135; and (2) the respondents committed forum shopping.<sup>12</sup>

In a **Resolution dated January 20, 2014**, RTC-Br. 226 denied the motions of both parties for lack of merit and sufficient basis. In denying the petitioners' Motion to Quash, RTC-Br. 226 held that the respondents could validly file the "*Ex-Parte* Petition for Issuance of Writ of Possession" as, by their purchase of the subject property, the respondents were deemed to have stepped into the shoes of their predecessors-in-interest and so acquired all the rights of the previous owner/buyer in the foreclosure sale, including the right to ask for the writ of possession.

The trial court also declared that the respondents were not guilty of forum shopping in filing their "*Ex-Parte* Petition for Issuance of Writ of Possession" because an application for writ of possession is a mere incident in the registration proceeding. Though denominated as a "petition," in substance, it is but a mere "motion," so the lower court held.

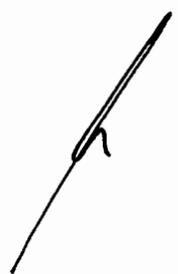
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<sup>9</sup> Id. at 36-37.

<sup>10</sup> Id. at 37.

<sup>11</sup> Id. at 37-38.

<sup>12</sup> Id. at 38.



In the meantime, in refusing to issue a Break Open Order in favor of the respondents, the trial court explained that the motion lacked sufficient basis considering that the petitioners were still occupying the subject property.<sup>13</sup>

On February 25, 2014, the respondents, once again, moved for the issuance of a Break Open Order in view of the Sheriff's Report stating that the gate of the subject property was already padlocked as of February 21, 2014. The petitioners, on the other hand, moved for the reconsideration of the January 20, 2014 Resolution and opposed the respondents' second motion praying for the issuance of a Break Open Order.<sup>14</sup>

In a **Resolution dated April 28, 2014**, the RTC-Br. 226 denied the petitioners' motion for reconsideration but granted the respondents' "Motion for Issuance of a Break Open Order." In so ruling, the trial court clarified that since the subject property was no longer occupied and its gate was already padlocked when the sheriff attempted to serve the notice to vacate on the petitioners, it is but proper to issue a Break Open Order to properly execute the writ of possession.<sup>15</sup>

On May 13, 2014, the writ of possession was finally implemented per the Certificate of Turn-Over of Possession issued by the sheriff.<sup>16</sup>

### **The Court of Appeals' Decision**

On appeal to the CA, the appellate court in the now assailed November 7, 2016 Decision sustained the September 20, 2013 Decision and the January 20, 2014 and April 28, 2014 Resolutions of RTC-Br. 226.

In finding for the herein respondents, the CA pronounced that they rightfully availed of the remedy of applying for the issuance of a writ of possession even though they were not the actual purchaser in the foreclosure sale. For such an instance is very well sanctioned by Section 33, Rule 39 of the Rules of Court. By this rule, the remedy of a writ of possession of the mortgagee-purchaser to acquire possession of the foreclosed property from the mortgagor is made available to a subsequent purchaser.

The CA went on to stress that the respondents acquired the absolute right, as purchaser and successors-in-interest of EIBI and LNC, to apply for the issuance of a writ of possession pursuant to Section 7 of Act No. 3135,<sup>17</sup> as amended. As the owner of the subject property, the respondents are entitled to its possession as a matter of right. Moreover, the issuance of a writ of possession over the subject property by the court is merely a ministerial function.

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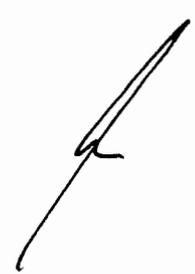
<sup>13</sup> Id. at 100-101.

<sup>14</sup> Id. at 39-40.

<sup>15</sup> Id. at 104.

<sup>16</sup> Id. at 40-41.

<sup>17</sup> *Infra*.



The CA similarly upheld the finding that the respondents committed no forum shopping. The appellate court took note of the fact that the respondents withdrew their appeal of the dismissal of their Complaint for Ejectment lodged with RTC-Br. 223 to avail of the proper legal remedy of filing an application for writ of possession, which was raffled to RTC-Br. 226.<sup>18</sup>

Still unfazed, the petitioners elevated the case to this Court advancing substantially the same arguments they broached before the lower courts.

In their Comment,<sup>19</sup> the respondents countered that they did not commit forum shopping and were entitled to the Writ of Possession and the Break Open Order issued by RTC-Br. 226.

### **The Issues**

Stripped of non-essentials, the issues for the Court's resolution can be narrowed down to the following: (1) whether the respondents committed forum shopping; and (2) whether the trial court was correct in issuing the Writ of Possession and Break Open Order in the respondents' favour.

