Republic of the Philippines
Supreme Court
Manila

THIRD DIVISION

LUZVIMINDA PALO, *Petitioner*,	**G.R. No. 228919**
	Present:
- versus -	CAGUIOA, *Chairperson*,
	INTING,*
SPOUSES REY C. BAQUIRQUIR and FLEURDELINE B. BAQUIRQUIR, TAKESHI NAKAMURA, ATTY. ORPHA T. CASUL-ARENDAIN, *Respondents*.	GAERLAN, DIMAAMPAO, *and* SINGH, *JJ.*
	Promulgated: August 23, 2023

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RESOLUTION

GAERLAN, *J.*:

Before Us is a Motion for Reconsideration[1] filed by petitioner Luzviminda Palo (Palo) against the November 20, 2017 Resolution[2] of this Court, which denied her petition for review on *certiorari* against the March 10, 2016 Decision[3] and the October 19, 2016 Resolution[4] of the Court of Appeals (CA) in CA-G.R. CV No. 04717, for failure to sufficiently show reversible error therein which would warrant the exercise of this Court's discretionary review jurisdiction.

Palo and her husband Marcelo (together referred to as the spouses Palo) obtained a loan of ₱407,000.00 from respondent Takeshi Nakamura (Nakamura), a Japanese national. The loan was secured by a real estate mortgage over a parcel of land located in Barrio Gabi, Cordova, Cebu, which is denominated as Lot No.

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* On leave.

1 *Rollo*, pp. 3-40.

2 Id. at 78-80. First Division.

3 Id. at 63-68. Penned by Associate Justice Edward B. Contreras, with Associate Justices Edgardo L. Delos Santos (a retired Member of this Court) and Geraldine C. Fiel-Macaraig, concurring.

4 Id. at 20-21.

4, Block 13, Pcs-072220-002578 and registered in Palo's name under Transfer Certificate of Title (TCT) No. T-103943.[5]

On May 12, 2004, respondent Atty. Orpha T. Casul-Arendain (Atty. Casul-Arendain) executed a Notice of Notarial Foreclosure[6] to the effect that Palo failed to comply with the conditions of the mortgage and Nakamura thus opted to exercise his right of foreclosure.[7] Pursuant to the notarial foreclosure, the property was sold at public auction.[8] Respondent Rey C. Baquirquir (Rey) won the auction as the highest bidder.[9] Palo failed to timely redeem,[10] so her TCT was cancelled[11] and a new TCT was issued to Rey.[12]

Sometime in February 2009, Palo sued Nakamura, Rey, and Atty. Casul-Arendain, among others, before the Regional Trial Court (RTC) of Lapu-Lapu City to annul the foreclosure, the resulting sale, and the new TCT issued to Rey, on the ground that the foreclosure is null and void because Nakamura had no authority under the terms of the mortgage to extrajudicially foreclose thereon. Palo also claimed that Rey is a mere dummy and that the auction sale was simulated, as Rey never paid the alleged price therefor.[13]

In their answer, respondents maintained the validity of the loan, the mortgage, and the extrajudicial foreclosure. They asserted that a special power of attorney (SPA) was not necessary to effect the foreclosure since the mortgage contract contained a provision authorizing the mortgagee to extrajudicially foreclose thereon.[14] Nakamura specifically denied being a moneylender and maintained that Palo was only able to pay ₱30,000.00 of the total obligation.[15]

Adamant that Nakamura needed an SPA to effect a valid foreclosure, Palo filed on September 30, 2009 a motion for judgment on the pleadings, asserting that respondents' answer failed to tender an issue on account of their admission that Nakamura did not have an SPA when he foreclosed on the mortgage. Palo maintained that "*Act No. 3135, as amended by Act 4118* [and A.M. No. 99-10-05-0, as implemented by Circular No. 7-2002], *requires that a special power is inserted or annexed to the Real Estate Mortgage in order to validate the extrajudicial foreclosure of the real property.*"[16]

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5 Id. at 31-32. Real Estate Mortgage.
6 Id. at 33.
7 Id.
8 Id. at 34. Certificate of Sale.
9 Id.
10 Id. at 36. Answer.
11 Id. at 29-30, TCT No. T-103943 in the name of Luzviminda Palo, stamped with the word, "CANCELLED".
12 Id. at 150-151, TCT No. T-152541 in the name of Rey C. Baquirquir.
13 Id. at 24-26. Complaint.
14 Id. at 36. Answer.
15 Id. at 35-36.
16 Id. at 41. Motion for Judgment on the Pleadings.

Commenting on the motion, respondents argued that no particular formality is required to authorize the mortgagee to effect the sale of the mortgaged property upon foreclosure.[17]

On August 7, 2012, the RTC rendered Judgment[18] on the pleadings in favor of respondents, *viz.*:

> **WHEREFORE,** premises considered, the Court hereby renders judgment **DISMISSING** the complaint for lack of merit and evidence. Defendants' counterclaims are likewise dismissed for lack of evidence.[19] (Emphasis in the original)

The RTC agreed with the respondents that the foreclosure provision of the mortgage contract gave Nakamura sufficient authority to foreclose and sell the disputed property. According to the trial court, "*[t]he provision is clear as well as specific enough that the conclusion is inevitable that the agreement between mortgagors Palo and mortgagee Nakamura was for the latter to foreclose the mortgage properly either judicially or extra-judicially if mortgagor fails to redeem the same within the given period.*"[20]

