

**DAVID LU, ROSA GO, SILVANO LU DO AND CL CORPORATION,
PLAINTIFFS-APPELLEES, VS. PATERNO LU YM, SR., PATERNO LU YM,
JR., VICTOR LU YM, JOHN LU YM, KELLY LU YM, AND LUDO &
LUYM DE...**

Ponente: INGLES, G. T., J.

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INGLES, G. T., J.:

Assailed in this appeal is the Decision[1] dated 1 March 2004 rendered by the Regional Trial Court, Branch 12, Cebu City in SRC Case No. 021-CEB (formerly docketed as Civil Case No. CEB-25502) in favor of David Lu.

THE FACTS

On 11 August 2000, David Lu, Rosa Go, Silvano Lu Do and CL Corporation (collectively plaintiffs hereinafter) filed a complaint for “Declaration of Nullity of Share Issue, Receivership and Dissolution” against Paterno Lu Ym, Sr., Paterno Lu Ym, Jr., Victor Lu Ym, John Lu Ym, Kelly Lu Ym, and Ludo & LuYm Development Corporation docketed as Civil Case No. CEB-25502.

The Complaint[2]

The plaintiffs averred that Ludo & LuYm Development Corporation is a family corporation founded by the brothers Paterno Lu Ym, Sr, Cayetano Lu Do (deceased father of Rosa Go and Silvano Lu Do, and Cipriano Lu (deceased father of David Lu). That, prior to the acts complained of, Paterno Lu Ym, Sr., et. al. (collectively defendants hereinafter) owned 29.99% of the corporation valued at P749,750,000.00. But after the acts complained of, said defendants together with their spouses, children and holding companies already owned 73.48% of the corporation valued at P1,837,000,000.00, an increase of P1,087,250,000.00. Consequently, the increase gave the said defendants more voting power at the expense of all the other stockholders who in turn sustained a corresponding reduction in their voting power and value of their holdings amounting to P1,087,250,000.00. On the other hand, their shareholding in the said corporation was reduced, that is, from 27.83% down to 10.53%. To translate this decrease in numerical figures, from P695,750,000.00 down to P263,250,000.00 or a drastic decrease of P432,500,000.00.

The plaintiffs continued that allegedly pursuant to a board resolution passed on November 18, 1997, the defendants Paterno Lu Ym, Sr. and his sons issued to themselves and their spouses, children and holding companies, 600,000 unsubscribed/unissued shares of Ludo & LuYm Corporation for a capital contribution in the amount of P60 million, the par value. Based, however, on underlying real estate value, the real value of these shares then was One Billion Eighty-Seven Million Fifty-Five Thousand One Hundred Five Pesos (P1,087,055,105.00). That, the shares were issued for one-eighteenth of their value. With these shares, the defendants obtained an instant profit of 1,800% of the amount put in, with the corresponding instant loss of the same amount sustained by the other stockholders. The plaintiffs posited that such a transaction has been struck down by the courts for being unconscionable as enunciated in the case of *Katzowitz v. Sidler* (24 NY2d 512, 301 NYS2d 470, 249 NE2d 359), wherein the New York Court of Appeals protected the minority stockholders against the issuance of stocks at less than its value. The plaintiffs added that by doing so, defendants Paterno Lu

Ym, Sr. and his sons violated their fiduciary duties as directors as provided in Section 31 of the Corporation Code. Too, these defendants are guilty of abuse of their rights and unjust enrichment at the expense of their cousins.

Having sustained such injury, they seek to dissolve the corporation and to appoint receivers.

Motion to Dismiss[3]

The defendants filed a Motion to Dismiss. Therein, the defendants alleged that the complaint violated Section 5, Rule 7 of the Revised Rules of Court anent the requirement of a certification against forum shopping. That, there is nothing in the complaint, and in the certification itself, to show that plaintiff David Lu was authorized to sign for and in behalf of the other plaintiffs. On this ground alone, the complaint is outright dismissible.

For another, the complaint does not allege that earnest effort toward a compromise has been made by the parties who are members of the same family in order to reach a workable and peaceable settlement among themselves.

Still for another, under Section 412 of the Local Government Code this action should be first brought before the appropriate Lupon Tagapamayapa. Failing which, the instant complaint is outright dismissible under Section 1(j) of the Revised Rules of Court.

By its Resolution[4] dated December 4, 2000, the RTC denied the motion to dismiss; and the defendants were directed to file their Answer within ten (10) days from notice. On reconsideration,[5] the RTC denied the defendants' motion.

On 24 January 2001, the plaintiffs filed an urgent motion to appoint receiver[6] on the following grounds: (1) since the filing of the complaint, the defendants have been distributing dividends in accordance with the questioned share issuances; (2) defendants plan to sell assets, the proceeds of which will be distributed in accordance with the questioned share issuances; (3) defendants have been entering or are about to enter into projects and contracts that would tie down a substantial proportion of the corporate assets, thus, burdening the corporation with indebtedness, which prior to the questioned realignment of shareholdings, it did not have; and (4) even before the questioned share issuances, defendants attempted to enter into self-dealing contracts with the corporation. To support this motion, the plaintiffs cite the case of *Financing Corporation of the Philippines, et. al. v. Jose Teodoro, et. al.*, (93 Phil 678, G.R. No. L-4900, August 31, 1953).

By its Resolution[7] dated 16 February 2001, the RTC granted the plaintiffs' urgent motion to appoint receiver.

In their motion for reconsideration[8] filed on March 7, 2001, the defendants alleged the following: (1) that, the resolution appointing a receiver violates Section 2, Rule 59 of the Revised Rules of Court, that is, for failure to require the applicant to file a bond in favor of the defendants; (2) that, the allegations of the complaint and its verification are insufficient/defective to warrant the appointment of a receiver, and in violation of Section 1 of Rule 59 of the Revised Rules of Court; (3) that, the urgent motion to appoint a receiver is unverified and in violation of Section 1, Rule 59 of the Revised Rules of Court; (4) that, the Honorable Court proceeded on the erroneous premise that defendants hypothetically admitted all allegations of facts in the complaint by filing a motion to dismiss; (5) that, the evidence presented by the plaintiffs in their memorandum show that Ludo & LuYm Development Corporation is profitable and managed well; (6) that, receivership is not a remedy provided for in the Corporation Code but "Appraisal Right"; (7) that, there is an unresolved issue on the matter of the insufficient certification of non-forum shopping in the complaint, which under the Revised Rules of Court is mandatory for the court to dismiss; and (8) that, the Honorable Court issued the resolution ordering the receivership without the benefit of a hearing.

By individual communication[9] dated March 2, 2001, the RTC directed the appointed receivers, Mr. Luis A. Cañete and Atty. Edward U. Du, to immediately discharge their duties and functions with the powers granted under Section 6, Rule 59 of the Rules of Court upon taking of their oath and posting a bond of One Hundred Thousand Pesos (P100,000.00) each.

In their opposition[10] to the defendants' motion for reconsideration, the plaintiffs countered that the Resolution appointing receivers was issued conformably with the pertinent Rules. Too, their complaint clearly discussed the acts and grounds to support the appointment of receivers. That, the verification does not need to repeat the grounds of the complaint as there is nothing in the Rules that require it. Moreover, what is required to be verified is the complaint or petition and not a motion subsequently filed in furtherance of the original prayer. Yet another thing to take into account is the "settled principle that a motion to dismiss is based on the ground that the complaint does not state a cause of action, and the averments in the complaint are deemed hypothetically admitted and the inquiry is limited to whether or not they make out a case on which reliefs can be granted." (*Acuña v. Batac Producers Cooperative Association*, June 30, 1967, G.R. No. L-20333). Anent the remedy for dissenting stockholders like them whose holdings stand to be diluted by the malicious issuance of shares at less than fair value, the case of *Katzowitz v. Sidler*, *supra*, is the case in point. To stress, the reliefs they prayed for are based on equity. Finally, there is no basis for the dismissal of the complaint since the authority of plaintiff David Lu to sign on behalf of the other plaintiffs is a probative matter which should be raised as an affirmative defense by the defendants.

After seeking extension within which to file their Answer, the defendant-appellants finally filed one.

Answer with Compulsory Counterclaim[11]

The defendants admitted with qualification that the plaintiffs only own about 10.51% and not 10.53% of the total subscribed shares of the said defendant corporation. That, the truth of the matter is that the corporation is being managed by a board of directors duly elected by the stockholders of the corporation and the plaintiffs are equally and duly represented in the board. They deny that they are the absolute majority shareholders because their aggregate stockholding as of March 26, 1999 is about 70.77% only. That, to be accurate, the corporation was founded not only by brothers Paterno Lu Ym, Sr., Cayetano Lu Do and Cipriano Lu but also by Rosita Lim Lu Ym, Victor S. Tan and Alfred C. Bates. That, the principal purpose of the corporation is to purchase, acquire, hold, sell, lease, mortgage, or deal in and with real estate and/or immovable property of any kind.

The defendants averred that paragraph 5 in the complaint does not state the acts complained of. As to the percentage of ownership they allegedly own, the truth is that as of March 31, 1997, they only owned 28.14% and not 29.99% of the defendant corporation and this was increased to about 70.77% by reason of lawful acquisition of additional shares in the said corporation and the failure of the plaintiffs to exercise their legal right or their abandonment thereof.

As to the plaintiffs' shareholding in the defendant corporation, their shareholding as of March 31, 1997 was 27.81%, and decreased to 10.51% after they failed to exercise and/or willfully abandoned their right of pre-emption and for being mere, baseless speculations and conclusions.

That, the issuance of the subject 600,000 shares was done pursuant to the authority and power of the Board of Directors of the defendant corporation and its stockholders, and were offered pro rata to all the registered stockholders vis-a-vis their respective subscription consonant to their pre-emptive rights under the law.

That, the rest of the allegations are denied for being mere conclusions of law, without any basis in fact.

By their Special and Affirmative Defenses, the defendants alleged that the complaint failed to comply with the mandatory requirement of Section 5, Rule 7 of the 1997 Rules of Civil Procedure because it was signed by plaintiff David Lu only, and he has not shown to have been authorized by the rest of the plaintiffs.

That, the complaint does not state a cause of action against them, more specially against the private defendants, as to be entitled to the reliefs prayed for. Too, the complaint failed to specify the acts complained of.

That, the plaintiffs are guilty of forum-shopping because the subject matter of this case has already been brought to the attention of the Securities and Exchange Commission (SEC) before the filing of the case, which case was already considered closed by the SEC.

That, the plaintiffs were duly notified of the issuance of the unsubscribed and unissued shares of the defendant corporation and for them to exercise their pre-emptive rights to the said issuances but they failed to do so without any justifiable cause, within the given period to do so. For this, the plaintiffs have no reason to complain why they were not given dividends on the basis of the shares of stocks they own.

That, they acquired the subject shares thru legitimate means, and in accordance with law and pursuant to their right as stockholders of the defendant corporation which was actually accorded to the plaintiffs.

That, the complaint failed to join compulsory and indispensable parties because the reliefs prayed for by the plaintiffs would require joinder of parties who approved the corporate acts, aside from them.

That, the plaintiffs are estopped from raising questions on their present stockholdings with the defendant corporation because they knowingly and voluntarily received dividends and they willfully failed to exercise their right and they acquiesced to the ruling of the SEC. To add, plaintiff David Lu was a member of the board who unanimously passed and approved the corporate resolutions.

In their Compulsory Counterclaim, they prayed for moral damages, exemplary damages and attorney's fees.

The defendants filed a petition[12] for certiorari with the Court of Appeals impugning the Resolutions dated December 4, 2000 denying their motion to dismiss, the March 2, 2001 denying their motion for reconsideration of the December 4, 2000 resolution, the February 16, 2001 resolution granting the plaintiffs' urgent motion to appoint a receiver, and the twin Orders dated March 2, 2001 appointing two receivers for Ludo & LuYm Development Corporation. The petition was docketed as CA-G.R. CV. No. 64523.

On 20 December 2001, this Court promulgated a decision in CA-G.R. CV. No. 64523 .

CA-G.R. CV. NO. 64523[13]

The fallo of the December 20, 2001 decision reads,

“WHEREFORE, the petition being impressed with merit is hereby GRANTED. The challenged Order dated 04 December 2000, having been issued with grave abuse of discretion amounting to excess of jurisdiction, is hereby REVERSED, and the inceptive Complaint DISMISSED. The three (3) other impugned Orders are hereby ANNULLED and SET ASIDE.

