

THIRD DIVISION

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

BANK OF COMMERCE, PETITIONER, VS. RADIO PHILIPPINES NETWORK, INC., INTERCONTINENTAL BROADCASTING CORPORATION, AND BANAHAW BROADCASTING CORPORATION, THRU BOARD OF ADMINISTRATOR, AND SHERIFF BIENVENIDO S. REYES, JR., SHERIFF, REGIONAL TRIAL COURT OF QUEZON CITY, BRANCH 98, RESPONDENTS.

DECISION

ABAD, J.:

In late 2001 the Traders Royal Bank (TRB) proposed to sell to petitioner Bank of Commerce (Bancommerce) for P10.4 billion its banking business consisting of specified assets and liabilities. Bancommerce agreed subject to prior Bangko Sentral ng Pilipinas' (BSP's) approval of their Purchase and Assumption (P & A) Agreement. On November 8, 2001 the BSP approved that agreement subject to the condition that Bancommerce and TRB would set up an escrow fund of P50 million with another bank to cover TRB liabilities for contingent claims that may subsequently be adjudged against it, which liabilities were excluded from the purchase.

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

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

The parties to the P & A had considered other potential liabilities against TRB, and to address these claims, the parties have agreed to set up an escrow fund amounting to Fifty Million Pesos (P50,000,000.00) in cash to be invested in government securities to answer for any such claim that shall be judicially established, which fund shall be kept for 15 years in the trust department of any other bank acceptable to the BSP. Any deviation therefrom shall require prior approval from the Monetary Board.

x x x x

Following the above approval, on November 9, 2001 Bancommerce entered into a P & A Agreement with TRB and acquired its specified assets and liabilities, excluding

liabilities arising from judicial actions which were to be covered by the BSP-mandated escrow of P50 million.

To comply with the BSP mandate, on December 6, 2001 TRB placed P50 million in escrow with Metropolitan Bank and Trust Co. (Metrobank) to answer for those claims and liabilities that were excluded from the P & A Agreement and remained with TRB. Accordingly, the BSP finally approved such agreement on July 3, 2002.

Shortly after or on October 10, 2002, acting in G.R. 138510, *Traders Royal Bank v. Radio Philippines Network (RPN), Inc.*, this Court ordered TRB to pay respondents RPN, Intercontinental Broadcasting Corporation, and Banahaw Broadcasting Corporation (collectively, RPN, et al.) actual damages of P9,790,716.87 plus 12% legal interest and some amounts. Based on this decision, RPN, et al. filed a motion for execution against TRB before the Regional Trial Court (RTC) of Quezon City. But rather than pursue a levy in execution of the corresponding amounts on escrow with Metrobank, RPN, et al. filed a Supplemental Motion for Execution^[1] where they described TRB as “now Bank of Commerce” based on the assumption that TRB had been merged into Bancommerce.

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

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

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

x x x x

We are not prepared though, unlike the respondent Judge, to declare the PSA between TRB and BANCOM as a farce or “a mere tool to effectuate a merger and/or consolidation” of the parties to the PSA. There is just a dearth of conclusive evidence to support such a finding, at least at this point. Consequently, the statement in the dispositive portion of the assailed August 15, 2005 Order referring to a merger/consolidation between TRB and BANCOM is deleted.^[6]

x x x x

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

SO ORDERED.^[7]

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

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

On August 18, 2010 the RTC issued the assailed Order^[10] denying Bancommerce pleas and, among others, directing the release to the Sheriff of Bancommerce's "garnished monies and shares of stock or their monetary equivalent" and for the sheriff to pay 25% of the amount "to the respondents' counsel representing his attorney's fees and P200,000.00 representing his appearance fees and litigation expenses" and the balance to be paid to the respondents after deducting court dues.

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

The issues this case presents are:

1. Whether or not the CA gravely erred in holding that Bancommerce had no valid excuse in failing to file the required motion for reconsideration of the assailed RTC Order before coming to the CA; and
2. Whether or not the CA gravely erred in failing to rule that the RTC's Order of execution against Bancommerce was a nullity because the CA Decision of December 8, 2009 in CA-G.R. SP 91258 held that TRB had not been merged into Bancommerce as to make the latter liable for TRB's judgment debts.

*Direct filing of the petition for
certiorari by Bancommerce*

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

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

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

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

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

Further, the Sheriff forcibly levied on Bancommerce's Lipa Branch cash on hand amounting to P1,520,000.00 and deposited the same with the Landbank. He also seized the bank's computers, printers, and monitors, causing the temporary cessation of its banking operations in that branch and putting the bank in an unwarranted danger of a run. Clearly, Bancommerce had valid justifications for skipping the technical requirement of a motion for reconsideration.

Merger and De Facto Merger

Merger is a re-organization of two or more corporations that results in their consolidating into a single corporation, which is one of the constituent corporations, one disappearing or dissolving and the other surviving. To put it another way, merger is the absorption of one or more corporations by another existing corporation, which retains its identity and takes over the rights, privileges,

franchises, properties, claims, liabilities and obligations of the absorbed corporation(s). The absorbing corporation continues its existence while the life or lives of the other corporation(s) is or are terminated.^[13]

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

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

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

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

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

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

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

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

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