Palo moved for reconsideration, still maintaining that an SPA is required to effect a valid extra-judicial foreclosure and further arguing that she was able to substantially pay her loan;[21] but on January 8, 2013, the RTC denied her motion for reconsideration.[22] Palo appealed to the CA,[23] arguing that the trial court erred in dismissing her claim on the basis of the pleadings, asserting that the trial court failed to categorically declare whether respondents' answer failed to tender an issue or admitted the material allegations of the complaint;[24] and insisting that "*the extrajudicial foreclosure proceeding was void since she did not execute any SPA, and the deed of mortgage that she signed did not authorize Nakamura or anybody to cause the extrajudicial foreclosure sale of the mortgaged property if she fails to make good her obligation.*"[25]

As earlier mentioned, the CA denied Palo's appeal, *viz.*:

> WHEREFORE, the appeal is DENIED. The Judgment dated August 7, 2012 and Order dated January 8, 2013, both rendered by the Regional Trial

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17 Id. at 45-47. Comment and Opposition to the Motion for Judgment on the Pleadings, citing *Tan Chat v. Hodges*, 98 Phil. 928 (1956).

18 Id. at 48-50. Rendered by Presiding Judge Victor Teves, Sr. of the RTC of Lapu-Lapu City, Branch 54.

19 Id. at 50.

20 Id.

21 Id. at 51-61. Motion for Reconsideration with annexes.

22 Id. at 62. Order of the RTC dated January 8, 2013.

23 Id. at 63. CA Decision.

24 Id. at 65.

25 Id.

> Court, Branch 54, Lapulapu City in Civil Case No. R-LLP-09-04171-CV, are hereby AFFIRMED.
>
> SO ORDERED.[26]

The appellate court held that the *act of issuance* of judgment on the pleadings is in itself the indication that the answer failed to tender an issue or admitted the material allegations of the complaint, so the trial court need not belabor this point.[27] On the substantive issue, the CA ruled that Nakamura's lack of an SPA does not preclude him from extrajudicially foreclosing on the mortgage, as the foreclosure provision of the mortgage contract gave him the requisite authority to do so.[28] The absence in the mortgage contract of an express authority in favor of Nakamura to conduct a foreclosure sale is immaterial, for no particular formality is required to empower the mortgagee to sell the mortgaged property. What matters is that the terms of the contract evince an intention that the sale may be made upon default or any other contingency.[29]

Upon the denial[30] of her motion for reconsideration,[31] Palo elevated the matter to this Court through a petition for review on *certiorari*.[32] In the assailed resolution,[33] We held that RTC and the CA did not err in ruling that the foreclosure provision of the mortgage contract gave Nakamura the requisite authority to foreclose on the mortgage and sell the disputed property.[34] We denied Palo's recourse in this manner:

> **WHEREFORE,** premises considered, the Petition for Review is **DENIED.** The CA Decision dated 10 March 2016 in CA-G.R. CV No. 04717, which affirmed the RTC Decision dated 7 August 2012 and Order dated 8 January 2013 in Civil Case No. R-LLP-09-04171-CV, upholding the validity of the extrajudicial foreclosure sale of the mortgaged property, is **AFFIRMED**.
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> **SO ORDERED.**[35] (Emphasis in the original)

In the present Motion for Reconsideration, Palo argues that: 1) the foreclosure provision of the mortgage contract does not name the person or persons authorized to foreclose upon the mortgage, contrary to Section 1 of Act No. 3135 as amended;[36] 2) since Nakamura was not specifically named in the mortgage contract as a party authorized to foreclose, the notarial foreclosure by

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26 Id. at 68.
27 Id. at 65-66.
28 Id. at 66.
29 Id. at 67.
30 Id. at 20-21. CA Resolution dated October 19, 2016.
31 Id. at 69-71.
32 Id. at 8-14.
33 Id. at 78-80. Unsigned Resolution dated November 20, 2017, First Division.
34 Id. at 79.
35 Id. at 80.
36 Id. at 82. Motion for Reconsideration.

Atty. Casul-Arendain on his behalf is likewise void;[37] and 3) upholding the foreclosure and the auction sale in favor of Rey amounts to a taking of property without due process of law.[38]

The Motion for Reconsideration is meritorious.

The kernel of this dispute lies in the construction of the pertinent provisions of the mortgage contract between the spouses Palo and Nakamura, which read as follows:

> WHEREAS, the MORTGAGOR acknowledges to be justly indebted to the MORTGAGEE in the sum set forth below, and is willing to guarantee the repayment thereof as well as the performance of such other obligations as may arise thereunder.
>
> NOW THEREFORE, for and in consideration of the above premises and more specifically as security for the principal obligation in the sum of FOUR HUNDRED SEVEN THOUSAND PESOS (P407,000.00), Philippine Currency, the receipt whereof is hereby acknowledged by the MORTGAGOR, payable on or before 24 November 2001, without any interest, the herein MORTGAGOR does by these presents constitute a first mortgage in favor of the MORTGAGEE, his heirs and assigns upon the afore-described parcel of land, INCLUDING all the buildings and improvements which may now or may hereafter exist thereon;
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> That it is the principal condition, of this mortgage that the MORTGAGOR is prohibited from selling/and or contract[ing] a 2nd mortgage subjecting the [abovementioned] properties (subject of this mortgage) in favor of any other person, persons or entities until the principal obligation in the sum of FOUR HUNDRED SEVEN THOUSAND PESOS (P407,000.00) shall be paid with the full satisfaction of the MORTGAGEE;
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> That if the MORTGAGOR faithfully compl[ies] with all the conditions herein mentioned, then this mortgage shall ipso facto become null and void, otherwise, it shall remain in full force and effect and be enforceable in the manner provided by law and by this agreement.
>
> **Should the MORTGAGOR fail to redeem the above-described properties within the period, then this mortgage shall be foreclosed either judicially or extra-judicially in accordance with law.**[39]

We find that the RTC and the CA committed reversible error when they construed the last aforequoted paragraph to be a fully-contained special power to both foreclose on the mortgage and sell the disputed property, in compliance with the provisions of Act No. 3135, as amended.