SO ORDERED.”

By Resolution[14] dated 28 May 2002, this Court denied the plaintiff-appellees' motion for reconsideration and the defendant-appellants' motion for clarification.

Dissatisfied, the plaintiff-appellees filed a petition[15] for review on certiorari dated July 12, 2002 docketed as G.R. No. 153690.

By Order[16] dated 19 August 2002, the RTC:

“1.

Declares that the herein receivership continues in full force and effect and that all orders and resolutions in connection therewith issued by this Court should be respected by all persons under pain of contempt for

non-compliance;

2.

Reaffirms that receivers Edward Du and Luis Cañete have the plenary powers granted to receivers under Rule 59;

3.

Directs all tenants of LuDoDev to pay rentals to the aforementioned receivers or the agents duly authorized by them and not to Green Forest Corporation or any other entity not authorized by the receivers;

4.

Directs all tenants of LuDoDev who have paid rentals to Green Forest Corporation despite this receivership, to pay the same amounts to the receivers; and directs Green Forest Corporation to refund all the rentals paid to it by aforesaid tenants;

5.

Directs all depository banks of LuDoDev funds to turn them over to the receivers forthwith upon demand by said receivers;

6.

Reiterates its Order dated March 13, 2002,

a.)

Directing Rizal Commercial Banking Corporation or RCBC to furnish this Court, thru receivers Luis A. Cañete and Edward U. Du, the records, including photocopies (front and dorsal side) of the checks issued in favor of Ludo & LuYm Development Corporation but deposited to Account No. 1-445-48982-0 and Savings Account No. 1-445-48983-9, within twenty (20) days from receipt of this order. Likewise, the following tenants, namely: Abacus Properties, Inc., Equitable PCI Bank, Gaisano Bookstore, Inc., Jo's Chicken Inato, La Nueva Supermart, Mango Plaza Dev. Corp., Machinery & Merchandising, Rustan's Marketing Corp., Rustan's Supermarket, Inc., Washington Grocery, White House Grill (at the addresses mentioned in the aforesaid Order) are directed to furnish this court, thru the aforementioned receivers, copies of their cancelled checks (front and dorsal side) they issued as payments of rental for the months of December 2001, January 2002 and March 2002, within twenty (20) days from receipt of this Order.

b.)

Considering that the twenty (20) days aforementioned have already elapsed, a grace period for compliance of another five (5) days receipt of this new order is hereby granted.”(Emphasis supplied)

By Order[17] dated 4 October 2002, the RTC, inter alia, took cognizance of the case as one involving an

intra-corporate controversy and assumed jurisdiction over it, docketed the case as SRC Case No. 021-CEB, and would do what are required or necessary to be done.

On 11 October 2002[18] the RTC heard the witness-affiants[19] presented by the defendant-appellants to affirm the due execution of their individual affidavit and the attachments thereof.

On 17 October 2002, plaintiff-appellee David Lu filed a petition for Certiorari and Prohibition with Urgent Application for Temporary Restraining Order and Writ of Preliminary Injunction[20] against the then presiding Judge Hon. Judge Isaias Dicdican, etc., Paterno Lu Ym, Sr. and sons, and Ludo & LuYm Development Corporation docketed as CA-G.R. SP. No. 73383. The petition sought “to enjoin the respondent Judge from hearing private respondents' Manifestation and Motion dated October 7, 2002 and from receiving evidence or conducting any proceedings or discussion in relation to the receivership over the Ludo & LuYm Development Corporation.”[21]

At the hearing[22] on 18 October 2002, the RTC issued an Order, reading as follows:

“When this case was called for continuation of hearing today on defendants' motion to lift the order issued in this case appointing receivers, in pursuance with the order issued in this case on October 11, 2002, the plaintiffs, through their counsel, chose not to cross-examine the witnesses for the defendant-movants who were supposed to be cross-examined today. The plaintiffs also did not [submit] a written opposition to the motion being heard by the Court, contrary to the undertaking made in court by their counsel (Atty. Mark Tolentino) on October 11, 2002. In view of these circumstances, this Court has to consider the aforementioned as now submitted to it for resolution.

Thus, the said motion is hereby considered by the Court as submitted to it for resolution.

IT IS SO ORDERED.”

On 27 February 2003, this Court promulgated a decision in CA-G.R. CV. No. 73383 granting plaintiff-appellee David Lu's petition.

The Ruling in CA-G.R. SP. NO. 73383[23]

“WHEREFORE, the instant Petition for Certiorari and Prohibition with Urgent Application for Temporary Restraining Order and Writ of Preliminary Injunction is hereby GRANTED. Public respondent is hereby ordered to desist from conducting any proceeding relating to the receivership over Lu Do and Lu Ym Development Corporation.

SO ORDERED.”

AMENDED COMPLAINT[24] dated 24 March 2003

The plaintiffs repleaded the main allegations in the original complaint. They vehemently re-stated that “allegedly pursuant to a board resolution passed on November 18, 1997, the defendants Paterno Lu Ym, Sr. and children issued to themselves and their spouses, children and holding companies the subject 600,000 unsubscribed and unissued shares at par value, or, valued at one-eighteenth of the real value of each share. In line with the New York case of Katzowitz v. Sidler, supra, this acts should not be countenanced as it runs afoul to fiduciary trust reposed on the directors, particularly defendants Paterno Lu Ym. Sr. and children. Too, these acts constitute abuse of rights and unjust enrichment.

Again, the plaintiffs alleged that defendant Paterno Lu Ym, Sr. and his children entered into self-dealing transactions which are grossly disadvantageous to the defendant corporation and minority shareholders.

Likewise, they re-alleged that there is imminent danger of dissipation of the defendant corporation's funds.

For these acts, the plaintiffs sought the declaration of nullity of the subject shares and dissolution of the defendant corporation, and appointment of a management committee.

On 21 April 2003, defendant-appellants filed a petition for review[25] with the Supreme Court assailing the February 27, 2003 decision of this Court promulgated in CA-G.R. SP. No. 73383, docketed as G.R. No. 157381.

By its Resolution[26] dated 18 July 2003, the RTC admitted the Amended Complaint and directed the defendant-appellants to file their Answer in accordance with, and within the reglementary period under, the Interim Rules.

By its Order[27] dated 10 September 2003, the RTC denied the defendant-appellants' Urgent Ex-parte Motion on the following grounds: (1) that the motion has no notice of hearing; and (2) that the motion is a prohibited pleading, it being a motion for reconsideration/extension of time in disguise.

By its Order[28] dated 26 January 2004, the RTC, inter alia, denied the defendant-appellants' motion to dismiss for being a prohibited pleading under the Rules for Intracorporate Controversies (A.M. 01-3-04-80), stating that:

“After review of the pleadings, affidavits and other evidence submitted by the parties, as well as the brief submitted, it appears that some issues may not be contested or may be resolved without need of further evidence. To assist the court on the matter, the court hereby orders the parties to file simultaneously their respective memoranda on their cases within a non-extendible period of twenty days from receipt of this order.”

In the same Order, the RTC suspended the pre-trial.

The defendant-appellants filed an Urgent Motion,[29] and therein, averred that:

“5.

In the alternative, without prejudice to the jurisdictional concern of the defendants expressed in the preceding paragraph, defendants respectfully bring to the attention of this Honorable Court that it failed to specify which issues may not be contested or may be resolved without further evidence, i.e., the matters that the court would like assistance with and which the parties' memoranda should address.

6.

It is respectfully submitted that without such clarifying information and given the diverse issues that have sprouted from this case, the parties would find it impossible to adequately comply with the order of this Court requiring them to submit memoranda. Further, the parties would also not know what issues shall remain to be litigated after the suspension of the pre-trial is lifted.

7.

At the same time, it should be understood that since pre-trial was merely suspended, for this case to continue, pre-trial will have to be completed because pre-trial is mandatory and no decision can be rendered without a proper pre-trial.

8.

On the other hand, no substantial action can emanate from this Honorable Court at this time in view of the standing injunction issued by the Court of Appeals in this case.

9.

In the meantime, defendants respectfully manifest that they intend to elevate to the appropriate higher court the Orders dated January 22 and 26, 2004 on serious substantive and procedural grounds, and defendants would like to be given the opportunity to do so before this Honorable Court continues with any further proceedings in this case.”

By its Order[30] dated 17 February 2004, the RTC granted the defendant-appellants' motion for re-raffling, and directed the branch clerk of court, subject to the approval of the Executive Judge, to return the record of the case to the Office of the Clerk of Court for re-raffling among the other branches.

By its Order[31] dated 17 February 2004, the Office of the Executive Judge approved to re-raffle the instant complaint.

On 19 February 2004, plaintiff-appellee David Lu filed a Motion[32] to recall transmittal/return of case records.

By its Order[33] dated 20 February 2004, the RTC canceled the hearing scheduled on February 23, 2004 of the plaintiffs' Motion to Recall Transmittal/Return of Case Records.

On February 20, 2004, the defendant-appellants filed a motion[34] to amend the February 20, 2004 Order on the ground that they have not yet received the plaintiff-appellees' motion[35] to recall transmittal/return of case records. They added that they cannot possibly file their comment within the period specified therein because they have not yet received a copy of the said motion.

On 1 March 2004, the RTC issued the assailed Decision.

THE RULING[36] OF THE REGIONAL TRIAL COURT

The fallo reads, to wit:

“WHEREFORE

Order

Ruling No. 1

A Management Committee to manage Ludo and LuYm Development Corporation is hereby created under Section 6(d) of PD 902-A, as amended.

x x x x

Ruling No. 2

The defendants are hereby divested of the 600,000 shares they issued to themselves and related parties pursuant to the LuDoDev board resolution of November 18, 1997, and said shares are hereby cancelled. The divestment and cancellation of the 600,00 shares are deemed executed by virtue of this order without need for the surrender of the stock certificates or any further documentation or act, as authorized by Rule 39, Sec. 10(a) of the Rules of Court, which says,

x x x x

Ruling No. 3

Pursuant to the powers vested in the court by Sec. 6(d) of PD 602-A (as amended) and in light of defendants' brazen 'in-your-face' continuing and unrepentant fraud and plunder, the court hereby DISSOLVES Ludo and LuYm Development Corporation. The management committee is hereby directed to LIQUIDATE the corporation under court supervision. The P60 Million paid by defendants and related parties for the 600,000

cancelled shares shall be returned to them after payment of corporate debts.

Ruling No. 4

Pursuant to the powers vested in it by Section 6(d) of PD 902-A (as amended), the management committee is hereby directed to (a) review all transactions and actions of the previous management and board of directors, (b) overrule or revoke those that have been detrimental to the corporation, (c) cause through legal and financial audits of Ludo and LuYm Development Corporation, and (d) file appropriate civil and/or criminal cases to recover corporate assets malversed or misappropriated.

Ruling No. 5

The provisions of Rule 1, Sec. 4 of the Intra-corporate Rules shall be observed. It says,

'x x x x.'

x x x x”

On 8 March 2004, the defendant-appellants filed an Urgent Motion[37] praying that the March 1, 2004 decision be declared null and void for having been issued without jurisdiction and in violation of defendants' right to due process and thereafter, to re-raffle this case to other RTC stations. The defendants, likewise, pray that in the interim or during the pendency of the instant motion, an order be immediately issued directing the parties to retain status quo prior to the issuance of the March 1, 2004 decision.

On 12 March 2004, the defendant-appellants notified[38] the court that they are withdrawing their “Urgent Motion” filed on 8 March 2004 seeking to set aside the March 1, 2004 decision and to order the re-raffling of the case to other RTC stations considering that the plaintiff-appellees have not yet filed their comment thereto and that, due to supervening events, they are no longer interested in pursuing the said urgent motion.

On 16 March 2004, the defendant-appellants filed their Notice of Appeal[39] on the ground that the March 1, 2004 decision is contrary to the evidence adduced, the law and applicable jurisprudence. The appeal filed under Rule 41 of the 1997 Rules of Civil Procedure, as amended, was docketed as CA-G.R. CV. NO. 81153.