### **Our Ruling**

Primarily, the parties' respective positions and arguments are a mere rehash of those presented and already passed upon by the CA. There being no cogent, much less compelling, reason to depart from the findings and conclusions made by the appellate court, the Court denies the petition.

#### ***No forum shopping***

As aptly held by the lower courts, the respondents did not commit forum shopping in filing a Complaint for Ejectment and later an *Ex-Parte* Petition for Issuance of Writ of Possession.

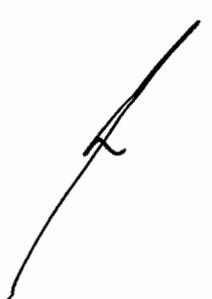
It has been jurisprudentially established that forum shopping exists when a party avails himself of several judicial remedies in different courts, simultaneously or successively, all substantially founded on the same transactions and the same essential facts and circumstances, and all raising substantially the same issues either pending in or already resolved adversely by some other courts.

The test to determine whether a party violated the rule against forum shopping is whether the elements of *litis pendentia* are present, or whether a final judgment in one case will amount to *res judicata* in another. Simply put, when *litis pendentia* or *res judicata* does not exist, neither can forum shopping exist.

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<sup>18</sup> Id. at 44-47.

<sup>19</sup> Dated April 6, 2017.



The requisites of *litis pendentia* are: (a) the identity of parties, or at least such as representing the same interests in both actions; (b) the identity of rights asserted and relief prayed for, the relief being founded on the same facts; and (c) the identity of the two cases such that judgment in one, regardless of which party is successful, would amount to *res judicata* in the other. On the other hand, the elements of *res judicata*, also known as bar by prior judgment, are: (a) the former judgment must be final; (b) the court which rendered it had jurisdiction over the subject matter and the parties; (c) it must be a judgment on the merits; and (d) there must be, between the first and second actions, identity of parties, subject matter, and causes of action.<sup>20</sup>

In the case at bench, even granting that the MeTC ruling had attained finality, still, such will not amount to *res judicata* in the subsequent *Ex-Parte* Petition for Issuance of Writ of Possession, there being no identity or similarity of action between the two proceedings with the latter being just an incident in the transfer of title.<sup>21</sup>

In the same way, there is no forum shopping based on *litis pendentia*. In this we quote the pronouncements of the CA, thus:

x x x x In the present case, one (1) day after the filing of the *Ex-Parte* Petition for Issuance of Writ of Possession on August 28, 2013, [herein respondents] **already moved for the withdrawal of their appeal** with [RTC-Quezon City], Branch 223 assailing the April 11, 2013 Decision in their Ejectment case of the MeTC. [Respondents] were still within their rights in availing themselves of the proper remedy, *i.e.*, to file the *Ex-Parte* Petition having realized their erroneous resort to the wrong remedy. Furthermore, forum shopping presupposes the availment of two or more simultaneous remedies, not to successive ones arising out of an error that may have been committed in good faith. Raising a matter to the correct forum employing the wrong mode or remedy, and then later resorting to the correct one, does not make an instance of forum shopping. **The remedies of appeal and *Ex-Parte* Petition for Issuance of Writ of Possession are mutually exclusive and not alternative or successive.**<sup>22</sup> (Emphases supplied.)

Since neither *litis pendentia* nor *res judicata* exists in the present case, respondents may not be held liable for forum shopping.

**The remedy of a writ of possession is available to a subsequent purchaser but only after hearing**

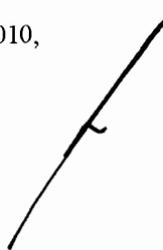
This Court also upholds the respondents' right to a writ of possession even though they were not the purchasers in the foreclosure proceedings.

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<sup>20</sup> *Dayot v. Shell Chemical Company (Phils.), Inc.*, G.R. No. 156542, June 26, 2007, 525 SCRA 535, 545-546.

<sup>21</sup> *Topacio v. Banco Filipino Savings and Mortgage Bank*, G.R. No. 157644, November 17, 2010, 635 SCRA 50, 69.

<sup>22</sup> *Rollo*, p. 46.



A writ of possession is a writ of execution employed to enforce a judgment to recover the possession of land. It commands the sheriff to enter the land and give its possession to the person entitled under the judgment.<sup>23</sup> It may be issued under the following instances: (1) in land registration proceedings under Section 17 of Act 496; (2) in a judicial foreclosure, provided the debtor is in possession of the mortgaged realty and no third person, not a party to the foreclosure suit, had intervened; (3) **in an extrajudicial foreclosure of a real estate mortgage under Section 7 of Act No. 3135, as amended; and (4) in execution sales (last paragraph of Section 33, Rule 39 of the Rules of Court).**<sup>24</sup>

In an extrajudicial foreclosure of real property, the purchaser becomes the absolute owner thereof if no redemption is made within one year from the registration of the certificate of sale by those entitled to redeem. Being the absolute owner, he is entitled to all the rights of ownership over a property recognized in Article 428<sup>25</sup> of the New Civil Code, not the least of which is possession, or *jus possidendi*.

