

**VICENTE L. LUNTAO AND NANETTE L. LUNTAO, PETITIONERS, V.
BAP CREDIT GUARANTY CORPORATION AND EFREN M. PINEDA,
RESPONDENTS.**

G.R. No. 204412. September 20, 2017

Ponente: LEONEN, J.

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LEONEN, J.:

The validity of accessory contracts mainly flows from the validity of the principal contracts. A real estate mortgage is in the nature of an accessory contract. Thus, the validity of a mortgage contract that was constituted to secure a loan obligation is affected by the validity of the loan contract.

This is a Petition for Review on Certiorari[1] under Rule 45 of the 1997 Rules of Civil Procedure, praying that the August 9, 2011 Decision[2] and October 17, 2012 Resolution[3] of the Court of Appeals in CA-G.R. CV No. 72586-MIN be reversed and set aside.[4] The Court of Appeals affirmed the April 18, 2001 Decision[5] of the Regional Trial Court, which denied Vicente L. Luntao and Nanette L. Luntao's (petitioners) prayers for the declaration of nullity of real estate mortgage and for the issuance of a writ of preliminary injunction.[6]

This case involves the validity of the real estate mortgage of petitioner Vicente L. Luntao's (Vicente) property in favor of respondent BAP Credit Guaranty Corporation (BAP). The mortgage was executed by petitioner Nanette L. Luntao (Nanette) by virtue of a Special Power of Attorney that Vicente issued in her favor.

Vicente was the owner of a real property covered by TCT No. T-111128 in Davao City.[7] He executed a Special Power of Attorney in favor of his sister Nanette.[8] As his attorney-in-fact, she was authorized:

(1) to mortgage his real property covered by Transfer Certificate of Title No. T-111128 of the Registry of Deeds of Davao City; (2) to apply for any commercial loan with any bank in the Philippines or any agency either private or government under such terms and conditions as she may deem proper using the aforesaid property as collateral for the loan; (3) to receive the proceeds of the loan to be used in the improvements of her business; and (4) to sign, execute and deliver any documents to effect the purposes aforesaid.[9]

Using the authorization given to her, Nanette applied for a loan with BAP and used Vicente's property as collateral.[10] The loan was for the improvement of the facilities of her business, the Holy Infant Medical Clinic.[11] According to Nanette, she was introduced to the lending institution by her sister Eleanor Luntao (Eleanor), who allegedly had a personal loan with it and whose office was located in the same building where BAP's office was.[12]

Upon approval of the loan, the amount of P900,000.00, representing the loan proceeds, was ordered to be released to the clinic through Security Bank.[13] When the loan obligation became due, BAP sent demand letters.[14] In a letter[15] dated October 14, 1997, Nanette and Eleanor's brother Jesus Luntao (Jesus) wrote BAP, asking for additional time to settle his sisters' accounts. He cited cash leakages and pending accreditation with life insurers as reasons for the clinic's substantial losses.[16]

However, Nanette's loan was still left unpaid. As a result, BAP applied for Extra-Judicial Foreclosure of Vicente's property. On November 27, 1997, the Regional Trial Court issued a Notice of Foreclosure and a Notice of Extrajudicial Sale.[17]

Subsequently, Vicente and Nanette filed a Complaint for Declaration of Nullity of Real Estate Mortgage with a prayer for the issuance of a Temporary Restraining Order and Writ of Preliminary Injunction against BAP. They also prayed for the award of damages and attorney's fees in their favor. The case was docketed as Civil Case No. 25-962-98.[18]

Nanette narrated that upon filing her loan application, BAP appraised the collateral to determine the loanable amount. They told her that she could borrow P900,000.00. Thereafter, a BAP personnel visited her to get her signature on the real estate mortgage, promissory note, and disclosure statement. The documents brought to her were all blank forms. She alleged that she signed the forms on the understanding that it was part of the bank's standard operating procedure.[19]

According to Nanette, she was surprised to receive the notice of foreclosure since she did not receive the proceeds of the loan.[20] She also noticed that the documents attached to the notice of foreclosure were the blank documents she signed earlier.[21] Upon checking, she was shocked to see that Eleanor's name was included in the loan documents.[22] It was Nanette's position to obtain the principal loan as stated in the Special Power of Attorney as she was the only person authorized to mortgage Vicente's property.[23]