On 30 March 2004, the defendant-appellants applied[40] for a Temporary Restraining Order and/or Writ of Preliminary Injunction to enjoin the RTC, the plaintiff-appellees the Management Committee and/or their representatives from executing the assailed decision pending final resolution of the instant appeal upon posting of an injunction bond, which was opposed by the plaintiff-appellees. On the same date, the defendant-appellants filed an Urgent Motion[41] with the RTC to disqualify the nominees to the management committee and, in any event, to increase the bond.

To complete the management committee, the defendant-appellants, via a Manifestation,[42] nominated Mr. Sabino R. Dapat, adding that the said nomination is without prejudice to their right to appeal and/or contest the March 1, 2004 decision.

By its Order[43] dated 2 April 2004, the RTC directed the plaintiff-appellees to file their comment on the defendant-appellants' Urgent Motion, within five (5) days from notice.

By Resolution[44] dated 28 June 2004, this Court issued a temporary restraining order for a period of sixty (60) days to enjoin the RTC, plaintiff-appellees, the Management Committee and/or their representatives from enforcing the assailed decision or from implementing the writ of execution.

By Resolution[45] dated 6 September 2004, this court, inter alia, denied the defendant-appellants' application for a writ of preliminary injunction and, prohibited the RTC from acting further in the case since the original records have already been transmitted to this court.

By Resolution[46] dated 25 November 2004, this Court required the plaintiff-appellees to comment on the defendant-appellants' Motion for Reconsideration of this Court's September 6, 2004 Resolution.

By Resolution[47] dated 30 June 2005, this Court set the case for oral arguments.

By Resolution[48] dated 31 August 2005, this Court ordered the mediation to continue.

By Resolution[49] dated 10 November 2005, this Court considered all pending motions submitted for resolution.

After failure of the parties to come up with an acceptable compromise agreement, this court, by its Resolution[50] dated 8 December 2005, denied the defendant-appellants' motion for reconsideration of the denial of their plea for injunctive relief and directed the Judicial Records Division (JRD) to immediately issue the appropriate notice/s requiring the filing of the parties' respective brief.

Dissatisfied, the defendant-appellants, on 11 January 2006, filed a petition[51] for certiorari, prohibition and mandamus with prayer for the issuance of a temporary restraining order and/or writ of preliminary injunction assailing the September 6, 2004 and December 8, 2004 resolutions with the Supreme Court docketed as G.R. No. 170889 entitled *John Lu Ym, et. al. v. CA, et. al.*

By Resolution[52] dated 23 January 2006, the Supreme Court in G.R. No. 170889 granted the defendant-appellants' plea for a temporary restraining order. Accordingly, a status quo order[53] was issued reading as follows:

“NOW, THEREFORE, you (respondents), your officers, agents, representatives, and/or persons acting upon your orders or, in your place or stead, are hereby ENJOINED from implementing the resolutions dated September 6, 2004 and December 8, 2005 of the Court of Appeals, Cebu City both issued in CA GR CV No. 81163 entitled “*Paterno Lu Ym, Sr., et. al. vs. David Lu, et.al.*” which denied the application of herein petitioners (defendant-appellants below) for the issuance of a writ of preliminary injunction and/or temporary restraining order to restrain herein respondents (plaintiff-appellees below), the management committee and its agents from implementing the decision dated March 1, 2004 of the Regional Trial Court, Br. 12. Cebu City in SRC Case No. 021-CEB entitled “*David Lu vs. Paterno Lu Ym, Sr., et al.*” which, among others, ordered the dissolution of the LuYm Development Corporation and created a management committee directed to liquidate the corporation under court supervision; and ORDERED, COMMANDED and DIRECTED to maintain the status quo effective today and until further orders from this Court.

x x x x.” (Emphasis supplied)

Expectedly, the plaintiff-appellees moved[54] to reconsider and to lift the status quo order issued by the Supreme Court.

The Supreme Court consolidated the petitions filed in G.R. No. 153690 (CA-G.R. SP. No. 64523), G.R. No. 157381 (CA-G.R. SP. NO. 73383) and G.R. No. 170889 (CA-G.R. SP. NO. 81163 assailing the resolutions dated September 6, 2004 and December 8, 2005 of this Court).

By decision[55] dated 26 August 2008, the Supreme Court disposed the consolidated petitions in this wise:

“WHEREFORE, premises considered, the petitions in G.R. Nos. 153690 and 157381 are DENIED for being moot and academic; while the petition in G.R. No. 170889 is DISMISSED for lack of merit. Consequently, the Status Quo Order dated January 23, 2006 is hereby LIFTED.

The Court of Appeals is DIRECTED to proceed with CA-G.R. CV No. 81163 and to resolve the same with dispatch.

SO ORDERED.”

On reconsideration, the Supreme Court by a majority vote reversed its August 26, 2008 decision, by Resolution[56] dated 4 August 2009, thus -

“WHEREFORE, in view of the foregoing, the Motion for Reconsideration filed by John Lu Ym and Ludo & LuYm Development Corporation is GRANTED. The Decision of this Court dated August 26, 2008 is RECONSIDERED and SET ASIDE. The complaint in SRC Case No. 021-CEB, now on appeal with the Court of Appeals in CA G.R. CV No. 81163, is DISMISSED.

All interlocutory matters challenged in these consolidated petitions are DENIED for being moot and academic.

SO ORDERED.”[57]

with Justice Conchita Carpio-Morales dissenting.

By Resolution[58] dated 15 February 2011, the Supreme Court in G.R. No. 153690 , G.R. No. 157381 (CA-G.R SP. NO. 73383) and G.R. No. 170889 (CA-G.R. SP. NO. 81163 assailing the resolutions dated September 6, 2004 and December 8, 2005 of this Court), the majority of the Supreme Court en banc reversed and set aside the August 4, 2009 Resolution and reinstated the August 26, 2008 decision with Justice Nachurra dissenting and Justices Corona and Leonardo—De Castro joining the dissent. Viz -

“In G.R. No. 153690[59] wherein David, et al. assailed the appellate court's resolutions dismissing their complaint for its incomplete signatory in the certificate of non-forum shopping and consequently annulling the placing of the subject corporation under receivership pendente lite, the Court, by Decision of August 26, 2008, found the issue to have been mooted by the admission by the trial court of David et al.'s Amended Complaint, filed by them pursuant to the trial court's order to conform to the requirements of the Interim Rules of Procedure Governing Intra-Corporate Controversies.

Since an amended pleading supersedes the pleading that it amends, the original complaint of David, et al. was deemed withdrawn from the records.

The Court noted in G.R. No. 153690 that both parties admitted the mootness of the issue and that the trial court had already rendered a decision on the merits of the case. It added that the Amended Complaint stands since Lu Ym father and sons availed of an improper mode (via an Urgent Motion filed with this Court) to assail the admission of the Amended Complaint.

In G.R. No. 157381[60] wherein Lu Ym father and sons challenged the appellate court's resolution restraining the trial court from proceeding with their motion to lift the receivership order which was filed during the pendency of G.R. No. 153690, the Court, by Decision of August 26, 2008 resolved that the issue was mooted by the amendment of the complaint and by the trial court's decision on the merits. The motion having been filed ancillary to the main action, which main action was already decided on the merits by the trial court, the Court held that there was nothing more to enjoin.

G.R. No. 170889[61] involved the denial by the appellate court of Lu Ym father and sons' application in CA-G.R. CV No. 81163 for a writ of preliminary injunction. By August 26, 2008 Decision, the Court dismissed the petition after finding no merit on their argument — which they raised for the first time in their motion for reconsideration before the appellate court — of lack of jurisdiction for non-payment of the correct RTC docket fees.

As reflected early on, the Court, in a turnaround, by Resolution of August 4, 2009, reconsidered its position on the matter of docket fees. It ruled that the trial court did not acquire jurisdiction over the case for David Lu, et al.'s failure to pay the correct docket fees, hence, all interlocutory matters and incidents subject of the present petitions must consequently be denied.” (Underscoring supplied)

The decretal portion of the Supreme Court's ruling in these three consolidated petitions, reads,

WHEREFORE, the assailed Resolutions of August 4, 2009 and September 23, 2009 are REVERSED and SET ASIDE. The Court's Decision of August 26, 2008 is REINSTATED.

The Court of Appeals is DIRECTED to resume the proceedings and resolve the remaining issues with utmost dispatch in CA-G.R. CV No. 81163.

By Resolution[62] dated 24 April 2012, the Supreme Court noted without action the following: (a) Letter dated March 23, 2012 filed by Esteban Y. Gochan, Jr.; (b) Motion for Leave to File and Admit Urgent Motion to Lift Entry of Judgment dated March 23, 2012 filed by counsel for petitioners John Lu Ym and Ludo and LuYm Development Corporation; and (c) Aforesaid Urgent Motion to Lift Entry of Judgment.”

On 03 May 2012, the defendant-appellants filed an urgent motion[63] with a plea for an injunctive writ and/or temporary restraining order to enjoin the RTC, the plaintiff-appellee, the Management Committee and/or their representatives from executing the March 1, 2004 decision pending final resolution of the instant appeal.

By Resolution[64] dated 4 May 2012, this Court directed the parties to file their respective brief and in the meanwhile, held in abeyance its action pending comment from the plaintiff-appellees to the defendant-appellants' urgent motion.

Via a manifestation[65] filed on 5 May 2012, the defendant-appellants prayed for the resolution of their urgent motion for the issuance of a TRO and/or writ of preliminary injunction reasoning that the management committee is illegally enforcing its own whims and taking the law into its own hands, cut off the electricity of some of the corporation's tenants, and barricaded the parking lots at the Mango Square Mall. That, if these acts be allowed to continue, they would be suffering untold damage and continue to suffer irreparable damage.

By Resolution[66] dated 21 May 2012, this Court, while awaiting the plaintiff-appellees' comment, set the pending incidents for hearing.

Of course, the plaintiff-appellees opposed[67] the defendant-appellants' motion for the issuance of a TRO and/or writ of preliminary injunction reasoning that: (1) The motion is a brazen and transparent attempt by the defendant-appellants to have this Court overturn the final and executory decision[68] (and Resolution[69] rendered en banc) of the Supreme Court and to have this Court grant the very same injunctive reliefs that the Supreme Court already ruled that they do not have. The TRO would allow the defendant-appellants to further dissipate the assets of the corporation to the grave and irreparable prejudice of plaintiff-appellee David Lu. (2) The defendant-appellants will not suffer any grave and irreparable injury in the event that the TRO is denied since their interests are being protected under the status quo where the MANCOM is in control of the corporation.

On 20 June 2012, the defendant-appellants John L. Lu Ym and Ludo & LuYm Development Corporation filed their appeal brief.[70]

Assignment of Errors for Defendant-Appellants John L.
Lu Ym and Ludo & LuYm Development Corporation

“I.

The court a quo acting as a Special Commercial Court (SCC) erred in not dismissing the case outright for lack of jurisdiction over the subject matter of the complaint.

I.a.

There is no intra-corporate relationship between the parties for the case to fall within the jurisdiction of the Special Commercial Court.

I.b.

There is no allegation of fraud for the case to fall within the jurisdiction of the Special Commercial Court.

I.c.

The controversy does not involve the regulation of the corporation for the case to be classified as an intra-corporate dispute.

I.d.

The nature of the controversy in the original complaint is civil in character and does not involve intra-corporate dispute.

I.e.

The Special Commercial Court has no jurisdiction to order the dissolution of the corporation.

I.f.

In the absence of jurisdiction, no amendment of the complaint is allowed and the proceedings in the Special Commercial Court are null and void.

I.g.

Defendant-appellants are not guilty of estoppel that would bar them from assailing the jurisdiction of the Special Commercial Court. Neither will estoppel act to confer jurisdiction on the Special Commercial Court.

II.

The court a quo erred in not dismissing the case considering that plaintiff-appellee is not the proper party to institute the action.

III.

Granting in arguendo that plaintiff-appellee has the legal personality to file the action, still the court a quo erred in annulling defendant-appellants' subscription of the 600,000 unissued shares of stocks.

IV.

The court a quo erred in evaluating the factual circumstances of the case.

V.

The court a quo committed various procedural lapses in the conduct of the proceedings of the case that would constitute a denial of defendant-appellants' right to due process.

VI.

