

JOHN GOKONGWEI, JR., PETITIONER, VS. SECURITIES AND EXCHANGE COMMISSION, ANDRES M. SORIANO, JOSE M. SORIANO, ENRIQUE ZOBEL, ANTONIO ROXAS, EMETERIO BUÑAO, WALTHRODE B. CONDE, MI...

G.R. No. L-45911. April 11, 1979

Ponente: ANTONIO, J.

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ANTONIO, J.:

The instant petition for certiorari, mandamus and injunction, with prayer for issuance of writ of preliminary injunction, arose out of two cases filed by petitioner with the Securities and Exchange Commission, as follows:

SEC CASE NO. 1375

On October 22, 1976, petitioner, as stockholder of respondent San Miguel Corporation, filed with the Securities and Exchange Commission (SEC) a petition for "declaration of nullity of amended by-laws, cancellation of certificate of filing of amended by-laws, injunction and damages with prayer for a preliminary injunction" against the majority of the members of the Board of Directors and San Miguel Corporation as an unwilling petitioner. The petition, entitled "John Gokongwei, Jr., vs. Andres Soriano, Jr., Jose M. Soriano, Enrique Zobel, Antonio Roxas, Emeterio Buñao, Walthrode B. Conde, Miguel Ortigas, Antonio Prieto and San Miguel Corporation," was docketed as SEC Case No. 1375.

As a first cause of action, petitioner alleged that on September 18, 1976, individual respondents amended the by-laws of the corporation, basing their authority to do so on a resolution of the stockholders adopted on March 13, 1961, when the outstanding capital stock of respondent corporation was only P70,139,740.00, divided into 5,513,974 common shares at P10.00 per share and 150,000 preferred shares at P100.00 per share. At the time of the amendment, the outstanding and paid up shares totalled 30,127,043, with a total par value of P301,270,430.00. It was contended that according to section 22 of the Corporation Law and Article VIII of the by-laws of the corporation, the power to amend, modify, repeal or adopt new by-laws may be delegated to the Board of Directors only by the affirmative vote of stockholders representing not less than 2/3 of the subscribed and paid up capital stock of the corporation, which 2/3 should have been computed on the basis of the capitalization at the time of the amendment. Since the amendment was based on the 1961 authorization, petitioner contended that the Board acted without authority and in usurpation of the power of the stockholders.

As a second cause of action, it was alleged that the authority granted in 1961 had already been exercised in 1962 and 1963, after which the authority of the Board ceased to exist.

As a third cause of action, petitioner averred that the membership of the Board of Directors had changed since the authority was given in 1961, there being six (6) new directors.

As a fourth cause of action, it was claimed that prior to the questioned amendment, petitioner had all the

qualifications to be a director of respondent corporation, being a substantial stockholder thereof; that as a stockholder, petitioner had acquired rights inherent in stock ownership, such as the rights to vote and to be voted upon in the election of directors; and that in amending the by-laws, respondents purposely provided for petitioner's disqualification and deprived him of his vested rights as afore-mentioned, hence the amended by-laws are null and void.[1]

As additional causes of action, it was alleged that corporations have no inherent power to disqualify a stockholder from being elected as a director and, therefore, the questioned act is ultra vires and void; that Andres M. Soriano, Jr. and/or Jose M. Soriano, while representing other corporations, entered into contracts (specifically a management contract) with respondent corporation, which was allowed because the questioned amendment gave the Board itself the prerogative of determining whether they or other persons are engaged in competitive or antagonistic business; that the portion of the amended by-laws which states that in determining whether or not a person is engaged in competitive business, the Board may consider such factors as business and family relationship, is unreasonable and oppressive and, therefore, void; and that the portion of the amended by-laws which requires that "all nominations for election of directors * * * shall be submitted in writing to the Board of Directors at least five (5) working days before the date of the Annual Meeting" is likewise unreasonable and oppressive.

It was, therefore, prayed that the amended by-laws be declared null and void and the certificate of filing thereof be cancelled, and that individual respondents be made to pay damages, in specified amounts, to petitioner.

On October 28, 1976, in connection with the same case, petitioner filed with the Securities and Exchange Commission an "Urgent Motion for Production and Inspection of Documents," alleging that the Secretary of respondent corporation refused to allow him to inspect its records despite request made by petitioner for production of certain documents enumerated in the request, and that respondent corporation had been attempting to suppress information from its stockholders despite a negative reply by the SEC to its query regarding their authority to do so. Among the documents requested to be copied were: (a) minutes of the stockholder's meeting held on March 13, 1961; (b) copy of the management contract between San Miguel Corporation and A. Soriano Corporation (ANSCOR); (c) latest balance sheet of San Miguel International, Inc.; (d) authority of the stockholders to invest the funds of respondent corporation in San Miguel International, Inc.; and (e) lists of salaries, allowances, bonuses, and other compensation, if any, received by Andres M. Soriano, Jr. and/or Jose M. Soriano from San Miguel International, Inc. and/or its successor-in-interest.

The "Urgent Motion for Production and Inspection of Documents" was opposed by respondents, alleging, among others, that the motion has no legal basis; that the demand is not based on good faith; that the motion is premature since the materiality or relevance of the evidence sought cannot be determined until the issues are joined; that it fails to show good cause and constitutes continued harassment; and that some of the information sought are not part of the records of the corporation and, therefore, privileged.