Nanette stated that before she received the notice of foreclosure, she had received four (4) letters from BAP, all addressed to Eleanor.[24] She gave the letters to Eleanor since the letters were about Eleanor's alleged loan with BAP and the post-dated checks she issued to secure it.[25]

Vicente and Nanette claimed that Eleanor's alleged debt with BAP was separate from Nanette's debt and was not secured by Vicente's property, which should not be foreclosed if Eleanor failed to pay her alleged debt.[26]

BAP presented BAP employees Raymond Bato (Bato) and Veronica Aguilo (Aguilo), and Security Bank employees Benjie Dimaunahan (Dimaunahan) and Belinda Yap (Yap) as witnesses.[27]

Bato was an account assistant of BAP. He testified that upon approval by the BAP Credit Committee of the Loan Release Ticket and the Promissory Note, Security Bank released the loan proceeds and credited it to the clinic's account. Security Bank also debited the amount released from BAP's account with it. When he tried to collect from Nanette, no payment was given. Thus, he sent the account to their Legal Department, which foreclosed the mortgage.[28]

Bato also stated that there was no document showing that the money was received by either Nanette or Vicente. In addition, the borrowers in the promissory notes were Nanette and Eleanor, not Holy Infant Medical Clinic, but the borrower in the mortgage contract was this clinic.[29] He also testified that Eleanor "did not sign the Real Estate [M]ortgage." [30]

Aguilo was BAP's assistant manager. She testified that Nanette and Eleanor met with her to borrow money from BAP. As evidence, she presented the promissory notes that they all had signed.[31] She also stated that Nanette was the only attorney-in-fact of Vicente as indicated in the Special Power of Attorney and that Nanette "did not authorize anyone to credit the loan to the account of Nanette Luntao under Holy Infant Medical Clinic." [32] Aguilo likewise stated that it was Eleanor, not Nanette, who issued several checks.[33]

Dimaunahan testified that the bank's Credit Memos and ledger showed that the account was under the name of the clinic with Nanette and Eleanor as its signatories.[34] Meanwhile, Yap testified that the bank credited a sum of

money to the clinic's account and debited it from BAP's account.[35]

On April 18, 2001, the Regional Trial Court rendered a Decision,[36] dismissing the complaint for lack of merit. It found that Nanette and Eleanor filed a loan application with BAP on behalf of the clinic. The sisters also signed three (3) promissory notes showing that the money would be used to acquire assets and as additional working capital. The promissory notes were secured by a mortgage contract, executed by Nanette as Vicente's attorney-in-fact. It also found that upon approval of the loan, the proceeds were given to the clinic through Security Bank. BAP's account was also debited.[37]

The trial court gave weight to Jesus' October 14, 1997 letter. It held that Jesus admitted the existence of the debt, that the loan was obtained in behalf of the clinic, and that the money was used according to its intended purpose. The statements of Jesus were not rebutted by Vicente or Eleanor. The trial court also found that Vicente and Nanette failed to present evidence that Eleanor used the loan proceeds for her personal use or that the foreclosure was because of Eleanor's non-payment of her separate debt. The alleged blank forms were also not presented in court.[38]

Finally, the trial court held that there was no evidence presented to support the allegation that the mortgage was void.[39] The dispositive portion of the decision stated:

WHEREFORE, judgment is rendered as follows:

1. The prayer for the issuance of a Writ of Preliminary Injunction is denied for lack of merit.
2. The prayer that the Real [E]state [M]ortgage be declared void is denied for lack of merit.

CASE DISMISSED.