The court a quo seriously erred in creating a management committee (MANCOM) for lack of jurisdiction and in the absence of sufficient evidence to warrant its creation.

The Management Committee (MANCOM) has been rendered functus officio upon the expiration of the corporate term and by the appointment of the trustees.”[71]

On 28 June 2012, this Court issued a Resolution,[72] the dispositive portion whereof reads,

“In view of the foregoing, We resolve to DENY defendants-appellants' Urgent Motion for the application of a temporary restraining order and/or writ of preliminary injunction filed on 03 May 2012.

Meanwhile, the Court resolves to: a) GRANT the Ex-parte Motion for Extension of Time to File Comment/Opposition filed by the Management Committee, through counsel on 14 June 2012 praying for additional period of fifteen (15) days from 14 June 2012 within which to file Comment/Opposition to appellants-movants' Very Urgent Reiterative Motion to Remove the Members of the Management Committee; b) NOTE the Manifestation and Motion filed by defendant-appellants John Lu Ym and LLDC that they will be excused from filing the required Comment to the Very Urgent Reiterative Motion until after the Court shall have resolved the Urgent Motion for the Issuance of Injunction; and c) NOTE and ADMIT the Brief for the Defendant-Appellants John Lu Ym and LLDC filed on 20 June 2012.

SO ORDERED.”

A Notice of Death[73] dated 25 July 2012 was filed by the counsel for defendant-appellant Paterno Lu Ym, Sr., to inform the court of the death of the said defendant-appellant on June 26, 2012.

The law firm Fernandez Law entered[74] its appearance as collaborating counsel for the plaintiff-appellees.

On August 9, 2012, the plaintiff-appellees filed a Motion for Leave to Withdraw Complaint.[75] In the said motion, the plaintiff-appellees averred, among others, that,

“x x x x

- 3. Plaintiffs-appellees have been exerting earnest efforts to finally resolve and put an end to the controversy between the parties which includes the termination of this case.

- 4. As a gesture of good faith, plaintiffs-appellees respectfully beg leave from this Honorable Court that they be allowed to withdraw their complaint as a significant step in finally resolving the entire controversy between the parties.

- 5. In view of the recent developments, plaintiffs-appellees sincerely believe that allowing this case to continue further will only breed animosity and may prove to be a hindrance to a final resolution of the conflict.

x x x x.”

In their Comment[76] to the plaintiff-appellees' Motion for Leave to Withdraw Complaint, defendant-appellants John L. Lu Ym and Ludo & LuYm Development Corporation stated that they do not object to the granting of the said motion for leave as it is allowed under the law and as a means to finally put an end to the instant case.

By way of Manifestation[77] (On Motion for Leave to File and Admit Motion and Motion for the Release of Funds to LuDoDev), plaintiff-appellees interposed no objection to the motions filed by the defendant-appellant Ludo & LuYm Development Corporation. They added, however, that this does not mean that they are waiving or renouncing the validity of the creation of the Management Committee (MANCOM), which issue they leave to the sound discretion of this Court.

On the other hand, the Management Committee (MANCOM) of the defendant corporation, thru counsel, by way of Manifestation[78] stated that they do not object to this Court's grant of the motions filed by the defendant-appellants as long as the funds that may be released to the defendant-appellant corporation be truly spent for the legitimate expenses of the corporation and shall be fully accounted for. The MANCOM added that its Manifestation is not a recognition of the authority of the alleged trustee of the defendant-corporation as it does not in any manner waive the validity of its (MANCOM's) nor does it abdicate its duties and powers.

On 30 May 2012, this Court heard[79] the oral arguments on the motions and/or manifestations filed by the defendant-appellants.

On 10 September 2012, defendant-appellants Kelly L. Lu Ym, Victor L. Lu Ym and Paterno L. Lu Ym, Jr. filed their appeal brief.[80]

Assignment of Errors for the defendant-appellants Paterno
Lu Ym, Sr., Paterno Lu Ym, Jr., Victor Lu Ym, John Lu Ym,
Kelly Lu Ym and Ludo & LuYm Development Corporation

“I.

With all due respect, the court a quo committed serious reversible error in failing to dismiss the plaintiff-appellee's complaint (To Conform to the Interim Rules on Intra-corporate Controversies) despite its clear failure to comply with Section 1, Rule 8 of the Interim Rule of Procedure for Intra-corporate Controversies.

II.

With all due respect, the court a quo committed serious reversible error in dissolving LudoDev when it has no jurisdiction to do so because Section 121 of the Corporation Code clearly vests such power with the Securities and Exchange Commission.

III.

With all due respect, the court a quo committed serious reversible error in rendering the March 1, 2004 Decision without any evidence in support thereof.

IV.

With all due respect, the court a quo committed serious reversible error in citing case law to supposedly support the March 1, 2004 decision when the cited cases were either irrelevant, inapplicable or merely highlighted the gross error committed by the court a quo.”

In a letter[81] addressed to the Assistant Clerk of Court and the Raffle Committee dated September 3, 2012, Justice Ramon Paul L. Hernando inhibited from participating further in the instant case.

On 18 October 2012, the defendant-appellants Kelly L. Lu Ym, Victor Lu Ym and Paterno L. Lu Ym filed a “Motion to Remand Case to the Trial Court for Accounting by the Management Committee and Trustees and for the Liquidation of the Assets of Ludo & LuYm Development Corporation”[82] In the same motion, said defendant-appellants likewise prayed to grant the plaintiff-appellees' motion to withdraw their complaint.

By Resolution[83] dated 25 October 2012, this Court held, that,

“After examination of all the pleadings presented, it would give the Court the impression that the parties are amenable to the dismissal of the complaint. However, the Court holds in abeyance the resolution of the said prayers for the dismissal of the complaint because the said motions are subject to several conditions which the Court believes can best be threshed out through a compromise agreement. The Court hereby **REQUIRES** the

parties and their counsels to thresh out these conditions in the negotiating table and to submit a compromise agreement, if they could reach one, setting therein all the conditions that are acceptable to the parties.

However, with regard to the Motion for the Release of Funds to LuDoDev, this Court feels that the same may be included in the compromise agreement if the parties are really sincere in their desire to settle this case and the litigation as soon as possible.

SO ORDERED.”

Both the Management Committee and plaintiff-appellees filed their respective Comment[84] to the Motion to Remand Case for Accounting and Liquidation of Assets. The management committee averred that once plaintiff-appellee's motion to withdraw complaint is approved by this Court, the instant case would be considered closed and terminated. Thus, without any case to speak of, the RTC would no longer have any jurisdiction and authority to act on the defendant-appellants' motion for accounting. On the other hand, the plaintiff-appellees posited that: (1) once their motion to withdraw complaint will be granted the only act left to be done by the RTC is to resolve the defendant-appellants' counterclaim; (2) the accounting and liquidation of the assets of the corporation were not among the counterclaims prayed for by the defendant-appellants; and (3) the proper action should have been to file a separate complaint for accounting and liquidation of assets and not to seek to remand the case.

On 19 November 2012, the plaintiff-appellees filed a “Motion to Partially Reconsider the Omnibus Resolution dated 25 October 2012”[85] on the following grounds, to wit: (1) that the motion for leave to withdraw complaint was not subject to any condition whatsoever; (2) that there exists no bar to the dismissal of the complaint because the other parties have manifested their wholehearted acquiescence to the withdrawal of the complaint; and (3) that the dismissal of the complaint should not be made to depend on the supposed conditions raised by the other parties.

On 23 November 2012, defendant-appellants John L. Lu Ym and Ludo & LuYm Development Corporation (LLDC) filed their motion for reconsideration[86] to the Omnibus Resolution dated October 25, 2012. Therein, they prayed that the said omnibus resolution be reconsidered and a new be issued granting the plaintiff-appellees' motion to withdraw complaint and to grant the motion for release of funds to LuDoDev.

On 7 December 2012, defendant-appellants Paterno Lu Ym, Sr. and sons filed an Extremely Urgent Application/Motion for Temporary Restraining Order (TRO) and Writ of Preliminary Injunction.[87] In the said motion, the aforementioned defendant-appellants alleged that there has been a pattern of brazen and scheming illegal and fraudulent acts and maneuvering by plaintiff-appellees David Lu, John Lu Ym, trustee Timothy Ryan S. Lu Ym and Douglas Lu Ym done behind the back of this court while this case is still pending, specifically the transfer of nine of the thirty-two parcels of land assigned to plaintiff-appellee David Lu and Douglas Lu Ym and their dummy corporation. That, these acts are clearly designed to defeat their rights and those of the other stockholders who are just waiting for the final resolution of this case. They added that plaintiff-appellee David Lu may have been thinking that their illegal and fraudulent acts may be put beyond the reach of this court if the instant complaint be ordered withdrawn. That, with the expiration of the corporation's life on 26 September 2006, it behooves this court to order the liquidation of the corporate assets after the shares of each stockholder is determined. That, with the liquidating corporate assets being raided by plaintiff-appellees, trustee Timothy Ryan Lu Ym and Douglas Lu Ym, there is no other plain, speedy and adequate remedy in the course of law other than to directly seek redress with this court and to pray for injunctive remedies of TRO and writ of preliminary injunction. Attached to this urgent application/motion are: copy of Stockholders' Resolution[88] dated 29 May 2012 conveying and assigning to plaintiff-appellee David Lu and Douglas Lu Ym certain real properties for and in consideration of all of the investments, shareholdings, collectibles, proprietary interests and financial claims of

the afore-named, various deeds of conveyances in favor of plaintiff-appellee David Lu and Douglas Lu Ym; various Certificate Authorizing Registration (CAR)[89]; various cancelled certificates of title; and Certificate of Incorporation of Dunes & Eagle Land Development Corporation.

On 10 December 2012, defendant-appellant Ludo & LuYm Corporation filed a Motion[90] (with leave of court) to direct depository banks to turn over LuDoDev Funds.

On 4 January 2013, the plaintiff-appellees filed their Opposition[91] to the extremely urgent application/motion for temporary restraining order and writ of preliminary injunction on the following grounds, to wit: (1) this Court is devoid of jurisdiction to rule upon or restrain the alleged illegal and fraudulent acts of the plaintiff-appellee David Lu, Douglas Lu Ym, John Lu Ym and trustee, Timothy Ryan S. Lu Ym because these were not raised in the instant appeal; (2) that the defendant-appellants are not the real parties-in-interest to assail the alleged fraudulent and illegal acts; and (3) that the defendant-appellants failed to establish the essential requisites to warrant the issuance of the injunctive writ.

On 1 February 2013, Ludo & LuYm Foundation, Inc, Crane Holdings Corporation and Maria Elvira Kaye G. Lu Ym filed an “Urgent Motion for Leave to Intervene and to File the Attached Motion-in-Intervention and Opposition”[92] praying that they be given leave to file the attached motion-in-intervention with opposition-in-intervention.[93]

On 4 February 2013, defendant-appellants Kelly L. Lu Ym, Victor L. Lu Ym and Paterno L. Lu Ym filed a Supplement to Extremely Urgent Application/Motion for Temporary Restraining Order (TRO) and Writ of Preliminary Injunction.[94] Therein, they averred that they just learned that all but four (4) of the real properties assigned to plaintiff-appellee David Lu and Douglas Lu Ym have already been transferred and issued certificates of title in their names, and subsequently to their dummy corporations.

By Manifestation,[95] the Management Committee alleged that the application for the issuance of a TRO and/or writ of preliminary injunction filed by defendant-appellants Paterno Lu Ym, Sr. and sons is procedurally infirmed. They added that the said defendant-appellants did not come to court with clean hands and that, in recognizing the authority of the ManCom, these defendant-appellants are now playing deceptive games and are engaging in double talk.

On 4 April 2013, plaintiff-appellee David Lu filed his brief.

Brief[96] for the Plaintiff-Appellee David Lu

Onset, plaintiff-appellee David Lu manifested that the submission of his brief without prejudice and is not in any way a waiver of his Motion for Leave to Withdraw Complaint dated August 8, 2012 and his Motion to Partially Reconsider the Omnibus Resolution dated October 25, 2012.