During the pendency of the motion for production, respondents San Miguel Corporation, Enrique Conde, Miguel Ortigas and Antonio Prieto filed their answer to the petition, denying the substantial allegations therein and stating, by way of affirmative defenses that "the action taken by the Board of Directors on September 18, 1976 resulting in the * * * amendments is valid and legal because the power to 'amend, modify, repeal or adopt new By-laws' delegated to said Board on March 13, 1961 and long prior thereto has never been revoked, withdrawn or otherwise nullified by the stockholders of SMC"; that contrary to petitioner's claim, "the vote requirement for a valid delegation of the power to amend, repeal or adopt new by-laws is determined in relation to the total subscribed capital stock at the time the delegation of said power is made, not when the Board opts to exercise said delegated power"; that petitioner has not availed of his intra-corporate remedy for the nullification of the

amendment, which is to secure its repeal by vote of the stockholders representing a majority of the subscribed capital stock at any regular or special meeting, as provided in Article VIII, section 1 of the by-laws and section 22 of the Corporation Law, hence the petition is premature; that petitioner is estopped from questioning the amendments on the ground of lack of authority of the Board, since he failed to object to other amendments made on the basis of the same 1961 authorization; that the power of the corporation to amend its by-laws is broad, subject only to the condition that the by-laws adopted should not be inconsistent with any existing law; that respondent corporation should not be precluded from adopting protective measures to minimize or eliminate situations where its directors might be tempted to put their personal interests over that of the corporation; that the questioned amended by-laws is a matter of internal policy and the judgment of the Board should not be interfered with; that the by-laws, as amended, are valid and binding and are intended to prevent the possibility of violation of criminal and civil laws prohibiting combinations in restraint of trade; and that the petition states no cause of action. It was, therefore, prayed that the petition be dismissed and that petitioner be ordered to pay damages and attorney's fees to respondents. The application for writ of preliminary injunction was likewise opposed on various grounds.

Respondents Andres M. Soriano, Jr. and Jose M. Soriano filed their opposition to the petition, denying the material averments thereof and stating, as part of their affirmative defenses, that in August 1972, the Universal Robina Corporation (Robina), a corporation engaged in business competitive to that of respondent corporation, began acquiring shares therein, until September 1976 when its total holding amounted to 622,987 shares; that in October 1972, the Consolidated Foods Corporation (CFC) likewise began acquiring shares in respondent corporation, until its total holdings amounted to P543,959.00 in September 1976; that on January 12, 1976, petitioner, who is president and controlling shareholder of Robina and CFC (both closed corporations) purchased 5,000 shares of stock of respondent corporation, and thereafter, in behalf of himself, CFC and Robina, "conducted malevolent and malicious publicity campaign against SMC" to generate support from the stockholder "in his effort to secure for himself and in representation of Robina and CFC interests, a seat in the Board of Directors of SMC," that in the stockholders' meeting of March 18, 1976, petitioner was rejected by the stockholders in his bid to secure a seat in the Board of Directors on the basic issue that petitioner was engaged in a competitive business and his securing a seat would have subjected respondent corporation to grave disadvantages; that "petitioner nevertheless vowed to secure a seat in the Board of Directors at the next annual meeting"; that thereafter the Board of Directors amended the by-laws as afore-stated.

As counterclaims, actual damages, moral damages, exemplary damages, expenses of litigation and attorney's fees were presented against petitioner.

Subsequently, a Joint Omnibus Motion for the striking out of the motion for production and inspection of documents was filed by all the respondents. This was duly opposed by petitioner. At this juncture, respondents Emigdio Tanjuatco, Sr. and Eduardo R. Visaya were allowed to intervene as oppositors and they accordingly filed their oppositions-in-intervention to the petition.

On December 29, 1976, the Securities and Exchange Commission resolved the motion for production and inspection of documents by issuing Order No. 26, Series of 1977, stating, in part as follows:

"Considering the evidence submitted before the Commission by the petitioner and respondents in the above-entitled case, it is hereby ordered:

1. That respondents produce and permit the inspection, copying and photographing, by or on behalf of the petitioner-movant, John Gokongwei, Jr., of the minutes of the stockholders' meeting of the respondent San Miguel Corporation held on March 13, 1961, which are in the possession, custody and control of the said corporation, it appearing that the same is material and relevant to the issues involved in the main case.

Accordingly, the respondents should allow petitioner-movant entry in the principal office of the respondent Corporation, San Miguel Corporation on January 14, 1977, at 9:30 o'clock in the morning for purposes of enforcing the rights herein granted; it being understood that the inspection, copying and photographing of the said documents shall be undertaken under the direct and strict supervision of this Commission. Provided, however, that other documents and/or papers not heretofore included are not covered by this Order and any inspection thereof shall require the prior permission of this Commission;

2. As to the Balance Sheet of San Miguel International, Inc. as well as the list of salaries, allowances, bonuses, compensation and/or remuneration received by respondent Jose M. Soriano, Jr. and Andres Soriano from San Miguel International, Inc. and/or its successors-in-interest, the Petition to produce and inspect the same is hereby DENIED, as petitioner-movant is not a stockholder of San Miguel International, Inc. and has, therefore, no inherent right to inspect said documents;

3. In view of the Manifestation of petitioner-movant dated November 29, 1976, with drawing his request to copy and inspect the management contract between San Miguel Corporation and A. Soriano Corporation and the renewal and amendments thereof for the reason that he had already obtained the same, the Commission takes note thereof; and

4. Finally, the Commission holds in abeyance the resolution on the matter of production and inspection of the authority of the stockholders of San Miguel Corporation to invest the funds of respondent corporation in San Miguel International, Inc., until after the hearing on the merits of the principal issues in the above entitled case.

This Order is immediately executory upon its approval."[2]

Dissatisfied with the foregoing Order, petitioner moved for its reconsideration.