Possession being an essential right of the owner with which he is able to exercise the other attendant rights of ownership, after consolidation of title, the purchaser in a foreclosure sale may demand possession as a matter of right. Thus, Section 7 of Act No. 3135, as amended, imposes upon the RTC a ministerial duty to issue a writ of possession to the new owner upon a mere *ex parte* motion.<sup>26</sup>

Section 7 of Act No. 3135, as amended, provides:

**Section 7.** In any sale made under the provisions of this Act, the purchaser may petition the Court of First Instance of the province or place where the property or any part thereof is situated, to give him possession thereof during the redemption period, furnishing bond in an amount equivalent to the use of the property for a period of twelve months, to indemnify the debtor in case it be shown that the sale was made without violating the mortgage or without complying with the requirements of this Act. Such petition shall be made under oath and filed in form of an *ex parte* motion in the registration or cadastral proceedings if the property is registered, or in special proceedings in the case of property registered under the Mortgage Law or under section one hundred and ninety-four of the Administrative Code, or of any other real property encumbered with a mortgage duly registered in the office of any register of deeds in accordance with any existing law, and in each case the clerk of the court shall, upon the filing of such petition, collect the fees specified in paragraph eleven of section one hundred and fourteen of Act Numbered Four hundred and ninety-six, as amended by Act Numbered Twenty-eight

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<sup>23</sup> *LZK Holdings and Development Corp. v. Planters Development Bank*, G.R. No. 167998, April 27, 2007, 522 SCRA 731, 738.

<sup>24</sup> *Philippine National Bank v. Sanao Marketing Corporation*, G.R. No. 153951, July 29, 2005, 465 SCRA 287, 299-300.

<sup>25</sup> Art. 428. The owner has the right to enjoy and dispose of a thing, without other limitations than those established by law.

The owner has also a right of action against the holder and possessor of the thing in order to recover it.

<sup>26</sup> *Gallent, Sr. v. Velasquez*, G.R. Nos. 203949 and 205071, April 6, 2016, 788 SCRA 518, 530.

hundred and sixty-six, and the court shall, upon approval of the bond, order that a writ of possession issue, addressed to the sheriff of the province in which the property is situated, who shall execute said order immediately.

In the case under consideration, the original right to file a Petition for Issuance of Writ of Possession belonged to EIBI, being the mortgagee-purchaser at the extrajudicial foreclosure sale. But, instead of seeking the issuance of a writ of possession, it sold the subject property to LNC, which, in turn, sold the same to the respondents. As such, by the sale, the respondents became the new owners of the subject property and were vested with all the rights and interests of their predecessors EIBI and LNC, including the right to the possession of the property. Undoubtedly, the respondents can apply for the issuance of a writ of possession even though they were not the purchasers at the foreclosure proceedings.

However, unlike the original mortgagee-purchaser, the respondents' right to apply for the issuance of a writ of possession is circumscribed and cannot be made *ex parte*; the issuance of a writ of possession in favor of a subsequent purchaser must be made only "after hearing and after determining that the subject property is still in the possession of the mortgagor." This Court elucidated in the seminal case of *Okabe v. Saturnino*, thus:

It is but logical that Section 33, Rule 39 of the Rules of Court be applied to cases involving extrajudicially foreclosed properties that were bought by a purchaser and later sold to third-party-purchasers after the lapse of the redemption period. **The remedy of a writ of possession, a remedy that is available to the mortgagee-purchaser to acquire possession of the foreclosed property from the mortgagor, is made available to a subsequent purchaser, but only after hearing and after determining that the subject property is still in the possession of the mortgagor.** Unlike if the purchaser is the mortgagee or a third party during the redemption period, a writ of possession may issue *ex-parte* or without hearing. **In other words, if the purchaser is a third party who acquired the property after the redemption period, a hearing must be conducted to determine whether possession over the subject property is still with the mortgagor or is already in the possession of a third party holding the same adversely to the defaulting debtor or mortgagor. If the property is not in the possession of the mortgagor, a writ of possession could thus be issued.**<sup>27</sup> (Emphasis and underscoring supplied.)

It was error, therefore, for RTC-Br. 226 to issue the writ of possession to the respondents *ex parte*. The writ deviated from the ruling in *Okabe*.

