



Republic of the Philippines
Supreme Court
 Manila

THIRD DIVISION

NG MENG TAM,
 Petitioner,

G.R. No. 214054

Present:

VELASCO, JR., *J., Chairperson,*
 PERALTA,
 VILLARAMA, JR.,
 PEREZ,* and
 JARDELEZA, *JJ.*

- versus -

CHINA BANKING CORPORATION,
 Respondent.

Promulgated:

August 5, 2015

x-----
[Signature]

DECISION

VILLARAMA, JR., J.:

Before this Court is a direct recourse from the Regional Trial Court (RTC) via petition¹ for review on the question of whether Section 5² of the Judicial Affidavit Rule (JAR) applies to hostile or adverse witnesses. The petition seeks to annul and set aside the May 28, 2014³ and August 27, 2014⁴ Orders of the RTC, Branch 139, Makati City in Civil Case No. 08-1028.

This case stemmed from a collection suit filed by China Banking Corporation (China Bank) against Ever Electrical Manufacturing Company Inc. (Ever), the heirs of Go Tong, Vicente Go, George Go and petitioner Ng Meng Tam sometime in December 2008. China Bank alleged that it granted

* Designated Acting Member in lieu of Associate Justice Bienvenido L. Reyes, per Special Order No. 2084 dated June 29, 2015.

¹ Under Rule 45 of the Revised Rules of Court. *Rollo*, pp. 3-21.

² JUDICIAL AFFIDAVIT RULE, Section 5 provides:

Sec. 5. *Subpoena*. - If the government employee or official, or the requested witness, who is neither the witness of the adverse party nor a hostile witness, unjustifiably declines to execute a judicial affidavit or refuses without just cause to make the relevant books, documents, or other things under his control available for copying, authentication, and eventual production in court, the requesting party may avail himself of the issuance of a subpoena *ad testificandum* or *duces tecum* under Rule 21 of the Rules of Court. The rules governing the issuance of a subpoena to the witness in this case shall be the same as when taking his deposition except that the taking of a judicial affidavit shall be understood to be *ex parte*.

³ *Rollo*, pp. 22-A to 24. Signed by Presiding Judge Benjamin T. Pozon.

⁴ *Id.* at 25-27.

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Ever a loan amounting to ₱5,532,331.63. The loan was allegedly backed by two surety agreements executed by Vicente, George and petitioner in its favor, each for ₱5,000,000.00, and dated December 9, 1993 and May 3, 1995, respectively. When Ever defaulted in its payment, China Bank sent demand letters collectively addressed to George, Vicente and petitioner. The demands were unanswered. China Bank filed the complaint for collection docketed as Civil Case No. 08-1028, which was raffled off to RTC Branch 62, Makati City.

In his Answer, petitioner alleged that the surety agreements were null and void since these were executed before the loan was granted in 2004. Petitioner posited that the surety agreements were contracts of adhesion to be construed against the entity which drafted the same. Petitioner also alleged that he did not receive any demand letter.

In the course of the proceedings, petitioner moved that his affirmative defenses be heard by the RTC on the ground that the suit is barred by the statute of limitations and laches.⁵ The motion was denied by the court.⁶ On appeal, the Court of Appeals (CA) in its December 22, 2010 Decision⁷ ruled that a preliminary hearing was proper pursuant to Section 6,⁸ Rule 16 of the Rules of Court due to the grounds cited by petitioner. There being no appeal, the decision became final and executory on August 28, 2011.⁹

On March 15, 2011, petitioner served interrogatories to parties¹⁰ pursuant to Sections 1¹¹ and 6,¹² Rule 25 of the Rules of Court to China Bank and required Mr. George C. Yap, Account Officer of the Account Management Group, to answer.

On June 22, 2011, George Yap executed his answers to interrogatories to parties.¹³

⁵ Id. at 65.

⁶ RTC Order dated January 4, 2010, id. at 66.

⁷ *Rollo*, pp. 63-75. Penned by Associate Justice Mariflor P. Punzalan Castillo with Associate Justices Josefina Guevara-Salonga and Franchito N. Diamante concurring.