Meanwhile, on December 10, 1976, while the petition was yet to be heard, respondent corporation issued a notice of special stockholders' meeting for the purpose of "ratification and confirmation of the amendment to the By-laws," setting such meeting for February 10, 1977. This prompted petitioner to ask respondent Commission for a summary judgment insofar as the first cause of action is concerned, for the alleged reason that by calling a special stockholders' meeting for the aforesaid purpose, private respondents admitted the invalidity of the amendments of September 18, 1976. The motion for summary judgment was opposed by private respondents. Pending action on the motion, petitioner filed an "Urgent Motion for the Issuance of a Temporary Restraining Order," praying that pending the determination of petitioner's application for the issuance of a preliminary injunction and/or petitioner's motion for summary judgment, a temporary restraining order be issued, restraining respondents from holding the special stockholders' meeting as scheduled. This motion was duly opposed by respondents.

On February 10, 1977, respondent Commission issued an order denying the motion for issuance of temporary restraining order. After receipt of the order of denial, respondents conducted the special stockholders' meeting wherein the amendments to the by-laws were ratified. On February 14, 1977, petitioner filed a consolidated motion for contempt and for nullification of the special stockholders' meeting.

A motion for reconsideration of the order denying petitioner's motion for summary judgment was filed by petitioner before respondent Commission on March 10, 1977. Petitioner alleges that up to the time of the filing of the instant petition, the said motion had not yet been scheduled for hearing. Likewise, the motion for reconsideration of the order granting in part and denying in part petitioner's motion for production of records had not yet been resolved.

In view of the fact that the annual stockholders' meeting of respondent corporation had been scheduled for May 10, 1977, petitioner filed with respondent Commission a Manifestation stating that he intended to run for the

position of director of respondent corporation. Thereafter, respondents filed a Manifestation with respondent Commission, submitting a Resolution of the Board of Directors of respondent corporation disqualifying and precluding petitioner from being a candidate for director unless he could submit evidence on May 3, 1977 that he does not come within the disqualifications specified in the amendment to the by-laws, subject matter of SEC Case No. 1375. By reason thereof, petitioner filed a manifestation and motion to resolve pending incidents in the case and to issue a writ of injunction, alleging that private respondents were seeking to nullify and render ineffectual the exercise of jurisdiction by the respondent Commission, to petitioner's irreparable damage and prejudice. Allegedly despite subsequent Manifestation to prod respondent Commission to act, petitioner was not heard prior to the date of the stockholders' meeting.

Petitioner alleges that there appears a deliberate and concerted inability on the part of the SEC to act, hence petitioner came to this Court.

SEC CASE NO. 1423

Petitioner likewise alleges that, having discovered that respondent corporation has been investing corporate funds in other corporations and businesses outside of the primary purpose clause of the corporation, in violation of section 17-1/2 of the Corporation Law, he filed with respondent Commission, on January 20, 1977, a petition seeking to have private respondents Andres M. Soriano, Jr. and Jose M. Soriano, as well as the respondent corporation declared guilty of such violation, and ordered to account for such investments and to answer for damages.

On February 4, 1977, motions to dismiss were filed by private respondents, to which a consolidated motion to strike and to declare individual respondents in default and an opposition *ad abundantiorum cautelam* were filed by petitioner. Despite the fact that said motions were filed as early as February 4, 1977, the Commission acted thereon only on April 25, 1977, when it denied respondents' motions to dismiss and gave them two (2) days within which to file their answer, and set the case for hearing on April 29 and May 3, 1977.

Respondents issued notices of the annual stockholders' meeting, including in the Agenda thereof, the following:

"6. Reaffirmation of the authorizations to the Board of Directors by the stockholders at the meeting on March 20, 1972 to invest corporate funds in other companies or businesses or for purposes other than the main purpose for which the Corporation has been organized, and ratification of the investments thereafter made pursuant thereto."

By reason of the foregoing, on April 28, 1977, petitioner filed with the SEC an urgent motion for the issuance of a writ of preliminary injunction to restrain private respondents from taking up Item 6 of the Agenda at the annual stockholders' meeting, requesting that the same be set for hearing on May 3, 1977, the date set for the second hearing of the case on the merits. Respondent Commission, however, cancelled the dates of hearing originally scheduled and reset the same to May 16 and 17, 1977, or after the scheduled annual stockholders' meeting. For the purpose of urging the Commission to act, petitioner filed an urgent manifestation on May 3, 1977, but this notwithstanding, no action has been taken up to the date of the filing of the instant petition.

With respect to the afore-mentioned SEC cases, it is petitioner's contention before this Court that respondent Commission gravely abused its discretion when it failed to act with deliberate dispatch on the motions of petitioner seeking to prevent illegal and/or arbitrary impositions or limitations upon his rights as stockholder of respondent corporation, and that respondents are acting oppressively against petitioner, in gross derogation of petitioner's rights to property and due process. He prayed that this Court direct respondent SEC to act on collateral incidents pending before it.

On May 6, 1977, this Court issued a temporary restraining order restraining private respondents from disqualifying or preventing petitioner from running or from being voted as director of respondent corporation and from submitting for ratification or confirmation or from causing the ratification or confirmation of Item 6 of the Agenda of the annual stockholders' meeting on May 10, 1977, or from making effective the amended by-laws of respondent corporation, until further orders from this Court or until the Securities and Exchange Commission acts on the matters complained of in the instant petition.

On May 14, 1977, petitioner filed a Supplemental Petition, alleging that after a restraining order had been issued by this Court, or on May 9, 1977, the respondent Commission served upon petitioner copies of the following orders:

- (1) Order No. 449, Series of 1977 (SEC Case No. 1375); denying petitioner's motion for reconsideration, with its supplement, of the order of the Commission denying in part petitioner's motion for production of documents, petitioner's motion for reconsideration of the order denying the issuance of a temporary restraining order, and petitioner's consolidated motion to declare respondents in contempt and to nullify the stockholders' meeting;
- (2) Order No. 450, Series of 1977 (SEC Case No. 1375), allowing petitioner to run as a director of respondent corporation but stating that he should not sit as such if elected, until such time that the Commission has decided the validity of the by-laws in dispute, and denying deferment of Item 6 of the Agenda for the annual stockholders' meeting; and
- (3) Order No. 451, Series of 1977 (SEC Case No. 1375), denying petitioner's motion for reconsideration of the order of respondent Commission denying petitioner's motion for summary judgment.