In brief, plaintiff-appellee David Lu alleges the following:

“(1)

That, the RTC was vested with and correctly exercised its jurisdiction over this case citing the case of David Lu vs. Paterno Lu Ym, Sr. (G.R. Nos. 153690, 157381, and 170889). That, no less that the Supreme Court has categorically ruled that this case is intra-corporate in nature. That, Lu Ym father and sons and LLDC are already barred by estopped from raising the alleged lack of jurisdiction of the RTC 12-Cebu City because they have repeatedly invoked the trial court's jurisdiction and have even insisted without fail that this case is an intra-corporate controversy. Finally, the law and jurisprudence vests jurisdiction upon the RTC 12-Cebu City to decide the case.

(2)

That, the RTC did not err in holding that he is the real party-in-interest because he has lodged this case as a stockholder of LLDC.

(3)

That, the RTC correctly declared the nullity of the issuance of the 600,00 LLDC shares in favor of Lu Ym father and sons and ordered the dissolution and liquidation of LLDC.

(4)

That, the RTC was correct in appointing a MANCOM to take over LLDC because the preservation of LLDC's assets was paramount.

(5)

That, the RTC did not infringe on the constitutional right to due process of Lu Ym father and sons and LLDC when it rendered its decision because the latter, by their own volition, chose not to participate and protect their rights in this case.”

On 25 April 2013, this Court issued an Omnibus Resolution,[97] the fallo of which reads,

“WHEREFORE, the Court hereby resolves to DENY the following motions:

- Plaintiffs-Appellees' Motion for Leave to Withdraw Complaint;
- Defendant-Appellant Ludo & LuYm Development Corporation (LudoDev)'s Motion for Leave to File and Admit Motion (For the Release of Funds to LudoDev) as well as the Motion (For the Release of Funds to LuDoDev);
- Plaintiffs-Appellees' Motion to Partially Reconsider the Omnibus Resolution dated 25 October 2012;
- Defendants-Appellants John Lu Ym and Ludo & LuYm Development Corporation's Motion for Reconsideration (To the Omnibus Resolution dated 25 October 2012);
- Defendants-Appellants John Lu Ym and Ludo & LuYm Development Corporation's Motion for Early Resolution (seeking an early resolution of their motion for release of funds and the motion to withdraw complaint)
- Defendants-Appellants Kelly Lu Ym and Victor Lu Ym and Paterno Lu Ym Jr.'s Motion to Remand Case to the Trial Court for Accounting by the Management Committee and Trustee and for the Liquidation of the Assets of Ludo & LuYm Development Corporation;
- Ludo & LuYm Foundation, Inc., Crane Holdings Corporation, and Maria Elvira Kaye G. Lu Ym's Urgent Motion for Leave to Intervene and Motion-in-Intervention and Opposition; and
- Defendants-Appellants John Lu Ym and Ludo & LuYm Development Corporation's Motion for Partial Reconsideration of the 15 February 2013 Resolution).

Further, the Court hereby issues a Writ of Preliminary Injunction enjoining and restraining Messrs. David Lu, John Lu Ym, Timothy Ryan S. Lu Ym, and Douglas Lu Ym, their agents, representatives or assignees or any person acting for and in their behalf or under their direction from disposing, distributing and/or transferring any of the remaining properties still in the name of Ludo & LuYm Development Corporation. This Writ of Preliminary Injunction also enjoins Messrs. David Lu, John Lu Ym, Timothy Ryan S. Lu Ym, and Douglas Lu Ym, their agents, representatives or assignees or any person acting for and in their behalf or under their direction from

executing and signing any document, deed or instrument that disposes, distributes and/or transfers any of the remaining properties still in the name of Ludo & LuYm Development Corporation. The Movants are required to post an injunctive bond in the amount of Ten Million Pesos (Php100,000,000.00) within ten (10) days from notice hereof.

Meanwhile, the Brief for the Plaintiff-Appellee Ex Abundanti Cautela filed by Plaintiff-Appellee David Lu (DAVID) on 04 April 2013 in compliance with the Resolution dated 15 February 2013 is hereby NOTED and ADMITTED.

SO ORDERED.”

Accordingly, a writ of preliminary injunction[98] was issued pursuant to this court's 25 April 2013 Resolution.

On 6 May 2013, defendant-appellants John L. Lu Ym and Ludo & LuYm Development Corporation filed their Motion for Partial Reconsideration[99] of the Omnibus Resolution dated April 25, 2013. On even date, they filed their Reply Brief.[100]

On 9 May 2013, plaintiff-appellee David Lu filed a motion for partial reconsideration[101] of the Omnibus Resolution dated 25 April 2013.

On 13 May 2013, defendant-appellant, thru counsel, filed its Motion for Partial Reconsideration of the April 25, 2013 Omnibus Resolution[102] on the ground that this Court did not give any clear-cut reason denying its motion to release funds considering that the parties did not object thereto.

On 14 May 2013, Ludo & LuYm Foundation, Inc., Crane Holdings Corporation and Maria Elvira Kaye G. Lu Ym filed their own motion for partial reconsideration[103] of the April 25, 2013 Omnibus Resolution only insofar as the denial of their urgent motion for leave to intervene and motion-in-intervention.

On 31 May 2013, John Lu Ym and Ludo & LuYm Development Corporation filed a petition[104] for certiorari, prohibition and mandamus with urgent prayer for temporary restraining order and therein prayed that: (1) a TRO be immediately issued to restrain public respondent from proceeding with the appeal and rendering a decision on the merits in CA-G.R.CV. NO. 81163; (2) to set aside the February 15, 2013 Resolution insofar as it required them to file appellees' brief and the April 25, 2013 Resolution insofar as it denied their motion for partial reconsideration of the February 15, 2013 resolution and in admitting the plaintiff-appellees' brief; and (3) to issue an Order to expunge the appellees' brief and to order that the appeal be decided on the basis only of the appellants' brief. The petition was docketed as G.R. No. 207180 entitled John Lu Ym and Lu Do & Lu Ym Dev. Corp. v. The Honorable Court of Appeals of Cebu City (Eighteenth Division), and David Lu, et. al.

By Resolution[105] dated 26 June 2013, the Supreme Court in G.R. No. 207180 disposed the petition in this wise, to wit:

“Acting on the petition for certiorari, prohibition and mandamus with urgent prayer for temporary restraining order assailing the Resolution dated February 15, 2013 and Omnibus Resolution dated April 25, 2013 of the Court of Appeals, Cebu City, in CA-G.R. CV. No. 81163, the Court resolves to DISMISS the petition for failure to show any grave abuse of discretion in rendering the challenged resolutions which, on the contrary, appear to be in accord with the facts and the applicable law and jurisprudence.

Moreover, the petition failed to comply strictly with the requirements specified under Rule 65 and other related provision of the 1997 Rules of Civil Procedure, as amended, governing petitions for certiorari, prohibition and mandamus filed with the Supreme Court, as follows:

(1)

The verification is based on belief and information in violation of Section 4, Rule 7, as amended by A.M. No. 00-2-10-SC; and

(2)

Petitioners failed to adduce proof of authority of petitioner John Lu Ym and Johnson Eric S. Lu Ym, trustee of petitioner corporation, to sign the verification (with certification on non-forum shopping) for and on behalf of petitioner corporation in violation of Sections 4 and 5, Rule 7.”

By Resolution[106] dated 2 July 2013, this Court submitted the instant appeal for decision. In the same Resolution this court: (1) denied the motions for partial reconsideration filed by the parties of the court's 25 April 2013 Resolution; (2) found no ground to recall its issuance of the writ of preliminary injunction; and (3) denied the plaintiff-appellees' motion for leave to withdraw complaint.

On 27 August 2013,[107] then Executive Justice Pampio A. Abarintos inhibited from the instant case.

On 3 September 2013, defendant-appellants Kelly L. Lu Ym, Victor Lu Ym and Paterno L. Lu Ym, Jr. filed an “Extremely Urgent Omnibus Motion”[108] praying: (1) to declare null and void the May 29, 2012 Stockholders' Resolution signed by David Lu, John Lu Ym, Timoth Ryan Lu Ym and Douglas Lu Ym; (2) to declare null and void the distribution of liquidating dividend through deeds of conveyance executed by Timothy Ryan Lu Ym involving properties of Ludo & LuYm Development Corporation in custodia legis; (3) to declare null and void the deeds of absolute sale over properties in custodia legis executed by David Lu and Douglas Lu Ym; (4) to declare in contempt in court John L. Lu Ym, David Ly, Johnson Lu Ym, Timothy Ryan Lu Ym, Douglas Lu Ym, Eusebio Tanco and the members of the management committee; (5) to set this case for hearing to allow movants to present and mark evidence in support of this motion.

On 9 September 2013, the June 26, 2013 Resolution of the Supreme Court promulgated in G.R. No. 207180 attained finality.[109]

On 24 September 2013, plaintiff-appellee David Lu filed a petition[110] under Rule 65 of the Rules of Court with the Supreme Court against this Court, Paterno Lu Ym, Sr., Paterno Lu Ym, Jr., Victor Lu Ym, John Lu Ym, Kelly Lu Ym, and Ludo & LuYm Development Corporation seeking to nullify the April 25, 2013 Omnibus Resolution and July 2, 2013 Resolution issued by this Court. The petition was docketed as G.R. No. 209807.

On 30 September 2013, Ludo & LuYm Foundation, Inc., Crane Holdings Corporation and Ma. Elvira Kaye Lu Ym-Sala filed a petition[111] for certiorari with the Supreme Court against this Court, David Lu, John L. Lu Ym, and Ludo & LuYm Corporation (thru the management committee) praying to annul and set aside the April 25, 2013 Omnibus Resolution of this Court insofar as it denied their motion for intervention, and the July 2, 2013 Resolution insofar as it denied their May 14, 2013 Motion for Partial Reconsideration. Ludo & LuYm Foundation, Inc., et. al., likewise prayed that their motion-in-intervention be granted. The petition was docketed as UDK-14976.

On 2 October 2013, plaintiff-appellee David Lu filed his Opposition[112] to the extremely urgent motion dated 2 September 2013.

On 10 October 2013, John L. Lu Ym and Ludo & LuYm Development Corporation filed their “Comment to the Extremely Urgent Motion to Declare Null and Void the May 29, 2012 Stockholders' Resolution, etc.”[113] praying therein that the said extremely urgent motion be denied.

On 11 October, 2013, defendant-appellants Kelly L. Lu Ym, Victor Lu Ym and Paterno Lu Ym, Jr. filed an Omnibus Motion[114] praying to: (1) change the members of the management committee; (2) direct John Lu Ym

to account funds in custodia legis; and (3) to direct all tenant of the Mango Square Mall and Ludo & LuYm Building to deposit all rent payments with a designated bank account under the supervision of this Court. The management committee opposed[115] this omnibus motion on the following grounds, to wit: (1) that the Kelly Lu Ym group is detestably trifling with this Court's orders; and (2) this omnibus motion is utterly devoid of factual and legal bases.

In their Comment[116] to the defendant-appellants' omnibus motion to change the members of the management committee, plaintiff-appellees posited that: (1) this Court can no longer decide the matters raised in the said omnibus motion; (2) the allegations in therein are factual in nature, hence, requires a full-blown trial and submission of documentary evidence; and (3) the said omnibus motion contravenes the August 26, 2008 decision of the Supreme Court which directed this Court to decide the appeal with dispatch.

On 11 November 2013, plaintiff-appellee David Lu filed a petition[117] for Indirect Contempt against defendant-appellants Kelly L. Lu Ym, Victor Lu Ym and Paterno Lu Ym, Jr. for their contumacious refusal to respect and for their continued defiance of the Omnibus Resolutions dated 25 October 2012 and 25 April 2012 and the Resolution dated 2 July 2013, docketed as CA-G.R. SP. No. 08034.

G.R. No. 209087 was consolidated with UDK-14976 “considering that both cases emanate from CA-G.R. CV. No. 81163, involve the same parties and raise interrelated issues.”

By Resolution[118] dated 25 November 2013, the Supreme Court disposed the consolidated petitions, thus,

“Acting on the petitions for certiorari assailing the Omnibus Resolution dated April 25, 2013 and Resolution dated July 2, 2013 of the Court of Appeals, Cebu City, in CA-G.R. CV. No. 81163, the Court resolves to DISMISS both petitions for failure to show any grave abuse of discretion in rendering the challenged resolutions which, on the contrary, appear to be in accord with the facts and the applicable law and jurisprudence.