Nonetheless, the Court is loath to abate the writ of possession already issued and implemented as the petitioners were eventually given their day in court and allowed to file their Motion to Quash. As this Court held in *Javate v. Tiotuico*,<sup>28</sup> 'to be heard' does not mean verbal argumentation alone inasmuch as one may be heard just as effectively through written

<sup>27</sup> G.R. No. 196040, August 26, 2014, 733 SCRA 652. See also *Gallent v. Velasquez*, *id.*

<sup>28</sup> *Javate v. Tiotuico*, G.R. No. 187606, March 9, 2015, 752 SCRA 128, 133.

explanations, submissions or pleadings. Furthermore, there is no quibble that the petitioners remained in possession of the subject property prior to the issuance of the writ of possession in favor of the respondents. Thus, to annul the writ of possession and require the respondents to petition for another one will only prolong the proceedings. Worse, such will unduly deny the respondents, as subsequent purchasers of the subject property, the possession of the property they now own. Withal, it must not be forgotten that the right to possess a property merely follows the right of ownership, and it would be illogical to hold that a person having ownership of a parcel of land is barred from seeking possession thereof.<sup>29</sup>

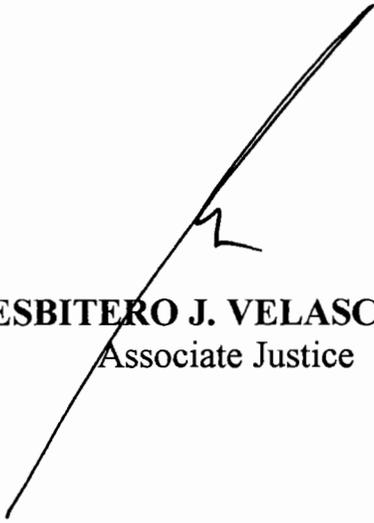
Lastly, the issue on whether or not the issuance of the writ of possession is proper and regular has been rendered moot and academic as petitioners voluntarily relinquish possession of the subject premises.

With respect to the aptness of the issuance of a Break Open Order to implement the writ of possession, this Court agrees with the trial court that:

x x x x since it was not disputed that no one was in the [subject property] and the “**gate was padlocked**” at the time the Sheriff went there to serve the Notice to Vacate. Needless to state, the character of the writ carries with it the authority to break open the [subject] property, if the Sheriff could not otherwise execute its command.<sup>30</sup>

**WHEREFORE**, the instant Petition is **DENIED**. The Court of Appeals’ November 7, 2016 Decision in CA-G.R. CV No. 102760 is **AFFIRMED**.

**SO ORDERED.**



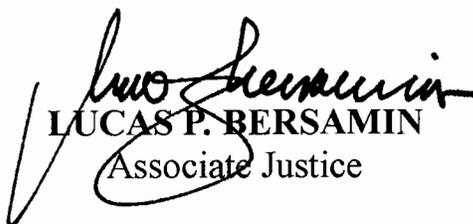
**PRESBITERO J. VELASCO, JR.**  
Associate Justice

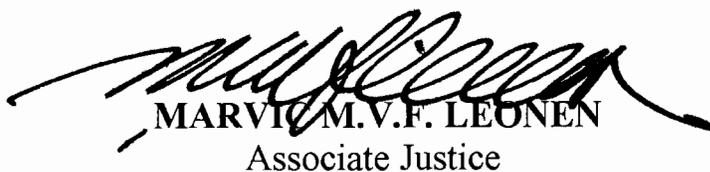
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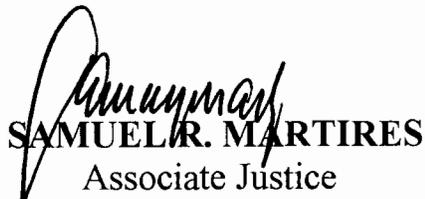
<sup>29</sup> *Edralin v. Philippine Veterans Bank*, G.R. No. 168523, March 9, 2011, 645 SCRA 75, 90.

<sup>30</sup> *Rollo*, p 149.

WE CONCUR:

  
**LUCAS P. BERSAMIN**  
 Associate Justice

  
**MARVIC M.V.F. LEONEN**  
 Associate Justice

  
**SAMUEL R. MARTIRES**  
 Associate Justice

  
**ALEXANDER G. GESMUNDO**  
 Associate Justice

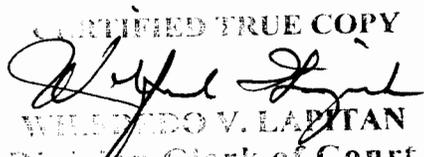
**ATTESTATION**

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

  
**PRESBITERO J. VELASCO, JR.**  
 Associate Justice  
 Chairperson

**CERTIFICATION**

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

CERTIFIED TRUE COPY  
  
**WILFREDO V. LAPID**  
 Division Clerk of Court  
 Third Division  
 OCT 06 2017

  
**MARIA LOURDES P. A. SERENO**  
 Chief Justice