It is petitioner's assertions anent the foregoing orders, (1) that respondent Commission acted with indecent haste and without circumspection in issuing the aforesaid orders to petitioner's irreparable damage and injury; (2) that it acted without jurisdiction and in violation of petitioner's right to due process when it decided en banc an issue not raised before it and still pending before one of its Commissioners, and without hearing petitioner thereon despite petitioner's request to have the same calendared for hearing; and (3) that the respondents acted oppressively against the petitioner in violation of his rights as a stockholder, warranting immediate judicial intervention.

It is prayed in the supplemental petition that the SEC orders complained of be declared null and void and that respondent Commission be ordered to allow petitioner to undertake discovery proceedings relative to San Miguel International, Inc. and thereafter to decide SEC Cases Nos. 1375 and 1423 on the merits.

On May 17, 1977, respondent SEC, Andres M. Soriano, Jr. and Jose M. Soriano filed their comment, alleging that the petition is without merit for the following reasons:

- (1) that the petitioner and the interests he represents are engaged in businesses competitive and antagonistic to that of respondent San Miguel Corporation, it appearing that he owns and controls a greater portion of his SMC stock thru the Universal Robina Corporation and the Consolidated Foods Corporation, which corporations are engaged in businesses directly and substantially competing with the allied businesses of respondent SMC and of corporations in which SMC has substantial investments. Further, when CFC and Robina had accumulated shares in SMC, the Board of Directors of SMC realized the clear and present danger that competitors or antagonistic parties may be elected directors and thereby have easy and direct access to SMC's business and trade secrets and plans;
- (2) that the amended by-laws were adopted to preserve and protect respondent SMC from the clear and present danger that business competitors, if allowed to become directors, will illegally and unfairly utilize their direct access to its business secrets and plans for their own private gain to the irreparable prejudice of respondent SMC,

and, ultimately, its stockholders. Further, it is asserted that membership of a competitor in the Board of Directors is a blatant disregard of no less than the Constitution and pertinent laws against combinations in restraint of trade;

(3) that the by-laws are valid and binding since a corporation has the inherent right and duty to preserve and protect itself by excluding competitors and antagonistic parties, under the law of self-preservation, and it should be allowed a wide latitude in the selection of means to preserve itself;

(4) that the delay in the resolution and disposition of SEC Cases Nos. 1375 and 1423 was due to petitioner's own acts or omissions, since he failed to have the petition to suspend, *pendente lite*, the amended by-laws calendared for hearing. It was emphasized that it was only on April 29, 1977 that petitioner calendared the aforesaid petition for suspension (preliminary injunction) for hearing on May 3, 1977. The instant petition being dated May 4, 1977, it is apparent that respondent Commission was not given a chance to act "with deliberate dispatch"; and

(5) that even assuming that the petition was meritorious, it has become moot and academic because respondent Commission has acted on the pending incidents complained of. It was, therefore, prayed that the petition be dismissed.

On May 21, 1977, respondent Emigdio G. Tanjuatco, Sr. filed his comment, alleging that the petition has become moot and academic for the reason, among others, that the acts of private respondents sought to be enjoined have reference to the annual meeting of the stockholders of respondent San Miguel Corporation, which was held on May 10, 1977; that in said meeting, in compliance with the order of respondent Commission, petitioner was allowed to run and be voted for as director; and that in the same meeting, Item 6 of the Agenda was discussed, voted upon, ratified and confirmed. Further, it was averred that the questions and issues raised by petitioner are pending in the Securities and Exchange Commission which has acquired jurisdiction over the case, and no hearing on the merits has been had; hence the elevation of these issues before the Supreme Court is premature.

Petitioner filed a reply to the aforesaid comments, stating that the petition presents justiciable questions for the determination of this Court because (1) the respondent Commission acted without circumspection, unfairly and oppressively against petitioner, warranting the intervention of this Court; (2) a derivative suit, such as the instant case, is not rendered academic by the act of a majority of stockholders, such that the discussion, ratification and confirmation of Item 6 of the Agenda of the annual stockholders' meeting of May 10, 1977 did not render the case moot; that the amendment to the by-laws which specifically bars petitioner from being a director is void since it deprives him of his vested rights.

Respondent Commission, thru the Solicitor General, filed a separate comment, alleging that after receiving a copy of the restraining order issued by this Court and noting that the restraining order did not foreclose action by it, the Commission en banc issued Orders Nos. 449, 450 and 451 in SEC Case No. 1375.

In answer to the allegation in the supplemental petition, it states that Order No. 450 which denied deferment of Item 6 of the Agenda of the annual stockholders' meeting of respondent corporation, took into consideration an urgent manifestation filed with the Commission by petitioner on May 3, 1977 which prayed, among others, that the discussion of Item 6 of the Agenda be deferred. The reason given for denial of deferment was that "such action is within the authority of the corporation as well as falling within the sphere of stockholders' right to know, deliberate upon and/or to express their wishes regarding disposition of corporate funds considering that their investments are the ones directly affected." It was alleged that the main petition has, therefore, become moot and academic.

On September 29, 1977, petitioner filed a second supplemental petition with prayer for preliminary injunction, alleging that the actuations of respondent SEC tended to deprive him of his right to due process, and "that all

possible questions on the facts now pending before the respondent Commission are now before this Honorable Court which has the authority and the competence to act on them as it may see fit." (Rollo, pp. 927-928.)