SO ORDERED.[40]

Vicente and Nanette elevated the case to the Court of Appeals. They impleaded Efren M. Pineda (Pineda), Sheriff IV of the Regional Trial Court of Davao City as additional respondent. The case was docketed as CA-G.R. CV No. 72586-MIN.[41]

On August 9, 2011, the Court of Appeals rendered a Decision[42] denying the appeal. It found that the elements of a valid contract are present in the case. There was consent on the part of Nanette when she signed the mortgage contract as Vicente's attorney-in-fact. Moreover, Vicente did not assail the Special Power of Attorney's validity or the loan application of Nanette with his lot as collateral. The object of the contract, which was Vicente's property covered by TCT No. T-111128, and the cause of obligation, which was to secure a loan, were also established.[43]

On Vicente and Nanette's allegation that they did not receive the loan proceeds, the Court of Appeals held that the records of the case show otherwise:

After the loan application was approved, the BAP issued Loan Release Tickets and Debit Memos for each promissory note. Raymond Bato, BAP's account assistant testified that the Loan Release Tickets are proof that they [would] release the amount loaned to the client. Upon approval of these loan release tickets, these [would] also be forwarded to the Security Bank which [would] issue the debit memos and [would] eventually debit the respective amount from the BAP's account, in favor of the client, which, in this case is Holy Infant Clinic/Nanette Luntao.[44] (Citations omitted)

The Court of Appeals also noted that Jesus' October 14, 1997 letter disclosed that Nanette and Eleanor received the loan proceeds.[45] Furthermore, Nanette's admission that she applied for a loan with Vicente's property as collateral "estopped [them] from assailing the validity and due execution of that mortgage deed." [46]

The dispositive portion of the Court of Appeals Decision stated:

WHEREFORE, premises considered, the appeal is DENIED for utter lack of merit. The Decision dated 18 April 2001 of the Regional Trial Court of Davao City, Branch 15, in Civil Case No. 25-962-98 is hereby AFFIRMED.

SO ORDERED.[47] (Emphasis in the original)

Vicente and Nanette moved for reconsideration, which was denied by the Court of Appeals in its October 17, 2012 Resolution.[48]

On December 6, 2012, Vicente and Nanette filed this Petition for Review[49] against BAP and Pineda before this Court. Petitioners pray for the nullification of the Real Estate Mortgage and the award of actual, moral, and exemplary damages, and attorney's fees in their favor.[50]

Petitioners allege that they did not receive the loan proceeds or that they allowed any other person to receive the proceeds for them. They also insist that respondent BAP defrauded petitioner Nanette by inserting Eleanor's name on the blank forms she signed earlier. BAP's action facilitated the release of the loan proceeds to a person other than petitioners.[51]

Petitioners argue that since they did not receive any amount from the allegedly approved loan application, they should not be held liable for its payment. They contend that it was respondent BAP's negligence that caused the release of the loan proceeds to a person not authorized by petitioners.[52] Petitioners add that neither of them gave authorization for BAP to release the loan proceeds through Security Bank. There was also no evidence showing that the power and authority to receive the loan proceeds under the Special Power of Attorney were delegate to Eleanor.[53] On Jesus' October 14, 1997 letter, petitioners argue that it "has not been authenticated." [54]

According to petitioners, the contract was not consummated since they did not receive the loan proceeds, and therefore, null and void. The principal contract being void, the accessory contract of mortgage was also null and void.[55] Petitioners add that the mortgage contract also contained a pactum commissorium provision, [56] which states:

In case of the sale pursuant to the provisions of the this (sic) paragraph, such sale, whether made to mortgagee or to any other person or persons shall be made free from any right of redemption on the part of the mortgagor, the right of redemption granted by Section 8 of said Act No. 3135 being herein expressly waived by the mortgagor.[57] (Emphasis supplied, citation omitted)

On May 7, 2013, respondent BAP filed its Comment.[58] It counters that the loan proceeds "were duly received, credited and transferred to the Holy Infant Medical Clinic/Nanette L. Luntao/Eleanor L. Luntao under Security Bank and Trust Company Account No. 10048[.]"[59] It presents the Credit Memos and the Computerized Bank Account Ledger issued by the bank as proof of credit.[60]

Respondent BAP also maintains that Eleanor has no separate personal loan with them.[61] It gave emphasis on Jesus' October 14, 1997 letter admitting the loan of his sisters.[62] It reiterated Bato's testimony that Nanette promised to pay her account when he tried to collect the loan payment from her.[63]

Finally, respondent BAP contends that the assailed mortgage provision is not pactum commissorium since it does not "automatically allow the mortgagee to appropriate or own the mortgage property without the need of ... foreclosure proceedings." [64]

On September 27, 2013, petitioners filed their Reply.[65] They argue that respondent BAP was the one that

opened the account with Security Bank under the name of Holy Infant Medical Clinic. Respondent BAP also failed to present a witness to testify on who withdrew the loan proceeds.[66] Additionally, petitioner Nanette denied authorizing Jesus to represent her.[67]

On November 20, 2013, this Court issued a Resolution,[68] giving due course to the petition and requiring the parties to file their respective memoranda.