⁸ RULES OF COURT, Rule 16, Section 6 provides:

SEC. 6. *Pleading grounds as affirmative defenses.* – If no motion to dismiss has been filed, any of the grounds for dismissal provided for in this Rule may be pleaded as an affirmative defense in the answer and, in the discretion of the court, a preliminary hearing may be had thereon as if a motion to dismiss had been filed.

⁹ *Rollo*, p. 76.

¹⁰ Id. at 77-79.

¹¹ RULES OF COURT, Rule 25, Section 1 provides:

SECTION 1. *Interrogatories to parties; service thereof.* – Under the same conditions specified in section 1 of Rule 23, any party desiring to elicit material and relevant facts from any adverse parties shall file and serve upon the latter written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf.

¹² Id., Section 6 provides:

SEC. 6. *Effect of failure to serve written interrogatories.* – Unless thereafter allowed by the court for good cause shown and to prevent a failure of justice, a party not served with written interrogatories may not be compelled by the adverse party to give testimony in open court, or to give a deposition pending appeal.

¹³ *Rollo*, pp. 80-85. Sent via registered mail on June 23, 2011.

In the meantime, having failed mediation and judicial dispute resolution, Civil Case No. 08-1028 was re-raffled off to RTC Branch 139, Makati City.

Petitioner again moved for the hearing of his affirmative defenses. Because he found Yap's answers to the interrogatories to parties evasive and not responsive, petitioner applied for the issuance of a subpoena *duces tecum* and *ad testificandum* against George Yap pursuant to Section 6,¹⁴ Rule 25 of the Revised Rules of Court.

On April 29, 2014, when the case was called for the presentation of George Yap as a witness, China Bank objected citing Section 5 of the JAR. China Bank said that Yap cannot be compelled to testify in court because petitioner did not obtain and present George Yap's judicial affidavit. The RTC required the parties to submit their motions on the issue of whether the preparation of a judicial affidavit by George Yap as an adverse or hostile witness is an exception to the judicial affidavit rule.¹⁵

Petitioner contended that Section 5 does not apply to Yap because it specifically excludes adverse party witnesses and hostile witnesses from its application. Petitioner insists that Yap needed to be called to the stand so that he may be qualified as a hostile witness pursuant to the Rules of Court.

China Bank, on the other hand, stated that petitioner's characterization of Yap's answers to the interrogatories to parties as ambiguous and evasive is a declaration of what type of witness Yap is. It theorizes that the interrogatories to parties answered by Yap serve as the judicial affidavit and there is no need for Yap to be qualified as a hostile witness.

In its May 28, 2014 Order, the RTC denied for lack of merit petitioner's motion to examine Yap without executing a judicial affidavit. The RTC in interpreting Section 5 of the JAR stated:

x x x The aforementioned provision, which allows the requesting party to avail himself of the provisions of Rule 21 of the Rules of Court finds applicability to: (a) a government employee or official, or the requested witness, who is neither the witness of the adverse party nor a hostile witness and (b) who unjustifiably declines to execute a judicial affidavit or refuses without just cause to make the relevant books, documents, or other things under his control available for copying, authentication, and eventual production in court.

In the case at bar, witness George Yap is being utilized as an adverse witness for the [petitioner]. Moreover, there was no showing that he unjustifiably declines to execute a judicial affidavit. In fact, it was [China Bank]'s counsel who insisted that said witness' judicial affidavit be taken. Thus, Section 5 of the [JAR] which [petitioner] invoked to exempt him from the Rule finds no application. Unless there is contrary ruling on the matter by the Supreme Court, this court has no choice but to implement the rule as written.

¹⁴ Supra note 12.

¹⁵ *Rollo*, pp. 86-87.