Petitioner, in his memorandum, submits the following issues for resolution:

- (1) whether or not the provisions of the amended by-laws of respondent corporation, disqualifying a competitor from nomination or election to the Board of Directors are valid and reasonable;
- (2) whether or not respondent SEC gravely abused its discretion in denying petitioner's request for an examination of the records of San Miguel International, Inc., a fully owned subsidiary of San Miguel Corporations; and
- (3) whether or not respondent SEC committed grave abuse of discretion in allowing discussion of Item 6 of the Agenda of the Annual Stockholders' Meeting on May 10, 1977, and the ratification of the investment in a foreign corporation of the corporate funds, allegedly in violation of section 17-1/2 of the Corporation Law.

I

Whether or not amended by-laws are valid is purely a legal question, which public interest requires to be resolved

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It is the position of the petitioner that "it is not necessary to remand the case to respondent SEC for an appropriate ruling on the intrinsic validity of the amended by-laws in compliance with the principle of exhaustion of administrative remedies", considering that: first: "whether or not the provisions of the amended by-laws are intrinsically valid * * * is purely a legal question. There is no factual dispute as to what the provisions are and evidence is not necessary to determine whether such amended by-laws are valid as framed and approved * * *"; second: "it is for the interest and guidance of the public that an immediate and final ruling on the question be made * * *"; third: "petitioner was denied due process by SEC" when "Commissioner de Guzman had openly shown prejudice against petitioner * * *," and "Commissioner Sulit * * * approved the amended by-laws ex-parte and obviously found the same intrinsically valid"; and finally: "to remand the case to SEC would only entail delay rather than serve the ends of justice."

Respondents Andres M. Soriano, Jr. and Jose M. Soriano similarly pray that this Court resolve the legal issues raised by the parties in keeping with the "cherished rules of procedure" that "a court should always strive to settle the entire controversy in a single proceeding leaving no root or branch to bear the seeds of future litigation," citing *Gayos v. Gayos*.^[3] To the same effect is the prayer of San Miguel Corporation that this Court resolve on the merits the validity of its amended by-laws and the rights and obligations of the parties thereunder, otherwise "the time spent and effort exerted by the parties concerned and, more importantly, by this Honorable Court, would have been for naught because the main question will come back to this Honorable Court for final resolution." Respondent Eduardo R. Visaya submits a similar appeal

It is only the Solicitor General who contends that the case should be remanded to the SEC for hearing and decision of the issues involved, invoking the latter's primary jurisdiction to hear and decide cases involving intra-corporate controversies.

It is an accepted rule of procedure that the Supreme Court should always strive to settle the entire controversy in a single proceeding, leaving no root or branch to bear the seeds of future litigation.^[4] Thus, in *Francisco v. City of Davao*,^[5] this Court resolved to decide the case on the merits instead of remanding it to the trial court for further proceedings since the ends of justice would not be subserved by the remand of the case. In *Republic v. Security Credit and Acceptance Corporation, et al.*,^[6] this Court, finding that the main issue is one of law, resolved to decide the case on the merits "because public interest demands an early disposition of the case," and in *Republic*

v. Central Surety and Insurance Company,[7] this Court denied remand of the third-party complaint to the trial court for further proceedings, citing precedents where this Court, in similar situations, resolved to decide the cases on the merits, instead of remanding them to the trial court where (a) the ends of justice would not be subserved by the remand of the case; or (b) where public interest demands an early disposition of the case; or (c) where the trial court had already received all the evidence presented by both parties and the Supreme Court is now in a position, based upon said evidence, to decide the case on its merits.⁸ It is settled that the doctrine of primary jurisdiction has no application where only a question of law is involved.^{8a} Because uniformity may be secured through review by a single Supreme Court, questions of law may appropriately be determined in the first instance by courts.^{8b} In the case at bar, there are facts which cannot be denied, viz.: that the amended by-laws were adopted by the Board of Directors of the San Miguel Corporation in the exercise of the power delegated by the stockholders ostensibly pursuant to section 22 of the Corporation Law; that in a special meeting on February 10, 1977 held specially for that purpose, the amended by-laws were ratified by more than 80% of the stockholders of record; that the foreign investment in the Hongkong Brewery and Distillery, a beer manufacturing company in Hongkong, was made by the San Miguel Corporation in 1948; and that in the stockholders' annual meeting held in 1972 and 1977, all foreign investments and operations of San Miguel Corporation were ratified by the stockholders.

II

Whether or not the amended by-laws of SMC disqualifying a competitor from nomination or election to the Board of Directors of SMC are valid and reasonable -

The validity or reasonableness of a by-law of a corporation is purely a question of law.⁹ Whether the by-law is in conflict with the law of the land, or with the charter of the corporation, or is in a legal sense unreasonable and therefore unlawful is a question of law.¹⁰ This rule is subject, however, to the limitation that where the reasonableness of a by-law is a mere matter of judgment, and one upon which reasonable minds must necessarily differ, a court would not be warranted in substituting its judgment instead of the judgment of those who are authorized to make by-laws and who have exercised their authority.¹¹

Petitioner claims that the amended by-laws are invalid and unreasonable because they were "tailored to suppress the minority and prevent them from having representation in the Board," at the same time depriving petitioner of his "vested right" to be voted for and to vote for a person of his choice as director.