Petitioners submitted their Memorandum[69] on February 19, 2014. Respondent BAP submitted its Memorandum[70] on February 25, 2014. It adds that Nanette and Eleanor's obligations are "joint and several or solidary" under the promissory notes that they executed.[71]

This Court resolves the sole issue of whether or not the Real Estate Mortgage executed by Vicente L. Luntao and Nanette L. Luntao should be nullified.

Petitioners' main argument in asking for the nullification of the mortgage is the absence of consideration in the principal contract of loan. Without any consideration, the loan contract is void. According to petitioner, the void loan contract will necessarily result to the nullification of the mortgage contract, which is merely an accessory contract to the loan.

Petitioners' contention has no merit.

As an accessory contract, a mortgage contract's validity depends on the loan contract's validity.[72] It is, thus, imperative for this Court to determine if the contract of loan between petitioners and private respondent is valid. This Court held in *Pentacapital Investment Corporation v. Mahinay*[73] that "[l]ike any other contract, a contract of loan is subject to the rules governing the requisites and validity of contracts in general." [74]

The elements of a valid contract are enumerated in Article 1318 of the Civil Code:

ARTICLE 1318. There is no contract unless the following requisites concur:

- (1) Consent of the contracting parties;
- (2) Object certain which is the subject matter of the contract;
- (3) Cause of the obligation which is established.

All elements should be present in a contract; otherwise, it cannot be perfected.[75] In this case, petitioners insist that they did not receive the loan proceeds, which is the object of the loan contract.[76]

The determination of whether or not petitioners received the loan proceeds involves a review of the facts already adjudged by the lower courts. This Court has consistently ruled that a determination of facts is not proper in a Rule 45 petition.[77]

Rule 45, Section 1 of the Rules of Court states:

RULE 45

APPEAL BY CERTIORARI TO THE SUPREME COURT

SECTION 1. Filing of petition with Supreme Court. — A party desiring to appeal by certiorari from a judgment or final order or resolution of the Court of Appeals, the Sandiganbayan, the Court of Tax Appeals, the Regional Trial Court or other courts, whenever authorized by law, may file with the Supreme Court a verified petition for review on certiorari. The petition may include an application for a writ of preliminary injunction or other provisional remedies and shall raise only questions of law, which must be distinctly set forth. The petitioner may seek the same provisional remedies by verified motion filed in the same action or proceeding at any time during its pendency. (Emphasis supplied)

Clearly, in a Rule 45 petition, this Court may only entertain cases involving questions of law. In *Century Iron Works, Inc., et al. v. Bañas*:^[78]

A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. For a question to be one of law, the question must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact.

Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact.^[79] (Citations omitted)

In *Naguiat v. Court of Appeals*:^[80]

Under Rule 45 which governs appeal by certiorari, only questions of law may be raised as the Supreme Court is not a trier of facts. The resolution of factual issues is the function of lower courts, whose findings on these matters are received with respect and are in fact generally binding on the Supreme Court. A question of law which the Court may pass upon must not involve an examination of the probative value of the evidence presented by the litigants. There is a question of law in a given case when the doubt or difference arises as to what the law is on a certain state of facts; there is a question of fact when the doubt or difference arises as to the truth or the falsehood of alleged facts.^[81] (Citations omitted)

Here, both the trial court and the Court of Appeals found that petitioners received the proceeds of the loan through the account under the name of Holy Infant Medical Clinic/Nanette Luntao/Eleanor Luntao. This finding was supported by evidence presented by the parties. Both courts also gave weight to Jesus' October 14, 1997 letter, which read:

99 Kanlaon Street
Central Park Subdivision
Bangkal, Davao City
October 14, 1997

BAP Credit Guaranty Corporation
R. Magsaysay Avenue, Davao City

Attention: Ms. Veronica A. Aguilo
Manager

Gentlemen:

With reference to the loans of my sisters, Nanette and Eleanor Luntao, under the name of Holy Infant Medical Clinic, please be advised that due to some business reverses experienced for the last several months, substantial losses were incurred that greatly affected our capacity to service the loans. Perhaps, it could be recalled that in

the past, we have been meeting religiously the installments due.