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37 Id. at 83.

38 Id. at 83-84.

39 Id. at 31. Real Estate Mortgage. Emphasis supplied.

The provisions of positive laws regulating a particular type of contract are deemed written into every contract of such type.[40] Real estate mortgages are governed by the Civil Code and special laws.[41] These laws are therefore deemed written and incorporated into Palo and Nakamura's contract, and must be kept in mind in interpreting the same. Pursuant to Articles 2087 and 2126 of the Civil Code, the nature and purpose of a real estate mortgage is the creation of a *right in favor of the mortgagee* to have the mortgaged property *alienated* in order to apply the proceeds of such *alienation* to the satisfaction of the principal obligation which is secured by the mortgage. The contract at bar clearly and specifically adverts to the spouses Palo as the MORTGAGOR;[42] and to Nakamura as the MORTGAGEE.[43] Clearly, when the spouses Palo and Nakamura agreed that:

> [s]hould the MORTGAGOR fail to redeem the above-described properties within the period, then this mortgage shall be **foreclosed either judicially or extra-judicially in accordance with law**,[44] (Emphasis and underscoring supplied)

their obvious intention was to empower Nakamura to seek the foreclosure of the mortgage in accordance with law. The omission of Nakamura's name in the contract's foreclosure provision is immaterial, for he is the mortgagee named in the contract.

However, the right of mortgagees to seek a foreclosure does not automatically vest them with the power to effect a foreclosure on their own. Ordinarily, the foreclosure process is initiated by judicial proceedings instituted by the mortgagee, and the sale of the property as ordained by the Civil Code is usually conducted by a judicial officer.[45] Under our prevailing law on extrajudicial foreclosure, the mortgagee must be given an ***express authority to sell the mortgaged property***.

In the early history of mortgages, foreclosure proceedings were mostly judicial in character.[46] Over time, extrajudicial foreclosure through the

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40 *Heirs of San Miguel v. Court of Appeals*, 416 Phil. 943, 954 (2001).

41 CIVIL CODE, Articles 2128 and 2131; ACT NO. 3135, as amended.

42 The Real Estate Mortgage (*rollo*, p. 31) states that "This instrument is made and executed between: SPOUSES LUZVIMINDA PALO & MARCELO PALO, Filipinos, of legal ages, and residents of Cordova, Cebu, hereinafter referred to as the MORTGAGOR" x x x.

43 The Real Estate Mortgage (id.) states that "TAKESHI NAKAMURA, likewise of legal age, a Japanese national, married, and a resident of Pajac, Lapu-lapu City, hereinafter referred to as MORTGAGEE" x x x x

44 *Rollo*, p. 66.

45 RULES OF COURT, Rule 68, Sections 1 and 3. Foreclosure proceedings are also judicial in character under the old Code of Civil Procedure (Sections 254-272) and the Mortgage Law of 1893 (Article 128).

46 See generally Chris Briggs & Jaco Zuijderduijn (eds.), LAND AND CREDIT MORTGAGES IN THE MEDIEVAL AND EARLY MODERN EUROPEAN COUNTRYSIDE (2018). "Courts of equity have inherent original jurisdiction of the subject of mortgages both for the foreclosure and redemption of them.

appointment of the mortgagee as the mortgagor's agent for the purpose of selling the mortgaged property became widespread, being justified on the ground that judicial foreclosure proceedings are time-consuming, expensive, and less conducive to capital investment.[47] Extrajudicial foreclosures of this nature were sanctioned for the first time by this Court a hundred years ago in the leading case of *El Hogar Filipino v. Paredes*[48] (*El Hogar Filipino*), which involved the mortgage of a *hacienda* in Negros containing these stipulations:

> Tenth. The borrower, Aniceta Ardosa, hereby confers a sufficient and irrevocable power of attorney in favor of the manager of the partnership, in order that he, in the event that the indebtedness, hereby acknowledged, falls due, on account of the failure on the part of the borrower to fulfill any of the obligations mentioned in clauses second, fourth, fifth, eleventh, thirteenth, sixteenth, seventeenth and twenty-first of this deed, once the board of directors has resolved that said partnership has decide to exercise its right to consider the indebtedness of the borrower due, and once a notice has been published in a newspaper of general circulation of this city, once a week, during three consecutive weeks, may proceed to make an extrajudicial sale, before a notary public or auctioneer, whom the board of directors may designate, of the real property, the subject of this mortgage, the manager of the partnership being hereby authorized, by irrevocable power of attorney, to execute, as agent of the borrower, the corresponding deed of sale in favor of the highest bidder at said auction sale; provided, however, that the deed of sale shall not be executed but after the expiration of the thirty days' time granted to run from the date of the borrower should pay, within that period of thirty days, to be computed from the date of the sale, to the partnership, the total amount of her indebtedness, at such date, with interest due and expenses incurred by the sale, less the expenses for the cancellation of her shares, such public sale shall remain invalid, and the representative of the partnership shall execute the proper deed for the cancellation of the mortgage hereby made, the expenses for the execution of said deed of cancellation being on account of the borrower.
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> Fifteenth. It is expressly agreed upon that the partnership shall be entitled to bid in any of the extrajudicial auctions for the sale of the mortgaged property, which might be held in accordance with the agreement entered into on this date, and that in the event that the partnership's bid be higher than any other bid made by any other person, the manager of the partnership may execute in favor of the partnership, as the agent for the borrower, the corresponding deed of sale, in the same form and under the same condition established in clause tenth of the deed.[49]

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used for the foreclosure of mortgages under different systems of law and practice adopted in different states, yet generally courts of equity are not deprived of jurisdiction by the existence of other remedies. In many states, as already seen, jurisdiction in equity of the foreclosure of mortgages is expressly conferred by statute." 3 Leonard A. Jones, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY 1 (7th ed., 1915).