At any rate, petitioners in UDK-14976, failed to pay P270.00 for docket and lawful fees; P500.00 as deposit for costs; P200.00 as deposit for Sheriff's fee and P30.00 for legal research fund in violation of Section 3, Rule 46 in relation to Section 2, Rule 56 of the 1997 Rules of Procedure.”

In a letter[119] dated 9 December 2013, Justice Marilyn B. Lagura-Yap inhibited from acting in CA-G.R. SP. No. 08034.

On 13 February 2014, the International Buddhist Progress Society of Manila, Inc., represented by Rosita L. Lu Ym filed a motion[120] for leave to file “Motion to Cancel Lis Pendens (Annotated on TCT No. 107-2012002150, Registered under the International Buddhist Progress Society of Manila, Inc.).”[121]

By Resolution[122] dated 21 April 2014, the November 25, 2013 the Supreme Court in G.R. No. 209087 and G.R. No. 209857 (formerly UDK-14976) denied with finality the separate motions for reconsideration filed by plaintiff-appellee David Lu and petitioners Ludo & LuYm Foundation, Inc., et. al. of the November 25, 2013 Resolution dismissing their petitions for certiorari as no substantial arguments were raised to warrant its reconsideration. The Supreme Court in the same Resolution resolved to:

“(1)

NOTE the motion of respondents' Victor L. Lu Ym, et. al. for leave to file an opposition (to petitioner David Lu's motion for reconsideration of the Resolution dated November 25, 2013) with motion to cite petitioner in contempt of court; and;

(2)

DENY for lack of merit said opposition with motion to cite petitioner in contempt of court.

No further pleadings or motions shall be entertained in this case. Let entry of judgment be issued.”

On 21 April 2014, the November 13, 2013 resolution attained finality.[123]

In a letter[124] dated 27 November 2012, Justice Pamela Ann Abella Maxino inhibited from participating in this case.

CA-G.R. CV. NO. 81163

THE ISSUE

Essentially, what is left to be resolved is the issue of whether the assailed decision with respect to the creation of the management committee and nullification of the subject 600,000 unissued and unsubscribed shares is supported with sufficient factual basis.

THIS COURT'S RULING

The appeal is partly meritorious.

It may be well to point out that the issue on the dissolution of LuDo Development Corporation is mooted by the supervening expiration of its term.

Now, to RESOLVE.

In reaching the assailed decision, the RTC stated, under the heading “CASE DISPOSITION”, that,

“X X X X

There being no factual issues to try, the court finds this case ripe for decision pursuant to Rule 4, Sec. 4 of the Intra-corporate Rules, which says:

X X X X.”

Additionally, under the heading “REMEDIES SOUGHT”, the trial court made the following statements:

“This is a direct or private suit filed by a minority stockholder invoking the court's jurisdiction at law as well as in equity, seeking the annulment of the issuance of 600,000 LuDoDev shares pursuant to a board resolution of November 18, 1997, and the dissolution of Ludo & LuYm Development Corporation.

The creation of a management committee is prayed for.’

Quite contrary, the RTC's proposition that there are no factual issues to be resolved is erroneous. Be it noted that the matters raised in the complaint are factual in nature. In fact, at the hearing held on October 11, 2002, the then Judge Isaias Dicdican, now Associate Justice of this Court, made the following remarks and observations, viz -

“Court:

The motion, I understand, is for setting aside of the order issued in this case on February 16, 2001 appointing the receivers for the defendant corporation.

Court:

We will just clarify.

The receivers appointed by the Court in this case were appointed pursuant to Rule 59 of the Rules of Court.

However, with the advent of the Interim Rules of Procedure Governing Intra-Corporate Controversies and this case being one involving intra-corporate disputes, the appointment of receivers should be in accordance with the provisions of Rule 9 of said Interim Rules. Is this correct?

Atty. Mendoza:

Yes, your Honor.

Court:

So, this is now clear to the parties. Since this case involves intra-corporate controversies, the receivers should be appointed or should have been appointed according to Rule 9 of the Interim Rules Governing Intra-Corporate Controversies. If ever there should be receivers now, they should be so appointed and allowed to continue as such pursuant to Rule 9 of the Interim Rules Governing Intra-Corporate Controversies.

Atty. Tolentino:

My understanding, your Honor, of the motion is that, they are alleging that the receivers are doing certain acts which are not in the interest of the corporation.

Court:

My understanding is that the defendants are contending that the appointment of the receiver here is not in the accordance of Rule 9. Is That my understanding?

Atty Jane Macasaet:

Yes, that is our position, considering that Rule 9 is the one that governs in this case involving intra-corporate disputes.

Court:

So, we will determine now the propriety of letting the receivers continue as such or to discharge them because the grounds for letting them continue as such do not actually exist. But the problem is that there are no minutes of the supposed hearing on the motion for appointment of receivers. Was there a hearing on January 24, 2001?

Atty. Jean Macasaet:

Your Honor, I think there's a motion which was set on January 24, 2001 for hearing.

Atty. Mendoza:

I think it was a part of our obligations, your Honor.

Court:

The Court is at a loss now because supposed to be the motion for appointment of receivers was set for hearing on January 30, 2001.

Atty. Jean Macasaet:

The motion was dated January 22, 2001 and it was set for hearing on January 30, 2001.

Court:

It was supposed to be set for hearing on January 30, 2001. But then there was already an order issued on January 24, 2001, giving the defendants until February 2, 2001 within which to oppose the said motion.

Atty. Macasaet:

To file their answer, your Honor.

Court:

Then what happened on February 2, 2001? There was no minutes showing what happened.

Atty. Macasaet:

I think there was an order dated February 10, 2002.

Court:

The Court is trying to find out if there was any evidence adduced to support the motion for appointment of receivers or the motion was just granted without evidence supporting it.

Atty. Mendoza:

It I may, your Honor. Basically, your Honor, there was no evidence that was adduced, there was no reception of evidence sought by Judge Gako.

Court:

So, there were no financial statements adduced in support of the motion?

Atty. Mendoza:

The counsel would be the best position to say what they presented, your honor. I think basically what was presented was a memorandum and the attachments to the memorandum, your Honor.

Court:

It would seem that just the affidavit, the motion and the memorandum were the basis in issuing the order dated February 16, 2001 appointing the receivers. Atty. Macasaet:

Yes, your Honor.

Court:

So on the issue of fact as to whether there was dissipation of assets or not, such was not established by evidence.

Atty. Macasaet:

Yes, your Honor. Actually, your Honor, in support of our manifestation and motion, we intend to submit now the affidavits of the witnesses and attached thereto are audited financial statements that would enable the Court to determine whether the grounds for appointment of receivers in this case or letting them continue as such are in existence. Court:

Do you have the financial statements now?

Atty. Macasaet:

Yes, your Honor.

x x x x.”[125]

True, the issue on receivership is already moot and academic, but the foregoing proceedings just show how the RTC did not endeavor to gather facts to support its order appointing receivers. Likewise, as can be readily gleaned from the foregoing TSNs, affidavits were presented by the defendant-appellants during the hearing on October 11,

2002 to disprove allegations of imminent dissipation or wastage of assets. Let it be remembered that these affidavits were presented prior to the rendition of the assailed decision, that is, one (1) year and four (4) months and 19 days prior thereto, yet the RTC stated therein under the heading “CASE DISPOSITION”, that -

“On record for plaintiff are his complaint, amended complaint, pre-trial brief, case memorandum, as well as affidavits and exhibits in support of the pleadings.

On record for defendants is their answer to the original complaint. For purposes of this decision, the figures cited by the defendants in their answer have been taken by the court to be true, and have been used as the correct ones where they differ from plaintiff's. Defendants have no answer to the amended complaint, no pre-trial brief, no counter-affidavits, no counter-exhibits, no memorandum to aid the court in making a decision favorable to themselves.

There being no factual issues to try, the court finds this case ripe for decision pursuant to Rule 4, Sec. 4 of the Intra-corporate Rules, which says,

'Sec. 4. Judgment before pre-trial. If, after submission of the pre-trial briefs, the court determines that, upon consideration of the pleadings, the affidavits and other evidence submitted by the parties, a judgment may be rendered, the court may order the parties to file simultaneously their respective memoranda within a non-extendible period of twenty (20) days from receipt of the order. Thereafter, the court shall render judgment, either full or otherwise, not later than ninety (90) days from the expiration of the period to file the memoranda.' (Underscoring ours)

What is more, the defendant-appellants filed their Answer with Compulsory Counterclaim to the original complaint. True, they did not file an Answer to the plaintiff-appellees' amended complaint still it is settled rule that: “An answer earlier filed may serve as the answer to the amended complaint if no new answer is filed.”[126] Thus, it was error for the RTC not to even consider the defendant-appellants' Answer to the original complaint as their Answer to the amended complaint. In addition, it was error for the RTC to disregard the affidavits presented by the defendant-appellants Paterno Lu Ym, Sr. and sons to support their claim that the corporation was not in imminent danger of dissipation, loss, wastage or destruction of assets or other properties or paralization of business operations when in fact they did by offering the affidavits of their witnesses and their testimonies thereon. Suffice it to say, according to the affidavit[127] of the corporation's Chief Accountant that based on the corporation's audited financial statement from 1997 to 2001, the corporation's total assets have been growing and that there has been no substantial disposition of assets during that time. Next, according to the affidavit[128] of the corporation's In-House Legal Counsel, since August 2001 up to execution of his affidavit, which was on October 10, 2002, the receivers have not approved any disbursements necessary for the payment of the corporation's administrative expenses. In his affidavit,[129] Jenar D. Suson, VP for Operations of LuDoDev, attested that during his tenure as such, the corporation has not sold or disposed of any of its assets; and that the recent development undertaken by the corporation is the four-storey commercial mall located at Gen. Maxilom Ave corner J. Osmeña Street, Cebu City. Finally, the affidavit[130] of the corporation's Marketing Officer pertinently states, that prospective tenants are turned off or refused to lease because the corporation was under receivership; and that the tenants are confused to whom to give their payment of the rent. These affidavits were presented precisely to refute the plaintiff-appellees' allegations of dissipation or wastage of corporate assets and funds, paralyzation of its business and misappropriation of corporation funds. Yet, the trial court did not even mention these affidavits in the assailed decision.

Interestingly, at the hearing on October 18, 2002, the then Judge Dicdican, now Associate Justice of this Court, issued an Order reading as follows:

“When this case was called for continuation of hearings today on defendants' motion to lift the order issued in this case appointing receivers, in pursuance with the order issued in this case on October 11, 2002, the

plaintiffs, through their counsel, chose not to cross-examine the witnesses for the defendants-movants who were supposed to be cross-examined today. The plaintiffs also did not [submit] a written opposition to the motion being heard by the Court, contrary to the undertaking made in court by their counsel (Atty. Mark Tolentino) on October 11, 2002. In view of these circumstances, this Court has to consider the aforementioned as now submitted to it for resolution.

Thus, the said motion is hereby considered by the Court as submitted to it for resolution.

IT IS SO ORDERED.”[131]

It may be well to stress that the plaintiff-appellees did not anymore examine the defendant-appellants' witnesses when they had the opportunity to do so. The plaintiff-appellees' failure to cross-examine the defendant-appellants' witnesses is an implied waiver of such right. “The right is a personal one which may be waived by conduct amounting to a renunciation of the right of cross-examination, thus, where a party has had the opportunity to cross-examine a witness but failed to avail himself of it, he necessarily forfeits the right to cross-examine.”[132] Effectively, the affidavits have already become an integral part of the records of the case and the averments therein admittedly true and undisputed.

Re: Creation of a management committee

In point is the case of *Jacinto v. First Women's Credit Corp.*,[133] where the Supreme Court explained that:

In exercising the discretion to appoint a management committee, the officer or tribunal before whom the application was made must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and the adequacy and effectiveness of other available remedies. The discretion must be exercised with great caution and circumspection and only for a reason strongly appealing to the tribunal or officer exercising jurisdiction. At any rate, once the discretion has been exercised, the presumption to be considered is that the officer or tribunal has fairly weighed and appraised the evidence submitted by the parties.