On this note, this Court also finds no merit on the contention of [China Bank] that the answer to the written interrogatories by witness George Yap already constitutes his judicial affidavit. Inasmuch as the Court strictly implemented the [JAR] on the part of [petitioner], so shall it rule in the same manner on the part of [China Bank]. As correctly pointed out by [petitioner], the said answer to interrogatories does not comply with Section 3 of the [JAR] which provides for the contents of the judicial affidavit.¹⁶

In essence, the RTC ruled that Section 5 did not apply to Yap since he was an adverse witness and he did not unjustifiably decline to execute a judicial affidavit. It stated:

In view of the foregoing, the motion of the [petitioner] that witness George Yap be examined without executing a Judicial Affidavit is hereby **DENIED FOR LACK OF MERIT.**¹⁷

Petitioner moved for reconsideration but it was denied by the RTC in its August 27, 2014 Order.¹⁸ The RTC reiterated its position and stated:

It must be pointed out that the [petitioner] [was] the [one] who invoked the provisions of Section 5 of the [JAR] to compel the attendance of witness George Yap and as such, it is their duty to show the applicability of the said provisions to the case at bar. As stated in the challenged Order, Section 5 of the [JAR] finds applicability to: (a) a government employee or official, or the requested witness, who is neither the witness of the adverse party nor a hostile witness and (b) who unjustifiably declines to execute a judicial affidavit or refuses without just cause to make the relevant books, documents, or other things under his control available for copying, authentication, and eventual production in court. In the case at bar, [petitioner] [does] not deny that witness George Yap is to be utilized as [his] adverse witness. On this score alone, it is clear that the provisions invoked do not apply.¹⁹

The RTC stressed that Section 5 of the JAR required the requested witness' refusal to be unjustifiable. It stated:

x x x the [JAR] requires that the refusal must be unjustifiable and without just cause. It must be pointed out that [China Bank]'s previous motions to quash the subpoena was grounded on the claim that having already submitted to this court his sworn written interrogatories, his being compelled to testify would be unreasonable, oppressive and pure harassment. Thus, witness' refusal to testify cannot be considered unjustifiable since he raised valid grounds.²⁰

Hence, this petition.

Petitioner contends that the RTC committed a grave error when it interpreted Section 5 to include adverse party and hostile witnesses. Based

¹⁶ Id. at 23.

¹⁷ Id.

¹⁸ Supra note 4.

¹⁹ Id. at 26.

²⁰ Id.

on the wording of Section 5, adverse party and hostile witnesses are clearly excluded.

China Bank asserts that Yap neither refused unjustifiably nor without just cause refused to a judicial affidavit. It cited the RTC's August 27, 2014 Order where the court said that Yap had answered the interrogatories and to compel him to testify in open court would be "unreasonable, oppressive and pure harassment." Moreover, it stated that based on the language used by Section 2 of the JAR the filing of judicial affidavits is mandatory.

The petition is anchored on the following arguments:

I

RTC BR. 139-MAKATI COMMITTED AN ERROR OF LAW WHEN IT INTERPRETED SEC. 5 OF THE [JAR] CONTRARY TO ITS WORDINGS.

II

RTC BR. 139-MAKATI COMMITTED AN ERROR OF LAW WHEN IT INTERPRETED SEC. 5 [OF THE JAR] CONTRARY TO ITS PRACTICAL INTENTION AND COMMON SENSE.

III

RTC BR. 139-MAKATI COMMITTED AN ERROR OF LAW WHEN IT EFFECTIVELY DISREGARDED THE RELEVANT RULES ON MODE OF DISCOVERY WHICH GOVERN THE PRESENTATION OF ADVERSE WITNESSES.

IV

ON A POLICY LEVEL AND IN THE EVENT RTC BR. 139-MAKATI'S INTERPRETATION AND APPLICATION OF SEC. 5 OF THE [JAR] IS CORRECT (I.E., THAT OPPOSING PARTY WHO INTENDS TO PRESENT ADVERSE OR HOSTILE WITNESS MUST GET AND SUBMIT THAT WITNESS' JUDICIAL AFFIDAVIT NO MATTER WHAT) IT IS HUMBLY SUBMITTED, WITH THE UTMOST INDULGENCE OF THE HONORABLE SUPREME COURT, THAT THE SAME RULE BE IMPROVED OR AMENDED BY PROVIDING SANCTIONS IN THE EVENT THE ADVERSE OR HOSTILE WITNESS REFUSES TO ANSWER OR EXECUTE JUDICIAL AFFIDAVIT AS REQUIRED BY THE OPPOSING PARTY.²¹

We grant the petition.