47 Johns, *J.*, dissenting in *El Hogar Filipino v. Paredes*, 45 Phil. 178, 202 (1923); Jones, id. at 435-436; 1 William F. Walsh, TREATISE ON MORTGAGES 340 (1934).

48 Id.

49 Id. at 188-189.

Upon default, the creditor, a Manila-based building and loan association, foreclosed in accordance with the mortgage contract and conducted an extrajudicial auction sale, where it emerged as the highest bidder. The provincial register of deeds refused to register the auction sale, prompting the creditor to file an action for mandamus to compel registration. Citing Spanish Supreme Court decisions and other Spanish and American sources, we ruled that:

> [A] stipulation in a mortgage conferring a power of sale upon the mortgagee is valid. The history of this doctrine, as abstracted from the pages of a well-known legal encyclopedia is briefly this: The right to foreclose a mortgage of personality by the exercise of a power of sale encountered considerable opposition; and doubts as to its validity of the power of sale encountered considerable opposition; and doubts as to its validity were not infrequently expressed far into the nineteenth century. In 1811, however, the power was recognized as being a good source of title, and in a few years the practice of inserting the provision had become general. Having once been recognized in England, the power of sale soon came to be an ordinary incident in the execution of a mortgage and was usually inserted as a matter of course; and so fully did the exercise of the power accord with considerations of public policy, that, by parliamentary enactment, the power of sale can now be exercised in England by the mortgagee although a provision therefor be omitted from the deed. In America also numerous early expressions are to be found which question the validity of the power of sale or deny it altogether; but legislative and judicial opinion soon eradicated this notion almost entirely, and it is now settle in America as in England that, in the absence of a statutory requirement of judicial foreclosure, the exercise of the power of sale contained in a mortgage or deed of trust will vest a good title in the purchaser and cut off the equity of redemption. Such is the doctrine maintained in the Federal courts of the United States and the courts of every American State with the exception of one only.
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> In the light of the foregoing authorities it is evident that the power of sale conferred on the creditor in the mortgage now under consideration cannot be declared to be in contravention either of law, morals, or public policy.
>
> That this view is in harmony with legal conceptions prevailing in this jurisdiction can be further seen from the circumstance that section 66 of the Land Registration Act (Act No. 496) fully recognizes the validity of a clause in a mortgage conferring a special power of sale on the mortgagee. It is true that that section deals only with land that has been registered under the Torrens system, but the provision reflects the commonly accepted professional view that such a clause is valid, regardless of the nature of the title. Certainly, it would be an astonishing conclusion if we were to hold here that a clause conferring special power of sale is invalid in a contract dealing with land not registered under the Torrens system, notwithstanding the fact that the same clause is valid when inserted in contract relating to land so registered.[50]

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[50] Id. at 182-185.

Justice George Malcolm dissented from this ruling on the ground that extrajudicial foreclosure agreements are not only prohibited by the then-prevailing laws but also prone to abuse and are therefore inimical to public policy.[51] Justice Charles Johns further argued that the aforequoted stipulations

> [give] the mortgagee an irrevocable power of attorney to sell the property to itself by the publishing of a notice of sale for three weeks in the City of Manila, and within thirty days after the sale, the mortgagee, as agent of the mortgagor, may make a deed to itself of the property. Under such provisions, it will be noted that the property may be advertised and sold without notice of any kind to the mortgagor, either real or constructive, except the notice to be published in a newspaper in the City of Manila, and that thirty days after the sale, the mortgagee may make a deed to itself of the property.
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> We vigorously contend that, under the conditions existing in the Philippine Islands, such provisions are both unfair, unjust and unconscionable, and ought never to be sanctioned or approved by any court.
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> In many of the States, which uphold the "power of sale" under a mortgage, it will be found that by such a mortgage, it will be found that by such a mortgage, the record title to the land passes ipso facto from the mortgagor to the mortgagee, subject only to the right of redemption.
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> Under the mortgage in the instant case, the record title could not pass to the mortgagee without the formalities of a sale.
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> The Philippine Islands is a country exclusively of islands of which there thousand. They are inhabited by people of different habits and modes of living, and who use and speak many different dialects and languages, and many of whom can only speak or write in their own dialect or language, and who know nothing of either Spanish or English.
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> The records of this court show, and it is a matter of common knowledge, that a very large percentage of all written instruments in the Philippine Islands are made and signed by "thumb prints" by person who cannot read or write in any language. In many of such cases, the makers such instruments do not know or understand what they are signing. Many of them at one time have owned valuable lands and property rights, which, through their ignorance and the cunning and design of the money lender, have been lost by the signing of instruments known as pacto de retro.
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> In the interest of justice, this court has many times been called upon to relieve innocent and ignorant people from the Shylock methods by which they were induced to sign a pacto de retro, and lost their title to valuable lands.
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> Even in that kind of an instrument, the time is specified in which the property may be redeemed, ranging from one to many years. With a "power of sale" under a mortgage, with the provisions in the instant case, a mortgagor may own land in one island and live at a long distance in another, and, through some

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[51] Id. at 187-188.