One cause was the fraud committed by some personnel that resulted to substantial cash leakages. Necessary internal controls were already instituted to forestall repetition of similar incident in the future.

Another are changes in the medical system of our major clientele, Tadeco, a major banana plantation, and Milsa, a lone stevedoring company operating at the Port of Panabo. These major customers have changed their group life insurers. Unfortunately, Holy Infant Medical Clinic is not among the accredited hospitals. We are still working for accreditation with these insurers which takes time. Meantime we suffer. Their workers and families cannot avail of our services due to non-accreditation.

Conscious of our obligation with you, we have already decided to dispose some of our properties to update our loans. However, disposal at the moment may take time due to economic condition prevailing in the country.

In view of the above, we highly appeal to your compassion to give us due consideration and ample time to update our account. Rest assured that priority is given to you as soon as funds are available.

Again, thank you for your valued understanding and consideration.

Yours very truly,
(signed)

JESUS L. LUNTAO[82] (Emphasis supplied)

Despite having the opportunity to prove that the admission of Jesus is false, petitioners failed to present rebuttal evidence. They also failed to present evidence to support their allegation that Eleanor received the loan proceeds or that Eleanor's non-payment of her alleged personal loan with BAP caused the foreclosure of the mortgage. What petitioners presented were mere denials.

Although the general rule that resolution of Rule 45 petitions is limited to questions of law, it admits of certain exceptions.[83] Nonetheless, petitioners failed to convince this Court to re-examine the facts already considered by both the trial court and the Court of Appeals.

WHEREFORE, the Petition is DENIED. The Court of Appeals Decision dated August 9, 2011 and Resolution dated October 17, 2012 in CA-G.R. CV No. 72586-MIN are AFFIRMED.

SO ORDERED.

Velasco, Jr., (Chairperson), Bersamin, Martires, and Gesmundo, JJ., concur.

December 11, 2017

NOTICE OF JUDGMENT

Sirs/Mesdames:

Please take notice that on September 20, 2017 a Decision, copy attached hereto, was rendered by the Supreme Court in the above-entitled case, the original of which was received by this Office on December 11, 2017 at 2:05 p.m.

Very truly yours,

WILFREDO V. LAPITAN

Division Clerk of Court

By:

(Sgd.) MISAEL DOMINGO C. BATTUNG III
Deputy Division Clerk of Court

[1] Rollo, pp, 8-37.

[2] Id. at 39-45. The Decision was penned by Associate Justice Abraham B. Borreta and concurred in by Associate Justices Romulo V. Borja and Melchor Quirino C. Sadang, of the Special Twenty-Second Division, Court of Appeals, Cagayan de Oro City.

[3] Id. at 57-60. The Resolution was penned by Associate Justice Romulo V. Borja and concurred in by Associate Justices Ma. Luisa C. Quijano-Padilla and Jhosep Y. Lopez of the Twenty-First Division, Court of Appeals, Cagayan de Oro City.

[4] Id. at 32-A, Petition for Review.

[5] Id. at 147-155. The Decision was penned by Judge Jesus V. Quitain of Branch 15, Regional Trial Court, Davao City.

[6] Id. at 147 and 155, Regional Trial Court Decision.

[7] Id. at 152, Regional Trial Court Decision.

[8] Id. at 39, Court of Appeals Decision, and 152, Regional Trial Court Decision.

[9] Id. at 12, Petition for Review.

[10] Id. at 40, Court of Appeals Decision, and 152, Regional Trial Court Decision.

[11] Id. at 153, Regional Trial Court Decision. The trial court erroneously cited the clinic's name as "Holy Name Medical Clinic" instead of "Holy Infant Medical Clinic".

[12] Id. at 13 and 16, Petition for Review.

[13] Id. at 152, Regional Trial Court Decision, and 42, Court of Appeals Decision

[14] Id. at 40, Court of Appeals Decision.

[15] Id. at 146.

[16] Id.

[17] Id. at 40, Court of Appeals Decision.