Upon the other hand, respondents Andres M. Soriano, Jr., Jose M. Soriano and San Miguel Corporation content that exclusion of a competitor from the Board is a legitimate corporate purpose, considering that being a competitor, petitioner cannot devote an unselfish and undivided loyalty to the corporation; that it is essentially a preventive measure to assure stockholders of San Miguel Corporation of reasonable protection from the unrestrained self-interest of those charged with the promotion of the corporate enterprise; that access to confidential information by a competitor may result either in the promotion of the interest of the competitor at the expense of the San Miguel Corporation, or the promotion of both the interests of petitioner and respondent San Miguel Corporation, which may, therefore, result in a combination or agreement in violation of Article 186 of the Revised Penal Code by destroying free competition to the detriment of the consuming public. It is further argued that there is no vested right of any stockholder under Philippine law to be voted as director of a corporation.

It is alleged that petitioner, as of May 6, 1978 has exercised, personally or thru two corporations owned or controlled by him, control over the following shareholdings in San Miguel Corporation, viz.: (a) John Gokongwei, Jr. - 6,325 shares; (b) Universal Robina Corporation - 738,647 shares; (c) CFC Corporation - 658,313 shares, or a total of 1,403,285 shares. Since the outstanding capital stock of San Miguel Corporation, as of the present date, is

represented by 33,139,749 shares with a par value of P10.00, the total shares owned or controlled by petitioner represents 4.2344% of the total outstanding capital stock of San Miguel Corporation. It is also contended that petitioner is the president and substantial stockholder of Universal Robina Corporation and CFC Corporation, both of which are allegedly controlled by petitioner and members of his family. It is also claimed that both the Universal Robina Corporation and the CFC Corporation are engaged in businesses directly and substantially competing with the allied businesses of San Miguel Corporation, and of corporations in which SMC has substantial investments.

ALLEGED AREAS OF COMPETITION BETWEEN PETITIONER'S CORPORATIONS AND SAN MIGUEL CORPORATION

According to respondent San Miguel Corporation, the areas of competition are enumerated in its Board Resolution dated April 28, 1978, thus:

PRODUCT LINE

ESTIMATED

1977

MARKET SHARE

TOTAL

SMC

ROBINA-CFC

Table Eggs

0.6%

10.0%

10.6%

Layer Pullets

33.0%

24.0%

57.0%

Dressed Chicken

35.0%

14.0%

49.0%

Poultry & Hog Feeds

40.0%

12.0%

52.0%

Ice Cream

70.0%

13.0%

83.0%

Instant Coffee

45.0%

40.0%

85.0%

Woven Fabrics

17.5%

9.1%

26.6%

Thus, according to respondent SMC, in 1976, the areas of competition affecting SMC involved product sales of over P400 million or more than 20% of the P2 billion total product sales of SMC. Significantly, the combined market shares of SMC and CFC-Robina in layer pullets, dressed chicken, poultry and hog feeds, ice cream, instant coffee and woven fabrics would result in a position of such dominance as to affect the prevailing market factors.

It is further asserted that in 1977, the CFC-Robina group was in direct competition on product lines which, for SMC, represented sales amounting to more than P478 million. In addition, CFC-Robina was directly competing in the sale of coffee with Filipro, a subsidiary of SMC, which product line represented sales for SMC amounting to more than P275 million. The CFC-Robina group (Robitex, excluding Litton Mills recently acquired by petitioner) is purportedly also in direct competition with Ramie Textile, Inc., another subsidiary of SMC, in product sales amounting to more than P95 million. The areas of competition between SMC and CFC-Robina in 1977 represented, therefore, for SMC, product sales of more than P849 million.

According to private respondents, at the Annual Stockholders' Meeting of March 18, 1976, 9,894 stockholders, in

person or by proxy, owning 23,436,754 shares in SMC, or more than 90% of the total outstanding shares of SMC, rejected petitioner's candidacy for the Board of Directors because they "realized the grave dangers to the corporation in the event a competitor gets a board seat in SMC." On September 18, 1978, the Board of Directors of SMC, by "virtue of powers delegated to it by the stockholders," approved the amendment to the by-laws in question. At the meeting of February 10, 1977, these amendments were confirmed and ratified by 5,716 shareholders owning 24,283,945 shares, or more than 80% of the total outstanding shares. Only 12 shareholders, representing 7,005 shares, opposed the confirmation and ratification. At the Annual Stockholders' Meeting of May 10, 1977, 11,349 shareholders, owning 27,257,014 shares, or more than 90% of the outstanding shares, rejected petitioner's candidacy, while 496 stockholders, representing 1,648,801 shares voted for him. On the May 9, 1978 Annual Stockholders' Meeting, 12,480 shareholders, owning more than 30 million shares, or more than 90% of the total outstanding shares, voted against petitioner.

AUTHORITY OF CORPORATION TO PRESCRIBE QUALIFICATIONS OF DIRECTORS EXPRESSLY CONFERRED BY LAW

Private respondents contend that the disputed amended by-laws were adopted by the Board of Directors of San Miguel Corporation as a measure of self-defense to protect the corporation from the clear and present danger that the election of a business competitor to the Board may cause upon the corporation and the other stockholders "irreparable prejudice." Submitted for resolution, therefore, is the issue -- whether or not respondent San Miguel Corporation could, as a measure of self-protection, disqualify a competitor from nomination and election to its Board of Directors.

It is recognized by all authorities that "every corporation has the inherent power to adopt by-laws 'for its internal government, and to regulate the conduct and prescribe the rights and duties of its members towards itself and among themselves in reference to the management of its affairs.'"¹² At common law, the rule was "that the power to make and adopt by-laws was inherent in every corporation as one of its necessary and inseparable legal incidents. And it is settled throughout the United States that in the absence of positive legislative provisions limiting it, every private corporation has this inherent power as one of its necessary and inseparable legal incidents, independent of any specific enabling provision in its charter or in general law, such power of self-government being essential to enable the corporation to accomplish the purposes of its creation."¹³

In this jurisdiction, under section 21 of the Corporation Law, a corporation may prescribe in its by-laws "the qualifications, duties and compensation of directors, officers and employees * * *." This must necessarily refer to a qualification in addition to that specified by section 30 of the Corporation Law, which provides that "every director must own in his right at least one share of the capital stock of the stock corporation of which he is a director * * *." In *Government v. El Hogar*,¹⁴ the Court sustained the validity of a provision in the corporate by-law requiring that persons elected to the Board of Directors must be holders of shares of the paid up value of P5,000.00, which shall be held as security for their action, on the ground that section 21 of the Corporation Law expressly gives the power to the corporation to provide in its by-laws for the qualifications of directors and is "highly prudent and in conformity with good practice."