> neglect or default, his land could be sold and a conveyance made and his title lost forever without his knowledge.
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> In the instant case the land is situated in the situated in the sitios of Agtongtong and Bayabas, barrio of Tortosa, municipality of Manapla, Province of Occidental Negros, and the mortgagor resided in Iloilo, and after three weeks' notice in a newspaper published in Manila, the land was sold in Manila.
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> Of what value is it to a person in a distant island, who does not take a newspaper, or who cannot read or write, to have a notice of the sale of his or her property published in a newspaper in the City of Manila?
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> It is a matter of common knowledge that there are about 11,000,000 people in the Philippine Islands, and that only about 1 per cent of them take or read a newspaper of any kind published in any language. Yet, by the majority opinion, these people, living in distant islands, can be divested of valuable lands and property rights, through a notice of sale published in a newspaper in the City of Manila, which they will never see and never read, and of which they never will have any knowledge.
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> In the final analysis, whatever injustice there may be in a pacto de retro, it will be found that the "power of sale" under the provisions of the real mortgage in question, is far more drastic, summary and unconscionable than a pacto de retro.[52]

In March 1924, less than a year after the promulgation of *El Hogar Filipino*, the Philippine Legislature passed Act No. 3135, entitled AN ACT TO REGULATE THE SALE OF PROPERTY UNDER SPECIAL POWERS INSERTED IN OR ANNEXED TO REAL-ESTATE MORTGAGES. Section 1 thereof provides:

> SECTION 1. When a sale is made under a special power inserted in or attached to any real-estate mortgage here after made as security for the payment of money or the fulfillment of any other obligation, the provisions of the following sections shall govern as to the manner in which the sale and redemption shall be effected, whether or not provision for the same is made in the power.

Act No. 3135 thus provides legislative sanction to extrajudicial foreclosures similar to the one implicated in *El Hogar Filipino*, while specifically addressing Justice Johns' objections to the particular power of sale therein. Thus, Sections 2 and 3 of the statute specifically address the objection regarding the conduct of the foreclosure sale outside the province where the property is located. Said provisions also provide for a longer publication period and advertisement of the sale through newspapers and public notices.[53] Section 6 of the statute extends the redemption period to one year, compared to the thirty days stipulated in the

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52 Id. at 193-196.

53 The benefits of such provisions on publication for unlettered mortgagors, as pointed out by Justice Johns, are debatable at best.

contract in question; and in 1933, the Legislature added Section 8, which gives the debtor a right of action to set aside the extrajudicial foreclosure sale.[54]

Apart from the subsequent legislative sanction given by Act No. 3135, extrajudicial foreclosure of real estate mortgages also finds basis in the Civil Code itself. In his well-regarded commentary on the old Civil Code, Justice Jose Maria Manresa argues that the proceeding for the notarial foreclosure of pledges under Article 1872 of the old Code (now Article 2112 of our New Civil Code) may be applied by analogy to real estate mortgages, such that real estate mortgages may be extrajudicially foreclosed in the same manner as pledges. Since mortgagors remain the owners of mortgaged properties, they can appoint mortgagees as their agents for the purpose of conducting a foreclosure sale; thus, the Spanish Supreme Court has ruled that such agreements are not contrary to law and are consistent with the concept of real estate mortgages. However, given the special nature of real properties and the special legal regime that governs the ownership and disposition thereof,[55] the mortgagee must be given further protection in the extrajudicial foreclosure of a real mortgage. One of the protective measures suggested by Justice Manresa is the requirement of an express authorization to conduct an extrajudicial foreclosure sale, issued by the mortgagor to the mortgagee:

> Después de tan terminante declaración de la jurisprudencia, imposible es toda duda; pero aún se registran otras resoluciones que confirman dicha doctrina, entre ellas una sentencia de 21 de Octubre del mismo año 1902, en la que al declarar válido el pacto autorizando á un acreedor hipotecario para proceder á la venta extrajudicial de las fincas hipotecadas al vencimiento de plazo, sin necesidad de demanda alguna, sirviendo do tipo la cantidad por que quedaban gravadas, y que si no hubiera licitador en las subastas cuyo número se fijaba, se adjudicara al acreedor por el precio que hubiera servido de tipo, vino á reconocer y sancionar la doctrina indicada, toda vez que si se estimó la validez de dicho pacto fué por la razón única de que no implicaba apropiación alguna de la finca hipotecada el derecho otorgado al acreedor para venderla, ó para la adjudicación en pago en su caso, sino sólo una derivación de la facultad concedida á los contratantes en el art. 1255, facultad no contraria á la ley, ya que lo único vedado por ésta consiste en que el acreedor pueda adquirir por la mera faltado pago la propiedad de la cosa dada en hipoteca (ó en prenda), y únicamente se le autorizaba por el pacto expresado para venderla con las condiciones estipuladas; autorización aneja al dominio y no contraria tampoco á la moral y al orden público, puesto que lo permitido por el art. 1872, en cuanto al acreedor pignoraticio, no podía nunca estimarse injusto respecto al acreedor hipotecario cuando el deudor expresamente ha convenido esa forma de pago. De este modo, y en términos tales, vino á quedar confirmada la prohibición de hacerse pago con la cosa pignorada ó hipotecada, sin que preceda la venta en la forma convenida ó en la establecida por la ley en otro caso.
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54 ACT NO. 4118 (1933), Section 2.

55 See also Johns, J., dissenting in *El Hogar Filipino v. Paredes*, supra note 47 at 181-182.

II. Tiene aplicación en el crédito hipotecario la facultad concedida al acreedor prendario?—Mucho se ha discutido si la potestad otorgada por este artículo al acreedor prendario debe considerarse extensiva, por razón de analogía, al acreedor hipotecario, el cual se encuentra en el mismo caso con relación al deudor hipotecante ó al dueño de la finca hipotecada, si fuere distinto de aquél.