[18] Id. at 40, Court of Appeals Decision, and 147, Regional Trial Court Decision.

- [19] Id. at 13, Petition for Review.
- [20] Id. at 17.
- [21] Id. at 14.
- [22] Id. at 15, Petition for Review, and 148, Regional Trial Court Decision.
- [23] Id. at 15, Petition for Review.
- [24] Id. at 148, Regional Trial Court Decision.
- [25] Id. at 15-17, Petition for Review.
- [26] Id. at 147.
- [27] Id. at 149-151. The trial court erroneously also referred to Aguilo as "Aguito."
- [28] Id. at 149-150.
- [29] Id. at 150.
- [30] Id.
- [31] Id. at 151.
- [32] Id.
- [33] Id.
- [34] Id. at 150.
- [35] Id. at 150-151.
- [36] Id. at 147-155.
- [37] Id. at 152-154.
- [38] Id. at 153-154.
- [39] Id. at 154.
- [40] Id. at 155.
- [41] Id. at 39 and 41, Court of Appeals Decision.
- [42] Id. at 39-45.
- [43] Id. at 42.
- [44] Id. at 43.
- [45] Id. at 43-44.
- [46] Id. at 44.
- [47] Id. at 45.
- [48] Id. at 57-60.
- [49] Id. at 8-37.

[50] Id. at 32-A.

[51] Id. at 21-25, Petition for Review.

[52] Id. at 25-26.

[53] Id. at 26-27.

[54] Id. at 27.

[55] Id. at 28-29.

[56] Id. at 29.

[57] Id.

[58] Id. at 113-132.

[59] Id. at 120, Comment.

[60] Id.

[61] Id. at 121.

[62] Id. at 124-126.

[63] Id. at 126-127.

[64] Id. at 127.

[65] Id. at 167-172.

[66] Id. at 168-169, Reply.

[67] Id. at 169.

[68] Id. at 174-174-A.

[69] Id. at 175-198.

[70] Id. at 200-223.

[71] Id. at 219, BAP Credit Guaranty Corporation's Memorandum.

[72] *Naguiat v. Court of Appeals*, 459 Phil. 237, 246 (2003) [Per J. Tinga, Second Division].

[73] 637 Phil. 283 (2010) [Per J. Nachura, Second Division].

[74] Id. at 301.

[75] *Limso v. Philippine National Bank*, G.R. No. 158622, January 27, 2016, 782 SCRA 137, 221 [Per J. Leonen, Second Division].

[76] *Naguiat v. Court of Appeals*, 459 Phil. 237, 243-244 (2003) [Per J. Tinga, Second Division].

[77] See *Limso v. Philippine National Bank*, G.R. No. 158622, January 27, 2016, 782 SCRA 137, 239-240 [Per J. Leonen, Second Division], citing *Land Bank of the Philippines v. Yatco Agricultural Enterprises*, 724 Phil. 276, 284-285 (2014) [Per J. Brion, Second Division]. See also *DST Movers Corporation v. People's General Insurance Corporation*, G.R. No. 198627, January 13, 2016, 780 SCRA 498, 507-508 [Per J. Leonen, Second Division].

[78] 711 Phil. 576 (2013) [Per J. Brion, Second Division].

[79] Id. at 585-586.

[80] 459 Phil. 237 (2003) [Per J. Tinga, Second Division].

[81] Id. at 241-242.

[82] Rollo, p. 146.

[83] See *Benito v. People*, 753 Phil. 616, 625-626 (2015) [Per J. Leonen, Second Division], which enumerates the exceptions to the rule: (1) when there is grave abuse of discretion; (2) when the findings are grounded on speculations; (3) when the inference made is manifestly mistaken; (4) when the judgment of the Court of Appeals is based on a misapprehension of facts; (5) when the factual findings are conflicting; (6) when the Court of Appeals went beyond the issues of the case and its findings are contrary to the admissions of the parties; (7) when the Court of Appeals overlooked undisputed facts which, if properly considered, would justify a different conclusion; (8) when the findings of the Court of Appeals are contrary to those of the trial court; (9) when the facts set forth by the petitioner are not disputed by the respondent; and (10) when the findings of the Court of Appeals are premised on the absence of evidence and are contradicted by the evidence on record.

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