NO VESTED RIGHT OF STOCKHOLDER TO BE ELECTED DIRECTOR

Any person "who buys stock in a corporation does so with the knowledge that its affairs are dominated by a majority of the stockholders and that he impliedly contracts that the will of the majority shall govern in all matters within the limits of the act of incorporation and lawfully enacted by-laws and not forbidden by law,"¹⁵ To this extent, therefore, the stockholder may be considered to have "parted with his personal right or privilege to regulate the disposition of his property which he has invested in the capital stock of the corporation, and

surrendered it to the will of the majority of his fellow incorporators. * * * It can not therefore be justly said that the contract, express or implied, between the corporation and the stockholders is infringed * * * by any act of the former which is authorized by a majority * * *."16

Pursuant to section 18 of the Corporation Law, any corporation may amend its articles of incorporation by a vote or written assent of the stockholders representing at least two-thirds of the subscribed capital stock of the corporation. If the amendment changes, diminishes or restricts the rights of the existing shareholders, then the dissenting minority has only one right, viz.: "to object thereto in writing and demand payment for his share." Under section 22 of the same law, the owners of the majority of the subscribed capital stock may amend or repeal any by-law or adopt new by-laws. It cannot be said, therefore, that petitioner has a vested right to be elected director, in the face of the fact that the law at the time such right as stockholder was acquired contained the prescription that the corporate charter and the by-law shall be subject to amendment, alteration and modification.¹⁷

It being settled that the corporation has the power to provide for the qualifications of its directors, the next question that must be considered is whether the disqualification of a competitor from being elected to the Board of Directors is a reasonable exercise of corporate authority.

A DIRECTOR STANDS IN A FIDUCIARY RELATION TO THE CORPORATION AND ITS SHAREHOLDERS

Although in the strict and technical sense, directors of a private corporation are not regarded as trustees, there cannot be any doubt that their character is that of a fiduciary insofar as the corporation and the stockholders as a body are concerned. As agents entrusted with the management of the corporation for the collective benefit of the stockholders, "they occupy a fiduciary relation, and in this sense the relation is one of trust."¹⁸ "The ordinary trust relationship of directors of a corporation and stockholders," according to *Ashman v. Miller*¹⁹ "is not a matter of statutory or technical law. It springs from the fact that directors have the control and guidance of corporate affairs and property and hence of the property interests of the stockholders. Equity recognizes that stockholders are the proprietors of the corporate interests and are ultimately the only beneficiaries thereof * * *."

Justice Douglas, in *Pepper v. Litton*,²⁰ emphatically restated the standard of fiduciary obligation of the directors of corporations, thus:

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

And in *Cross v. West Virginia Cent. & P. R. Co.*,²¹ it was said:

"* * * A person cannot serve two hostile and adverse masters without detriment to one of them. A judge cannot be impartial if personally interested in the cause. No more can a director. Human nature is too weak for this. Take whatever statute provision you please giving power to stockholders to choose directors, and in none will you find any express prohibition against a discretion to select directors having the company's interest at heart, and it would simply be going far to deny by mere implication the existence of such a salutary power."

"* * * If the by-law is to be held reasonable in disqualifying a stockholder in a competing company from being a director, the same reasoning would apply to disqualify the wife and immediate member of the family of such stockholder, on account of the supposed interest of the wife in her husband's affairs, and his supposed influence over her. It is perhaps true that such stockholders ought not to be condemned as selfish and dangerous to the best interest of the corporation until tried and tested. So it is also true that we cannot condemn as selfish and dangerous and unreasonable the action of the board in passing the by-law. The strife over the matter of control in this corporation as in many others is perhaps carried on not altogether in the spirit of brotherly love and affection. The only test that we can apply is as to whether or not the action of the Board is authorized and sanctioned by law. * * *."22

These principles have been applied by this Court in previous cases.²³

AN AMENDMENT TO THE CORPORATE BY-LAW WHICH RENDERS A STOCKHOLDER INELIGIBLE TO BE DIRECTOR, IF HE BE ALSO DIRECTOR IN A CORPORATION WHOSE BUSINESS IS IN COMPETITION WITH THAT OF THE OTHER CORPORATION, HAS BEEN SUSTAINED AS VALID

It is a settled state law in the United States, according to Fletcher, that corporations have the power to make by-laws declaring a person employed in the service of a rival company to be ineligible for the corporation's Board of Directors. "* * * (A)n amendment which renders ineligible, or if elected, subjects to removal, a director if he be also a director in a corporation whose business is in competition with or is antagonistic to the other corporation is valid."²⁴ This is based upon the principle that where the director is so employed in the service of a rival company, he cannot serve both, but must betray one or the other. Such an amendment "advances the benefit of the corporation and is good." An exception exists in New Jersey, where the Supreme Court held that the Corporation Law in New Jersey prescribed the only qualification, and therefore the corporation was not empowered to add additional qualifications.²⁵ This is the exact opposite of the situation in the Philippines because as stated heretofore, section 21 of the Corporation Law expressly provides that a corporation may make by-laws for the qualifications of directors. Thus, it has been held that an officer of a corporation cannot engage in a business in direct competition with that of the corporation where he is a director by utilizing information he has received as such officer, under "the established law that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director."²⁶