In determining whether Hearing Officer Palmares correctly exercised his judgment when he ordered the creation of the IMC, it is necessary to refer to Sec. 6, par. (d), of PD 902-A —

Sec. 6. In order to effectively exercise such jurisdiction, the Commission shall possess the following powers: . . . d) To create and appoint a management committee, board, or body upon petition or *motu proprio* when there is imminent danger of dissipation, loss, wastage or destruction of assets or other properties or paralization of business operations of such corporations or entities which may be prejudicial to the interest of minority stockholders, parties-litigants or the general public (*italics supplied*).

A reading of the aforecited legal provision reveals that for a minority stockholder to obtain the appointment of an interim management committee, he must do more than merely make a *prima facie* showing of a denial of his right to share in the concerns of the corporation; he must show that the corporate property is in danger of being wasted and destroyed; that the business of the corporation is being diverted from the purpose for which it has been organized; and that there is serious paralization of operations all to his detriment. It is only in a strong case where there is a showing that the majority are clearly violating the chartered rights of the minority and putting their interests in imminent danger that a management committee may be created.

In this regard, mere disagreement among stockholders as to the affairs of the corporation would not in itself suffice as a ground for the appointment of a management committee. At least where there is no imminent danger of loss of corporate property or of any other injury to stockholders, management of corporate business should not be wrested away from duly elected officers, who are *prima facie* entitled to administer the affairs of the corporation, and placed in the hands of the management committee. However, where the dissension among

stockholders is such that the corporation cannot successfully carry on its corporate functions the appointment of a management committee becomes imperative.

More to this point is *Sy Chim v. Sy Hiy Ho & Sons, Inc.*,^[134] wherein the Supreme Court explained further in length the rationale behind the concurrence of the requirements provided in Section 1, Rule 9 of the Interim Rules of Procedure of Intra-corporate Controversies. Viz -

The rationale for the need to establish the confluence of the two (2) requisites under Section 1, Rule 9 by an applicant for the appointment of a management committee is primarily based upon the fact that such committee and receiver appointed by the court will immediately take over the management of the corporation, partnership or association, including such power as it may deem appropriate, and any of the powers specified in Section 5 of the Rule.

Indeed, upon the appointment of a receiver, the duly elected/appointed officers of the corporation are divested of the management of such corporation in favor of the management committee/receiver. Such transference of the corporation's management will certainly have a negative, if not crippling effect, on the operations/affairs of the corporation not only with banks and other business institutions including those abroad which it deals business with. A wall of uncertainty is erected; the short and long-term plans of the management of the corporation are disrupted, if not derailed.

Thus, the creation and appointment of a management committee and a receiver is an extraordinary and drastic remedy to be exercised with care and caution; and only when the requirements under the Interim Rules are shown. It is a drastic course for the benefit of the minority stockholders, the parties-litigants or the general public are allowed only under pressing circumstances and, when there is inadequacy, ineffectual or exhaustion of legal or other remedies. The power to intervene before the legal remedy is exhausted and misused when it is exercised in aid of such a purpose. The power of the court to continue a business of a corporation, partnership or association must be exercised with the greatest care and caution. There should be a full consideration of all the attendant facts, including the interest of all the parties concerned.

Neither Presidential Decree No. 902-A and Republic Act No. 8799 nor the Interim Rules of Procedure define "imminent danger." "Danger" is a general term, including peril, jeopardy, hazard and risk; as used in the Rule, it refers to exposure or liability to injury. "Imminent" refers to something which is threatening to happen at once, something close at hand, something to happen upon the instant, close although not yet happening, and on the verge of happening.

In the present case, petitioners failed to make a strong showing that there was an imminent danger of dissipation, loss, wastage or destruction of assets or other properties of respondent corporation and paralysis of its business operations which may be prejudicial to the interest of the parties-litigants, petitioners, or the general public. The RTC thus committed grave abuse of its discretion amounting to excess of jurisdiction in creating a management committee and the subsequent appointment of a comptroller.

In the same case, the Supreme Court continued to explain, that:

We agree that past conduct and condition of the corporation may be considered in determining the present situation and what the future will be. However, a management committee or receiver will not be appointed merely because of things done or attempted at a past time when the present situation and the prospects for the future are not such as to warrant taking the control of the property out of the hands of its owners. The circumstances to justify the appointment of a management committee/receiver must be extraordinary and something more must be shown than past misconduct and a mere apprehension based thereon of future wrongdoing. To repeat, in the absence of a strong showing of an imminent danger of dissipation, loss, wastage or destruction of assets or other properties of a corporation and paralysis of its business operations, the mere apprehension of future misconduct based upon prior mismanagement will not authorize the appointment of a management committee/receiver.

In the assailed decision, the RTC merely re-echoed the acts enumerated by the plaintiff-appellees in their amended complaint allegedly showing how the defendant-appellants Paterno Lu Ym, Sr. and sons are dissipating or wasting the assets of the LudoDev or diverting corporate funds. But just like the amended complaint, the RTC's conclusion that there was a need to create a management committee to protect the interest of the corporation and its stockholders does not have any factual basis to stand on. First, the plaintiff-appellees failed to produce any financial statement/report and bank statements to show that the corporation's funds are being depleted or in danger of being depleted. The checks presented by the plaintiff-appellees show that these were deposited to the account of Cebu Green Forest Corporation and to another account not belonging to the corporation do not prove depletion of corporate funds or misappropriation thereof. What these checks simply showed is that these were deposited to accounts not belonging to the corporation. Second, there is nothing in the records to show that the corporation has failed to meet with its obligations. Third, no empirical data was presented to show that prior to the appointment of receivers and creation of management committee the corporation suffered or has been suffering decrease in the earnings. Fourth, nary any evidence was adduced to show that the business operations of the corporation was paralyzed or is in imminent danger of being paralyzed. Fifth, there was no audit to show that defendant-appellants Paterno Lu Ym, Sr. and sons took money from the coffers of the corporation and misappropriated it for their own use and benefit.

Re: violation of fiduciary duties and issuance of the 600,000 unissued and unsubscribed shares

The fiduciary duty of a director of a corporation was aptly explained by the Supreme Court in *Cojuangco, Jr. v. Sandiganbayan*,^[135] citing the case of *Gokongwei, Jr. v. Securities and Exchange Commission*,^[136] viz -

Although in the strict and technical sense, directors of a private corporation are not regarded as trustees, there cannot be any doubt that their character is that of a fiduciary insofar as the corporation and the stockholders as a body are concerned. As agents entrusted with the management of the corporation for the collective benefit of the stockholders, "they occupy a fiduciary relation, and in this sense the relation is one of trust." "The ordinary trust relationship of directors of a corporation and stockholders", according to *Ashaman v. Miller*, "is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of corporate affairs and property and hence of the property interests of the stockholders. Equity recognizes that stockholders are the proprietors of the corporate interests and are ultimately the only beneficiaries thereof

Justice Douglas, in *Pepper v. Litton*, emphatically restated the standard of fiduciary obligation of the directors of corporations, thus:

A director is a fiduciary. . . . Their powers are powers in trust. . . . He who is in such fiduciary position cannot serve himself first and his cestuis second. . . . He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters He cannot utilize his inside information and strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do so directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference or advantage of the fiduciary to the exclusion or detriment of the cestuis.

And in *Cross v. West Virginia Cent. & P. R. R. Co.*, it was said:

. . . A person cannot serve two hostile and adverse masters, without detriment to one of them. A judge cannot be impartial if personally interested in the cause. No more can a director. Human nature is too weak for this. Take whatever statute provision you please giving power to stockholders to choose directors, and in none will

you find any express prohibition against a discretion to select directors having the company's interest at heart, and it would simply be going far to deny by mere implication the existence of such a salutary power. (emphasis and underscoring supplied)

At this juncture, this Court takes note of Resolution No. II adopted and approved by the Board of Directors of Ludo & LuYm Development Corporation at the meeting held on November 18, 1997, which reads:

“RESOLVE, as it is hereby resolved, to issue the remaining 600,00 shares of UNSUBSCRIBED and UNISSUED capital stock of the Corporation at par value of P100.00 per share and notify all stockholders on record as of November 18, 1997 of their respective rights of pre-emption to subscribe the same and to remit or pay their subscriptions not later than January 31, 1998.”

As reflected in the Minutes of the Meeting, the said Resolution was approved by the majority of the members of the board. Significantly, the assailed decision does not say whether the notification to the stockholders on record of their respective right of pre-emption was complied with or not. Evidence of such compliance or non-compliance is crucial to the RTC's finding of fraud or ill motive against herein defendant-appellants. It may be well to point out that plaintiff-appellee David Lu was present at the November 18, 1997 board meeting.

On another note, in a letter[137] dated 16 February 1998 addressed to defendant-appellant Paterno Lu Ym, Sr., Douglas Lu Ym, Atty. Ildefonsa A. Ybañez and members of the board of the directors, counsel for the heirs of Cipriano Lu and Cayetano Lu Do manifested that the said heirs have not, in any manner, waived nor have they any intention to waive whatever rights they may have which will have any effect on their interests as stockholders of Ludo and LuYm Development Corporation (LLDC) especially on their pre-emptive rights as defined under the corporation code. On this note, the RTC should have heard the parties regarding this matter in order to resolve the issue of whether the defendant-appellants Paterno Lu Ym, Sr. and sons ignored the heirs of Cipriano Lu and Cayetano Lu Do and proceeded to acquire the subject 600,000 for themselves and their families and holding companies.

Significantly, in the excerpts[138] of the minutes taken on the board meeting held on 26 March 1998, five (5) members of the board constituting a majority voted in favor of the motion “that those stockholders who did not exercise their rights of pre-emption to subscribe to the remaining unissued portion of the capital stock of the corporation be considered as having waived their respective rights and that their stock rights shall be offered to non-waiving stockholders at par value in proportion to their equity interest. Any offered shares not taken up by the non-defaulting stockholders may be offered for sale to third parties at a price recommended by investment banker to be commissioned for the purpose.” Only two (2) members voted against the said motion, one of whom is plaintiff-appellee David Lu who at the same meeting was voted as SVP for Administration. Yet, the RTC failed to make any finding that the defendant-appellants failed to offer the subject 600,000 shares to all the stockholders on record; that there were stockholders who waived (and who they are); and that the stock rights of these waiving stockholders were offered to those who did not waive at par value in proportion to their equity interest. The RTC, likewise, did not touch on the regularity of the offering of the subject shares.

To stress,

Pre-emptive right under Sec. 39 of the Corporation Code refers to the right of a stockholder of a stock corporation to subscribe to all issues or disposition of shares of any class, in proportion to their respective shareholdings. The right may be restricted or denied under the articles of incorporation, and subject to certain exceptions and limitations. The stockholder must be given a reasonable time within which to exercise their preemptive rights. Upon the expiration of said period, any stockholder who has not exercised such right will be deemed to have waived it.[139]

On this note, the RTC did nothing to ascertain whether or not the plaintiff-appellees and the rest of the stockholders were given reasonable time to exercise their pre-emptive rights.

Pertinently,

The validity of issuance of additional shares may be questioned if done in breach of trust by the controlling stockholders. Thus, even if the pre-emptive right does not exist, either because the issue comes within the exceptions in Section 39 or because it is denied or limited in the articles of incorporation, an issue of shares may still be objectionable if the directors acted in breach of trust and their primary purpose is to perpetuate or shift control of the corporation, or to "freeze out" the minority interest.[140]

In this instance, the RTC did not endeavor to gather more facts, thru the conduct of a full-blown hearing, with respect to the plaintiff-appellees' claim that defendant-appellants Paterno Lu Ym, Sr. and sons premeditated, in effect, to take control of the corporation by issuing the subject 600,000 shares to themselves and their families and holding companies, and thus, diluting their (plaintiff-appellees') interest and shareholding in LuDoDev.

Prescinding from the foregoing, the assailed decision failed to show that the corporation or the plaintiff-appellees suffered losses and serious injury directly attributable to the acts and omissions of defendant-appellant Paterno Lu Ym, Sr. and sons. Or that the said defendant-appellants acted beyond the scope of their authority, and for their own selfish interest. Without any factual basis to support these, the creation of a management committee was not called for. It is entrenched well in our jurisdiction that allegations are not evidence.