El Código no resuelve de una manera expresa esta cuestión, ni en el capitulo siguiente, consagrado especialmente á la hipoteca; se encuentra disposición alguna que á ello se refiera; pero tanto la Dirección general de los Registros, como el Tribunal Supremo, han sentado una jurisprudencia uniforme en sentido afirmativo en determinados casos, fundándose para ello en la razón de analogía antes indicada y por motivos de equidad dignos de ser tenidos en cuenta.

En prueba de ello, pueden verse las resoluciones de la Dirección citada de 9 de Febrero, 12 de Julio y 21 de Octubre de 1901, 16 de Noviembre de 1902, 5 de Diciembre de 1903, 28 de Mayo de 1904 y la ya citada de 19 de Febrero de dicho año, así como la sentencia del Tribunal Supremo de 21 de Octubre de 1902, en las cuales se establece la doctrina, común á la prenda y á la hipoteca, de que el pacto en virtud del cual el deudor concede al acreedor hipotecario el derecho de vender en pública subasta extrajudicial la cosa hipotecada para hacerse pago de la deuda, no implica apropiación de aquélla, sino solo una derivación de la facultad concedida á los contratantes en el artículo 1255, cuya facultad no es contraria á la ley, porque lo único vedado por ésta consiste en que el acreedor pueda, por sólo la falta de pago, adquirir la propiedad de la cosa dada en hipoteca, y tampoco es contraria á la moral, porque lo autorizado por el Código civil en cuanto al acreedor pignoraticio, no puede estimarse injusto con respecto al acreedor hipotecario, sobre todo sí el deudor conviene en tal forma de pago. Pero si bien es lícito dicho pacto, es condición indispensable para su validez, según las citadas decisiones, que la enajenación se verifique precisamente con sujeción á los requisitos y formalidades que se determinan en el art. 1872, siendo nulo el pacto de que el acreedor pueda vender los inmuebles hipotecados sin dar cuenta al prestatario, y con sólo el anuncio de la subasta en los periódicos de la localidad.

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Esos requisitos y formalidades exigidos por este artículo son [referring to *Article 1872 of the old Code*], como dice la Dirección [de los Registros, *referring to the Spanish directorate of civil registries*] mencionada en sus resoluciones citadas, «garantía cierta de que mediante ellos no puede ser expoliado el deudor con inmoral enriquecimiento del acreedor», y «lo que es justo, tratándose de la prenda, no ha de reputarse injusto con relación á la cosa hipotecada».

La necesidad de la concurrencia de esos requisitos consistentes en la celebración de subasta pública y de la previa citación indicada, tanto en la prenda como en la hipoteca, se halla sancionada también por el Tribunal Supremo, en sentencia de 3 de Noviembre de 1902, en la que terminantemente se declara que «es un pacto inmoral aquel en que se estipula que el acreedor pueda apropiarse de la cosa dada en prenda como si le fuera vendida, por el solo transcurso del término del contrato de préstamo, porque siendo nulo dicho pacto en cuanto al acreedor hipotecario (art. 1884), no hay fundamento racional para que pueda estimarse lícito con respecto al acreedor pignoraticio, el cual, á

> falta de otras condiciones válidamente pactadas, no puede prescindir para la enajenación de la prenda de los términos prescriptos en el art. 1872, que si constituye derecho concedido al acreedor, es también garantía del deudor que no puede perderla por la sola voluntad de aquél, ó pactando lo que es ineficaz en derecho».
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> De cuanto llevamos dicho acerca de la aplicación del precepto de este artículo al acreedor hipotecario, podemos deducir como conclusión, que, á pesar de no existir disposición especial alguna en el capítulo consagrado al contrato especial de hipoteca que haga extensivo á él dicha disposición, puede, sin embargo, el acreedor proceder válidamente á la venta de las fincas hipotecadas en los términos expuestos en el presente artículo, siempre que exista pacto expreso que le autorice para ello; pero de no existir tal pacto, no tendrá otro medio para conseguir la realización de su crédito, en el caso de que no fuere satisfecho á su vencimiento, que pedir la venta judicial de los bienes afectados con la garantía.
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> A esto no obsta la consideración alegada por algunos, de que hallándose para la ley en igualdad de circunstancias el acreedor hipotecario y el prendario, y siendo lícito y permitido á éste proceder á la enajenación extrajudicial de las cosas dadas en prenda, aunque no exista pacto expreso que le autorice para ello, por ser una facultad inherente al contrato de prenda, debiera igualmente permitirse á aquél dicha venta sin necesidad de que se le conceda autorización especial, por ser también un derecho esencial de la garantía constituida por la hipoteca la realización de los bienes gravados con ella. **Pero á poco que se fije la atención en la distinta clase de bienes destinados en uno y otro caso á asegurar el cumplimiento de la obligación principal ó la realización y efectividad del crédito que la misma constituye, se comprenderá la razón de la diferencia y su plena justificación.**
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> **En efecto; la índole especial de los inmuebles, las mayores garantías que requiere su transmisión, y la superior cuantía é importancia de los perjuicios que en dicho caso podrían ocasionarse al dueño de los bienes hipotecados por los abusos á que puede dar lugar la venta extrajudicial, aconsejan la limitación en la facultad mencionada autorizándola tan sólo en el caso en que el hipotecante haya prestado su conformidad expresamente, porque entonces todos los daños y todos los perjuicios que le puedan sobrevenir tienen que ser imputados á sí mismo por efecto de su propia voluntad, aceptándolos desde luego al conceder dicha autorización.**[56]

It may well be argued that the power to foreclose necessarily includes the power to sell, for the essence of foreclosure lies in the termination of the mortgagee's right in the mortgaged property,[57] and that such termination of right

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[56] 12 Jose Maria Manresa *y* Navarro, COMENTARIOS AL CODIGO CIVIL ESPANOL, 389-390, 446-447, 452-454 (1907). Emphasis and underlining supplied.