**THE JUDICIAL AFFIDAVIT RULE
APPLIES TO PENDING CASES**

On September 4, 2012, the JAR was promulgated to address case congestion and delays in courts. To this end, it seeks to reduce the time

²¹ Id. at 9-10.

needed to take witnesses' testimonies.²² The JAR took effect on January 1, 2013 and would also apply to pending cases pursuant to Section 12 to wit:

Sec. 12. Effectivity. – This rule shall take effect on **January 1, 2013** following its publication in two newspapers of general circulation not later than September 15, 2012. **It shall also apply to existing cases.** (Emphasis supplied)

The Court En Banc gave public prosecutors in first and second level courts one year of modified compliance.²³ The JAR thus took full effect on January 1, 2014.

Here, parties were presenting their evidence for the RTC's consideration when the JAR took effect. Therefore, pursuant to Section 12 the JAR applies to the present collection suit.

SECTION 5 OF THE JAR DOES NOT APPLY TO ADVERSE PARTY WITNESSES

The JAR primarily affects the manner by which evidence is presented in court. Section 2(a) of the JAR provides that judicial affidavits are mandatorily filed by parties to a case except in small claims cases. These judicial affidavits take the place of direct testimony in court. It provides:

Sec. 2. Submission of Judicial Affidavits and Exhibits in lieu of direct testimonies. – (a) The parties shall file with the court and serve on the adverse party, personally or by licensed courier service, not later than five days before pre-trial or preliminary conference or the scheduled hearing with respect to motions and incidents, the following:

(1) The judicial affidavits of their witnesses, which shall take the place of such witnesses' direct testimonies; and

(2) The parties' documentary or object evidence, if any, which shall be attached to the judicial affidavits and marked as Exhibits A, B, C, and so on in the case of the complainant or the plaintiff, and as Exhibits 1, 2, 3, and so on in the case of the respondent or the defendant.

x x x x

Section 3²⁴ of the JAR enumerates the content of a judicial affidavit.

²² JUDICIAL AFFIDAVIT RULE, 4th Whereas Clause provides:

x x x x

Whereas, in order to reduce the time needed for completing the testimonies of witnesses in cases under litigation, on February 21, 2012 the Supreme Court approved for piloting by trial courts in Quezon City the compulsory use of judicial affidavits in place of the direct testimonies of witnesses;

x x x x

²³ Resolution dated January 8, 2013, *rollo* (A.M. No. 12-8-8-SC), pp. 37-39.

²⁴ JUDICIAL AFFIDAVIT RULE, Section 3 provides:

Sec. 3. Contents of Judicial Affidavit. – A judicial affidavit shall be prepared in the language known to the witness and, if not in English or Filipino, accompanied by a translation in English or Filipino, and shall contain the following:

(a) The name, age, residence or business address, and occupation of the witness;

Under Section 10,²⁵ parties are to be penalized if they do not conform to the provisions of the JAR. Parties are however allowed to resort to the application of a subpoena pursuant to Rule 21 of the Rules of Court in Section 5 of the JAR in certain situations. Section 5 provides:

Sec. 5. Subpoena. – If the government employee or official, or the requested witness, who is neither the witness of the adverse party nor a hostile witness, unjustifiably declines to execute a judicial affidavit or refuses without just cause to make the relevant books, documents, or other things under his control available for copying, authentication, and eventual production in court, the requesting party may avail himself of the issuance of a subpoena *ad testificandum* or *duces tecum* under Rule 21 of the Rules of Court. The rules governing the issuance of a subpoena to the witness in this case shall be the same as when taking his deposition except that the taking of a judicial affidavit shall be understood to be *ex parte*.

While we agree with the RTC that Section 5 has no application to Yap as he was presented as a hostile witness we cannot agree that there is need for a finding that witness unjustifiably refused to execute a judicial affidavit.