Since the assailed decision suffers from utter lack of factual basis, this Court cannot simply turn a blind eye to this and blindly proceed to resolve the issues raised in the instant appeal. To do so, is to shirk from our solemn duty to do justice to every man. Evidence must be presented to substantiate the allegations of dissipation or danger of dissipation of corporate funds and assets and malversation and misappropriation of corporate funds and not merely unsubstantiated allegations thereof.

Anent the nullification of the subject 600,000 shares, the RTC mainly ratiocinated that it was priced way below its actual market value that is, at one-seventeenth[141] thereof. Much emphasis is placed by the RTC on the New York case of *Katzowitz v. Sidler* (24 NY2d 512, 301 NYS2d 470, 249 NE2d 359). The RTC did not, however, make any finding about the legality or illegality of the board resolution authorizing the issuance of the subject 600,000 shares of stocks priced at par value.

Verily, it was imperative for the RTC to hear and try the factual issues raised by the parties considering the grave importance thereof and the urgent necessity of resolving them expeditiously. In leaving them unresolved, the RTC practically invited unnecessary anxiety coupled with all the dire consequences such a situation implies.

Remand to the special court is, thus, warranted

Considering that the issues involved are factual in nature, such issues are best addressed to the Special Commercial Court which has the power to try this case and conduct hearings, receive evidence and perform any and all acts necessary to resolve factual issues raised in intra-corporate cases falling within its original, exclusive jurisdiction.

All told, in the interest of substantial justice, the instant case should be remanded to the RTC in order that the ends of justice and fair play may be subserved.

In view of the remand of this case, this Court finds it no longer necessary to delve into and resolve the other issues raised in this instance.

WHEREFORE, the Decision dated 1 March 2004 rendered by the Regional Trial Court, Br. 12, Cebu City in SRC

Case No. 021-CEB (formerly docketed as Civil Case No. CEB-25502) is hereby REVERSED and SET ASIDE. This case is REMANDED to the Special Commercial Court. Let the records of this case be transmitted to the said court with dispatch. The Special Commercial Court is hereby DIRECTED to hear the case and resolve the same within sixty (60) days from notice. The petition in CA-G.R. SP. NO. 08034 is DISMISSED.

SO ORDERED.

[?] Delos Santos, E.L., and Francisco, R.C., JJ., concur.

[*] Notice of Death, Rollo, Vol. II, pp. 659-661.

[*]The only plaintiff appearing in the caption of the assailed Decision.

[?] Acting Third Member vice J. Pamela Ann Abella Maxino as per her Letter of Inhibition dated November 27, 2014 and as per Result of Raffle dated December 2, 2014.

[1] Original Records, Vol. 7, pp. 4291-4306.

[2] Original Records, Vol. 1, pp. 1- 16.

[3] Original Records, Vol.1, pp. 21-26.

[4] Original Records, Vol. 1, pp. 53-54.

[5] Original Records, Vol. 1, pp. 58-69.

[6] Original Records, Vol. 1, pp. 71-78.

[7] Original Records, Vol. 1, pp. 164-169.

[8] Original Records, Vol. 1, pp. 228-239.

[9] Original Records, Vol. 1, pages 256 and 257.

[10] Original Records, Vol.1, pp. 261-272.

[11] Original Records, Vol. I, pp. 301-307.

[12] Original Records, Vol. 1, pp. 517-556. With Annexes.

[13] Original Records, Vol. 3, pp. 1859-1868.

[14] Original Records, Vol. 4, pp. 2607-2613.

[15] Original Records, Vol. 4, pp. 2614-2641.

[16] Original Records, Vol. 3, pp. 1939-1942.

[17] Original Records, Vol. 4, p. 2669.

[18] TSN of October 11, 2002.

[19] Original Records, Vol. 3, Exhibit "1" Affidavit of Erlinda U. Gidayawan, pp. 1945-1950, with attachments; Exhibit "2", Affidavit of Gerry A. Aguilar, pp. 2010-2016, with attachments; Exhibit "3", Affidavit of Jenar D. Suson, pp. 2046-2049; and Exhibit "4", Affidavit of Glenda Dawn Carlota, pp. 2050-2014, with attachments.

[20] As reflected in the petition filed in G.R. No. 157381, Original Records, Vol. 4, pp. 2516-2560.

- [21] Original Records, Vol. 4, p. 2815.
- [22] TSN of October 18, 2002.
- [23] Original Records, Vol. 4, pp. 2815-2821.
- [24] Original Records, Vol. 3, pp. 2316-2342.
- [25] Original Records, Vol. 4, pp. 2516-2562.
- [26] Original Records, Vol. 4, pp. 2964-2969.
- [27] Original Records, Vol. 5, p. 3387.
- [28] Original Records, Vol. 7, p. 4698.
- [29] Original Records, Vol. 7, pp. 4699-4705.
- [30] Original Records, Vol. 7, p. 4261.
- [31] Original Records, Vol. 7, p. 4708.
- [32] Original Records, Vol. 7, pp. 4263-4269.
- [33] Original Records, Vol. 7, p. 4709.
- [34] Original Records, Vol. 7, pp. 4710-4712.
- [35] Original Records, Vol. 7, pp. 4713-4719.
- [36] Original Records, Vol. 7, pp. 4291-4306.
- [37] Original Records, Vol. 7, pp. 4316-4325.
- [38] Original Records, Vol. 7, p. 4350-4353.
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- [40] Rollo, Vol. 1, pp. 9-30.
- [41] Original Records, Vol. 7, pp. 4397-4410.
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- [43] Original Records, Vol. 7, p. 4737.
- [44] Rollo, Vol. 1., p. 438.
- [45] Rollo, Vol. I-A, pp. 560-561.
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- [47] Rollo, Vol. I-A, pp. 689-690.
- [48] Rollo, Vol. I-A, pp. 821-823.
- [49] Rollo, Vol. I-A, pp. 906-907.
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[53] Rollo, Vol. I-B, pp. 1532-1533.

[54] Rollo, Vol. I-B, pp. 1290-1328.

[55] Rollo, Vol. II, pp. 17-41.

[56] Rollo, Vol. II-A, pp. 916-928.

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[61] CA-G.R. SP. N0. 81153.

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[63] Rollo, Vol. I-B, pp. 1749-1785.

[64] Rollo, Vol. I-B, pp. 1832-1833.

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[67] Rollo, Vol. II, pp. 1-16.

[68] Rollo, Vol. II, pp. 17-31.

[69] Rollo, Vol. II, pp. 17-66. With separate concurring opinion and dissenting opinions.

[70] Rollo, Vol. II, pp. 474-605.

[71] Rollo, Vol. II, pp. 474-605.

[72] Rollo, Vol. II, pp. 627-629.

[73] Rollo, Vol. II, pp. 659-661.

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- [79] Rollo, Vol. II-A, pp. 780-819.
- [80] Rollo, Vol. II-A, pp. 708-758.
- [81] Rollo, Vol. II-B.
- [82] Rollo, Vol. II-A, pp. 828-835.
- [83] Rollo, Vol. II-A, pp. 840-841.
- [84] The Mancom's Comment, Rollo, Vol. II-A, pp. 842-845. The plaintiff-appellees' Comment, Rollo, Vol. I-A, pp. 847-851.
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- [86] Rollo, vol. II-A, pp. 874-880.
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- [97] Rollo, Vol. II-B, pp. 1825-1824.
- [98] Rollo, Vol. II-B, pp. 1890-1892.
- [99] Rollo, vol. II-B, pp. 1826-1830.
- [100] Rollo, Vol. II-B, pp. 1883-1894.
- [101] Rollo, Vol. II-B, pp. 1883-1894.
- [102] Rollo, Vol. II-B, pp. 1905-1908.
- [103] Rollo, Vol. II-B, pp. 1917-1927.
- [104] Rollo, Vol. II-A, pp. 1954-1971.
- [105] Rollo, Vol. I, attached to the rollo front cover.
- [106] Rollo, Vol. II-B, pp. 2083-2086.
- [107] Letter, attached to the cover of Rollo, Vol. II-B.

- [108] Rollo, Vol. III, pp. 1-43.
- [109] Entry of Judgment, Rollo, Vol. III.
- [110] Rollo, Vol. III, pp. 295-316.
- [111] Rollo, Vol. III, 346-366.
- [112] Rollo, Vol. III.
- [113] Rollo, Vol. III, pp. 384-391.
- [114] Rollo, Vol. III, pp. 392-397.
- [115] Rollo, Vol. III, pp. 416-425.
- [116] Rollo, Vol. III, pp. 426-439.
- [117] Rollo of SP No. 08034, pp. 3-20.
- [118] Rollo, Vol. III, p. 441.
- [119] Attached to the Rollo of SP. No. 08034.
- [120] Rollo, Vol. III, 453-455.
- [121] Rollo, Vol. III, pp. 456-461.
- [122] Rollo, Vol. III, p. 571.
- [123] Rollo, Vol. III, pp. 574-576.
- [124] Rollo of SP 08034, pp. 786-787.
- [125] TSN of October 11, 2002, pp. 2-5.
- [126] Section 3, Rule 11 of the 1997 Rules of Civil Procedure, as amended.
- [127] Exhibit “1”, Affidavit of Erlinda U. Gidayawan, Original Records, Vol. 3, pp. 1945-1959. With Attachments.
- [128] Exhibit “2”, Affidavit of Atty. Gerry A. Aguilar, Original Records, Vol. 3, pp. 2010-2016. With Attachments.
- [129] Exhibit “3”, Affidavit of Jenar D. Suson, Original Records, Vol. 3, pp. 2046-2049.
- [130] Exhibit “4”, Affidavit of Glenda Dawn Carlota, Original Records, Vol. 3, pp. 2050- 2054.
- [131] TSN of October 18, 2002, pp.27-28.
- [132] Ayala Land, Inc. v. Hon. Lucenito N. Tagle, in his capacity as Presiding Judge, RTC-Imus, Branch 20, et. al., G.R. No. 153667, August 11, 2005. Citing De la Paz v. Intermediate Appellate Court, G.R. No. L-71537, September 17. 1987, 154 SCRA 65.
- [133] Ramon P. Jacinto and Jaime J. Colayco v. First Women's Credit Corporation, represented in this derivative suit by Shig Katayama, G.R. No. 154049, August 28, 2003.
- [134] Sy Chim and Felicidad Chan Sy v. Sy Siy Ho & Sons, Inc, doing business under the name and style Guan Yiac Hardware, G.R. No. 164958, January 27, 2006.

[135] Eduardo M. Cojuangco, Jr. v. Sandiganbayan (First Division) and People of the Philippines, G.R. No. 134307, December 21, 1998.

[136] En Banc. John Gokongwei, Jr. v. Securities and Exchange Commission, et. al., G.R. No. L-52129, April 21, 1980.

[137] Original Records, Vol. 3. pp. 3558-3559.

[138] Excerpts of the Minutes of the Regular Meeting of the Board of Directors of LUDO & LuYm DEVELOPMENT CORPORATION held at their Office in Cebu City on March 26, 1998, at 10:40 A.M. Original Records, Vol. 3. pp. 3560-3562.

[139] Majority Stockholders of Ruby Industrial Corporation v. Miguel Lim, in his personal capacity as Stockholder of Ruby Industrial Corporation and representing the Minority Stockholders Committee of Ruby Industrial Corporation and the Management Committee, G.R. No. 165887, June 6, 2011; and China Banking Corporation v. Miguel Lim, in his personal capacity as Stockholder of Ruby Industrial Corporation and representing the Minority Stockholders of Ruby Industrial Corporation, G.R. No. 165929, June 6, 2011. Citing Jose Campos, Jr. & Maria Clara L. Campos, The Corporation Code: Comments, Notes and Selected Cases, Vol. II (1990 ed.)

[140] Majority Stockholders of Ruby Industrial Corporation v. Miguel Lim, in his personal capacity as Stockholder of Ruby Industrial Corporation and representing the Minority Stockholders Committee of Ruby Industrial Corporation and the Management Committee, G.R. No. 165887, June 6, 2011; and China Banking Corporation v. Miguel Lim, in his personal capacity as Stockholder of Ruby Industrial Corporation and representing the Minority Stockholders of Ruby Industrial Corporation, G.R. No. 165929, June 6, 2011.

[141] At page 5 of the assailed decision, Rollo, Vol. I, p. 35.

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