[57] See CA Decision, *rollo*, p. 67, quoting Narciso Peña, Narciso Peña, Jr., and Nestor Peña, REGISTRATION OF LAND TITLES AND DEEDS 731 (revised edition, 2008), in turn citing Reyes v. Register of Deeds of Manila, LRC Consulta No. 31, March 19, 1955. In *Development Bank of the Philippines v. Zaragoza*, 174 Phil. 153, 158 (1978), it was held that "**a foreclosure of mortgage means the termination of all rights of the mortgagor in the property covered by the mortgage. It denotes the procedure adopted by the mortgagee to terminate the rights of the mortgagor on the property and includes the sale itself.** (Emphasis and underlining supplied) In judicial

necessarily involves the *alienation*, *i.e.*, the sale, of the mortgaged property in order to apply the proceeds of such *alienation* to the satisfaction of the principal obligation which is secured by the mortgage.[58] However, in its formulation of specific rules governing the extrajudicial foreclosure of real estate mortgages under Act No. 3135, the legislature used the particular term "*sale made under a special power*", which, as explained in *El Hogar Filipino*, contemplates an express authority to sell the mortgaged property. This deliberate choice of term dovetails perfectly with Justice Manresa's discussion regarding the validity of extrajudicial foreclosures of real mortgages under the Civil Code, subject to the requirement of an express authorization from the mortgagor. To this Court's mind, these circumstances reflect the legislature's intent to adopt the power of sale, as contemplated in the common law, as the modality by which real estate mortgages may be extrajudicially foreclosed. Furthermore, by referring to special powers that are *inserted or attached* to real estate mortgages, Act No. 3135 forecloses the invocation of any implicit power to sell, since the act of *insertion* or *attachment* necessarily implies that the special power must be expressly and distinctly granted.

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foreclosures, the "foreclosure" is not complete until the Sheriff's Certificate executed, acknowledges and recorded. In the absence of a Certificate of Sale, no title passes by the foreclosure proceedings to the vendee. It is only when the foreclosure proceedings completed and the mortgaged property sold to the purchaser that all interests of the mortgagor are cut off from the property. This principle is applicable to extrajudicial foreclosures. Consequently, in the case at bar, prior to the completion of foreclosure, the mortgagor is, therefore, liable for the interest on the mortgage." See also *Medina v. Philippine National Bank*, 56 Phil. 651, 657 (1932).

In *Bicol Savings and Loan Association v. Court of Appeals*, 253 Phil. 620, 626 (1989), we ruled that Article 1879 of the Civil Code does not apply to extrajudicial foreclosure auction sales because:

"The sale proscribed by a special power to mortgage under Article 1879 is a voluntary and independent contract, and not an auction sale resulting from extrajudicial foreclosure, which is precipitated by the default of a mortgagor. Absent that default, no foreclosure results. The stipulation granting an authority to extrajudicially foreclose a mortgage is an ancillary stipulation supported by the same cause or consideration for the mortgage and forms an essential or inseparable part of that bilateral agreement (*Perez v. Philippine National Bank*, 124 Phil. 260 (1966).

The power to foreclose is not an ordinary agency that contemplates exclusively the representation of the principal by the agent but is primarily an authority conferred upon the mortgagee for the latter's own protection. That power survives the death of the mortgagor (Perez vs. PNB, id.). In fact, the right of the mortgagee bank to extrajudicially foreclose the mortgage after the death of the mortgagor Juan de Jesus, acting through his attorney-in-fact, Jose de Jesus, did not depend on the authorization in the deed of mortgage executed by the latter. That right existed independently of said stipulation and is clearly recognized in Section 7, Rule 86 of the Rules of Court, which grants to a mortgagee three remedies that can be alternatively pursued in case the mortgagor dies, to wit: (1) to waive the mortgage and claim the entire debt from the estate of the mortgagor as an ordinary claim; (2) to foreclose the mortgage judicially and prove any deficiency as an ordinary claim; and (3) to rely on the mortgage exclusively, foreclosing the same at any time before it is barred by prescription, without right to file a claim for any deficiency. It is this right of extrajudicial foreclosure that petitioner bank had availed of, a right that was expressly upheld in the same case of *Perez v. Philippine National Bank* (id.), which explicitly reversed the decision in *Pasno v. Ravina*, 54 Phil. 382 (1930), requiring a judicial foreclosure in the same factual situation. The Court in the aforesaid PNB case pointed out that the ruling in the Pasno case virtually wiped out the third alternative, which precisely includes extrajudicial foreclosure, a result not warranted by the text of the Rule." However, the mortgagee's right to foreclose was not an issue therein, for the CA applied Article 1879 not to the mortgage contract itself but to the previous special power to mortgage given by the landowner to the mortgagor. Furthermore, the mortgage specifically provided that "***For the purpose of extrajudicial foreclosure, the Mortgagor hereby appoints the Mortgagee his attorney-in-fact to sell the property mortgaged***".