Section 5 of the JAR contemplates a situation where there is a (a) government employee or official or (b) requested witness who is **not** the (1) adverse party's witness nor (2) a hostile witness. If this person either (a) unjustifiably declines to execute a judicial affidavit or (b) refuses without just cause to make the relevant documents available to the other party and its presentation to court, Section 5 allows the requesting party to avail of issuance of subpoena *ad testificandum* or *duces tecum* under Rule 21 of the Rules of Court. Thus, adverse party witnesses and hostile witnesses being excluded they are not covered by Section 5. *Expressio unius est exclusion*

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- (b) The name and address of the lawyer who conducts or supervises the examination of the witness and the place where the examination is being held;
 - (c) A statement that the witness is answering the questions asked of him, fully conscious that he does so under oath, and that he may face criminal liability for false testimony or perjury;
 - (d) Questions asked of the witness and his corresponding answers, consecutively numbered, that:
 - (1) Show the circumstances under which the witness acquired the facts upon which he testifies;
 - (2) Elicit from him those facts which are relevant to the issues that the case presents; and
 - (3) Identify the attached documentary and object evidence and establish their authenticity in accordance with the Rules of Court;
 - (e) The signature of the witness over his printed name; and
 - (f) A jurat with the signature of the notary public who administers the oath or an officer who is authorized by law to administer the same.

²⁵ Id., Section 10 provides:

Sec. 10. Effect of non-compliance with the Judicial Affidavit Rule. – (a) A party who fails to submit the required judicial affidavits and exhibits on time shall be deemed to have waived their submission. The court may, however, allow only once the late submission of the same provided, the delay is for a valid reason, would not unduly prejudice the opposing party, and the defaulting party pays a fine of not less than P1,000.00 nor more than P5,000.00, at the discretion of the court.

(b) The court shall not consider the affidavit of any witness who fails to appear at the scheduled hearing of the case as required. Counsel who fails to appear without valid cause despite notice shall be deemed to have waived his client's right to confront by cross-examination the witnesses there present.

(c) The court shall not admit as evidence judicial affidavits that do not conform to the content requirements of Section 3 and the attestation requirement of Section 4 above. The court may, however, allow only once the subsequent submission of the compliant replacement affidavits before the hearing or trial provided the delay is for a valid reason and would not unduly prejudice the opposing party and provided further, that public or private counsel responsible for their preparation and submission pays a fine of not less than P1,000.00 nor more than P5,000.00, at the discretion of the court.

alterius: the express mention of one person, thing, or consequence implies the exclusion of all others.²⁶

Here, Yap is a requested witness who is the adverse party's witness. Regardless of whether he unjustifiably declines to execute a judicial affidavit or refuses without just cause to present the documents, Section 5 cannot be made to apply to him for the reason that he is included in a group of individuals expressly exempt from the provision's application.

The situation created before us begs the question: if the requested witness is the adverse party's witness or a hostile witness, what procedure should be followed?

The JAR being silent on this point, we turn to the provisions governing the rules on evidence covering hostile witnesses specially Section 12, Rule 132 of the Rules of Court which provides:

SEC. 12. *Party may not impeach his own witness.* – Except with respect to witnesses referred to in paragraphs (d) and (e) of Section 10, the party producing a witness is not allowed to impeach his credibility.

A witness may be considered as unwilling or hostile only if so declared by the court upon adequate showing of his adverse interest, unjustified reluctance to testify, or his having misled the party into calling him to the witness stand.

The unwilling or hostile witness so declared, or the witness who is an adverse party, may be impeached by the party presenting him in all respects as if he had been called by the adverse party, except by evidence of his bad character. He may also be impeached and cross-examined by the adverse party, but such cross-examination must only be on the subject matter of his examination-in-chief.

Before a party may be qualified under Section 12, Rule 132 of the Rules of Court, the party presenting the adverse party witness must comply with Section 6, Rule 25 of the Rules of Court which provides:

SEC. 6. *Effect of failure to serve written interrogatories.* – Unless thereafter allowed by the court for good cause shown and to prevent a failure of justice, a party not served with written interrogatories may not be compelled by the adverse party to give testimony in open court, or to give a deposition pending appeal.

In *Afulugencia v. Metropolitan Bank & Trust Co.*,²⁷ this Court stated that “in civil cases, the procedure of calling the adverse party to the witness stand is not allowed, unless written interrogatories are first served upon the latter.”²⁸ There petitioners Spouses Afulugencia sought the issuance of a

²⁶ *Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS, INC.) v. Power Sector Assets and Liabilities Management Corporation (PSALM)*, G.R. No. 192088, October 9, 2012, 682 SCRA 602, 649.

²⁷ G.R. No. 185145, February 5, 2014, 715 SCRA 399.

²⁸ *Id.* at 412.

subpoena *duces tecum* and *ad testificandum* to compel the officers of the bank to testify and bring documents pertaining to the extrajudicial foreclosure and sale of a certain parcel of land. Metrobank moved to quash the issuance of the subpoenas on the ground of non-compliance with Section 6, Rule 25 of the Rules of Court. In quashing the issuance of the subpoena, the Court reminded litigants that the depositions are a mechanism by which fishing expeditions and delays may be avoided. Further written interrogatories aid the court in limiting harassment and to focus on what is essential to a case. The Court stated:

One of the purposes of the above rule is to prevent fishing expeditions and needless delays; it is there to maintain order and facilitate the conduct of trial. It will be presumed that a party who does not serve written interrogatories on the adverse party beforehand will most likely be unable to elicit facts useful to its case if it later opts to call the adverse party to the witness stand as its witness. Instead, the process could be treated as a fishing expedition or an attempt at delaying the proceedings; it produces no significant result that a prior written interrogatories might bring.

Besides, since the calling party is deemed bound by the adverse party's testimony, compelling the adverse party to take the witness stand may result in the calling party damaging its own case. Otherwise stated, if a party cannot elicit facts or information useful to its case through the facility of written interrogatories or other mode of discovery, then the calling of the adverse party to the witness stand could only serve to weaken its own case as a result of the calling party's being bound by the adverse party's testimony, which may only be worthless and instead detrimental to the calling party's cause.

Another reason for the rule is that by requiring prior written interrogatories, the court may limit the inquiry to what is relevant, and thus prevent the calling party from straying or harassing the adverse party when it takes the latter to the stand.

Thus, the rule not only protects the adverse party from unwarranted surprises or harassment; it likewise prevents the calling party from conducting a fishing expedition or bungling its own case. Using its own judgment and discretion, the court can hold its own in resolving a dispute, and need not bear witness to the parties perpetrating unfair court practices such as fishing for evidence, badgering, or altogether ruining their own cases. Ultimately, such unnecessary processes can only constitute a waste of the court's precious time, if not pointless entertainment.²⁹ (Citation omitted)

In this case, parties, with the approval of the Court, furnished and answered interrogatories to parties pursuant to Rule 25 of the Rules of Court. They therefore complied with Section 6 of Rule 25 of the Rules of Court. Before the present controversy arose, the RTC had already issued subpoenas for Yap to testify and produce documents. He was called to the witness stand when China Bank interposed its objection for non-compliance with Section 5 of the JAR. Having established that Yap, as an adverse party witness, is not within Section 5 of the JAR's scope, the rules in presentation

²⁹ Id. at 413-414.


of adverse party witnesses as provided for under the Rules of Court shall apply. In keeping with this Court's decision in *Afulugencia*, there is no reason for the RTC not to proceed with the presentation of Yap as a witness.

In sum, Section 5 of the JAR expressly excludes from its application adverse party and hostile witnesses. For the presentation of these types of witnesses, the provisions on the Rules of Court under the Revised Rules of Evidence and all other correlative rules including the modes of deposition and discovery rules shall apply.


WHEREFORE, the petition is **GRANTED**. The May 28, 2014 and August 27, 2014 Orders of the Regional Trial Court, Branch 139, Makati City are hereby **ANNULLED** and **SET ASIDE**.


No pronouncement as to costs.


SO ORDERED.


MARTIN S. VILLARAMA, JR.
Associate Justice

WE CONCUR:


PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

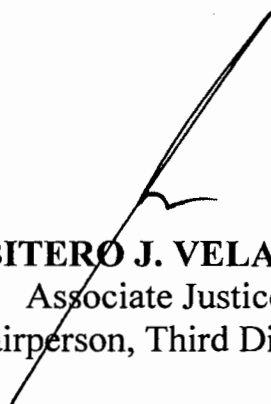

DIOSDADO M. PERALTA
Associate Justice


JOSE PORTUGAL PEREZ
Associate Justice


FRANCIS H. JARDELEZA
Associate Justice

A T T E S T A T I O N

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



PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson, Third Division

C E R T I F I C A T I O N

Pursuant to Section 13, Article VIII of the 1987 Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



MARIA LOURDES P. A. SERENO
Chief Justice