58 CIVIL CODE, Articles 2087 and 2126.

As explained above, the requirement of express authorization protects mortgagors by giving them notice that when they agree to an extrajudicial foreclosure, they also agree to share a portion of their ownership rights, *i.e.*, the power to sell, with the mortgagor, in order to facilitate the enforcement of the mortgage contract, and in lieu of regular judicial foreclosure proceedings.[59] This is the context of our pronouncement in *Tan Chat v. Hodges*,[60] that

> [W]hile it has been held that a power of sale will not be recognized as contained in mortgage unless it is given by express grant and in clear and explicit terms, and that there can be no implied power of sale where a mortgage holds by a deed absolute in form, it is generally held that no particular formality is required in the creation of the power of sale. Any words are sufficient which evince an intention that the sale may be made upon default or other contingency.[61]

Thus, while it is not necessary that the words "sale" or "sell" be used in the special power, the terms thereof must clearly evince the mortgagee's intent to vest in the mortgagee the power to sell or to otherwise alienate the mortgaged property for purposes of foreclosing upon the mortgage. For example, in *The Commoner Lending Corporation v. Villanueva*,[62] the mortgage contract contained the following provision:

> 3. That in case of non-payment or violation of the terms of the mortgage or any of the provision of the Republic Act No. 728 as amended this mortgage shall immediately be foreclosed judicially or extra-judicially as provided by law and the mortgagee is hereby appointed attorney-in-fact of the mortgagor(s) with full power and authority to take possession of the mortgaged properties without the necessity of any judicial order or any other permission of power, and to take any legal action as may be necessary to satisfy the mortgage debt, but if the mortgagor(s) shall well and truly fulfill the obligation above stated according to the terms thereof then this mortgage shall become null and void. [63]

We ruled that the aforequoted provision is a valid special power under Act No. 3135 because the "*full power and authority to x x x take any legal action as may be necessary to satisfy the mortgage debt*" can only be construed as including

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59 In *Bicol Savings and Loan Association v. Court of Appeals*, supra note 57, We held that "[t]*he power to* [extrajudicially] *foreclose is not an ordinary agency that contemplates exclusively the representation of the principal* [*i.e.*, the mortgagor] *by the agent but is primarily an authority conferred upon the mortgagee for the latter's own protection.* In certain jurisdictions, mortgages may only be foreclosed by judicial action, and some jurisdictions also prohibit extrajudicial "power-of-sale" foreclosures. Johns, J., dissenting in *El Hogar Filipino*, supra note 47 at 182-183; Jones, supra note 46 at 393-434. For example, in Louisiana, conventional mortgages may only be enforced through judicial proceedings, whether ordinary or executory (an expedited judicial proceeding which is also regulated by their Code of Civil Procedure) See Patrick S. Ottinger, Enforcement of Real Mortgages by Executory Process, 51 LA. L. REV. (1990). Accessed 10 August 2023 at https://digitalcommons.law.lsu.edu/lalrev/vol51/iss1/7.

60 Supra note 17.

61 Id. at 930-931.

62 G.R. No. 235260, August 27, 2020, 947 SCRA 429.

63 Id. at 437.

the power to sell or otherwise alienate the mortgaged property as satisfaction for the secured debt.

Consequently, a stipulation giving the mortgagee the power to extrajudicially foreclose, or a general provision regarding extrajudicial foreclosure, does not constitute a special power to effect an extrajudicial sale. In *Spouses Baysa v. Spouses Plantilla*,[64] we held that a provision in a mortgage contract stating that "*[i]n the event of non-payment of the entire principal and accrued interest due under the conditions described in this paragraph, the mortgagors expressly and specifically agree to the extra-judicial foreclosure of the mortgaged property*"[65] does not give the mortgagor sufficient authority to proceed with an extrajudicial foreclosure sale, because it merely expresses the mortgagors' amenability to an extrajudicial foreclosure.

In the case at bar, respondents specifically averred in their answer that "*a special power of attorney was no longer necessary by virtue of the provision under the real estate mortgage contract [between the spouses Palo and Nakamura] which explicitly authorized [Nakamura] to foreclose the mortgage judicially or extra-judicially*;"[66] however, as explained above, Act No. 3135 and the Civil Code ordain otherwise. Thus, when Palo moved for judgment on the pleadings on the basis of her complaint and respondents' answer, the trial court should have rendered judgment in her favor; and the CA committed reversible error in sustaining the erroneous conclusion of the trial court.

WHEREFORE, the motion for reconsideration is **GRANTED**. The assailed Resolution of this Court, dated November 20, 2017, is hereby **SET ASIDE.** The Decision, dated March 10, 2016, and the Resolution, dated October 19, 2016, of the Court of Appeals in CA-G.R. CV No. 04717 are hereby **REVERSED** and **SET ASIDE**. Judgment is hereby rendered **NULLIFYING**:

1) the document entitled "Notice of Notarial Foreclosure for NF # 0041-L", dated May 12, 2004 and signed by Atty. Orpha T. Casul-Arendain;

2) the document entitled "Certificate of Sale" dated July 1, 2004 signed by Atty. Orpha T. Casul-Arendain; and

3) Transfer Certificate of Title No. T-152541 in the name of Rey C. Baquirquir, married to Fleurdeline B. Baquirquir.

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64 763 Phil. 562 (2015).

65 Id. at 572.

66 *Rollo*, p. 36, page 2 of respondents' Answer.

SO ORDERED.

SAMUEL H. GAERLAN
Associate Justice

WE CONCUR:

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

(On leave)
HENRI JEAN PAUL B. INTING
Associate Justice

JAPAR B. DIMAAMPAO
Associate Justice

MARIA FILOMENA D. SINGH
Associate Justice

ATTESTATION

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

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice
Chairperson, Third Division

CERTIFICATION

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

ALEXANDER G. GESMUNDO
Chief Justice