It is also well established that corporate officers "are not permitted to use their position of trust and confidence to further their private interests."²⁷ In a case where directors of a corporation cancelled a contract of the corporation for exclusive sale of a foreign firm's products, and after establishing a rival business, the directors entered into a new contract themselves with the foreign firm for exclusive sale of its products, the court held that equity would regard the new contract as an offshoot of the old contract and, therefore, for the benefit of the corporation, as a "faultless fiduciary may not reap the fruits of his misconduct to the exclusion of his principal."²⁸

The doctrine of "corporate opportunity"²⁹ is precisely a recognition by the courts that the fiduciary standards could not be upheld where the fiduciary was acting for two entities with competing interests. This doctrine rests fundamentally on the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection.³⁰

It is not denied that a member of the Board of Directors of the San Miguel Corporation has access to sensitive and highly confidential information, such as: (a) marketing strategies and pricing structure; (b) budget for expansion and diversification; (c) research and development; and (d) sources of funding, availability of personnel, proposals of mergers or tie-ups with other firms.

It is obviously to prevent the creation of an opportunity for an officer or director of San Miguel Corporation, who is also the officer or owner of a competing corporation, from taking advantage of the information which he

acquires as director to promote his individual or corporate interests to the prejudice of San Miguel Corporation and its stockholders, that the questioned amendment of the by-laws was made. Certainly, where two corporations are competitive in a substantial sense, it would seem improbable, if not impossible, for the director, if he were to discharge effectively his duty, to satisfy his loyalty to both corporations and place the performance of his corporate duties above his personal concerns.

Thus, in *McKee Co. v. First National Bank of San Diego*, supra, the court sustained as valid and reasonable an amendment to the by-laws of a bank, requiring that its directors should not be directors, officers, employees, agents, nominees or attorneys of any other banking corporation, affiliate or subsidiary thereof. Chief Judge Parker, in *McKee*, explained the reasons of the court, thus:

"* * * A bank director has access to a great deal of information concerning the business and plans of a bank which would likely be injurious to the bank if known to another bank, and it was reasonable and prudent to enlarge this minimum disqualification to include any director, officer, employee, agent, nominee, or attorney of any other bank in California. The *Ashkins* case, supra, specifically recognizes protection against rivals and others who might acquire information which might be used against the interests of the corporation as a legitimate object of by-law protection. With respect to attorneys or persons associated with a firm which is attorney for another bank, in addition to the direct conflict or potential conflict of interest, there is also the danger of inadvertent leakage of confidential information through casual office discussions or accessibility of files. Defendant's directors determined that its welfare was best protected if this opportunity for conflicting loyalties and potential misuse and leakage of confidential information was foreclosed."

In *McKee*, the Court further listed qualification by-laws upheld by the courts, as follows:

- "(1) A director shall not be directly or indirectly interested as a stockholder in any other firm, company, or association which competes with the subject corporation.
- (2) A director shall not be the immediate member of the family of any stockholder in any other firm, company, or association which competes with the subject corporation.
- (3) A director shall not be an officer, agent, employee, attorney, or trustee in any other firm, company, or association which competes with the subject corporation.
- (4) A director shall be of good moral character as an essential qualification to holding office.
- (5) No person who is an attorney against the corporation in a law suit is eligible for service on the board." (At p. 7.)

These are not based on theoretical abstractions but on human experience — that a person cannot serve two hostile masters without detriment to one of them.

The offer and assurance of petitioner that to avoid any possibility of his taking unfair advantage of his position as director of San Miguel Corporation, he would absent himself from meetings at which confidential matters would be discussed, would not detract from the validity and reasonableness of the by-laws here involved. Apart from the impractical results that would ensue from such arrangement, it would be inconsistent with petitioner's primary motive in running for board membership -- which is to protect his investments in San Miguel Corporation. More important, such a proposed norm of conduct would be against all accepted principles underlying a director's duty of fidelity to the corporation, for the policy of the law is to encourage and enforce responsible corporate management. As explained by *Oleck*:³¹ "The law will not tolerate the passive attitude of directors * * * without active and conscientious participation in the managerial functions of the company. As directors, it is their duty to control and supervise the day to day business activities of the company or to promulgate definite policies and rules of guidance with a vigilant eye toward seeing to it that these policies are carried out. It is only then that

directors may be said to have fulfilled their duty of fealty to the corporation."

Sound principles of corporate management counsel against sharing sensitive information with a director whose fiduciary duty of loyalty may well require that he disclose this information to a competitive rival. These dangers are enhanced considerably where the common director such as the petitioner is a controlling stockholder of two of the competing corporations. It would seem manifest that in such situations, the director has an economic incentive to appropriate for the benefit of his own corporation the corporate plans and policies of the corporation where he sits as director.

Indeed, access by a competitor to confidential information regarding marketing strategies and pricing policies of San Miguel Corporation would subject the latter to a competitive disadvantage and unjustly enrich the competitor, for advance knowledge by the competitor of the strategies for the development of existing or new markets of existing or new products could enable said competitor to utilize such knowledge to his advantage.³²

There is another important consideration in determining whether or not the amended by-laws are reasonable. The Constitution and the law prohibit combinations in restraint of trade or unfair competition. Thus, section 2 of Article XIV of the Constitution provides: "The State shall regulate or prohibit private monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."

Article 186 of the Revised Penal Code also provides:

"Art. 186. Monopolies and combination's in restraint of trade. - The penalty of prision correccional in its minimum period or a fine ranging from two hundred to six thousand pesos, or both, shall be imposed upon:

1. Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market.
2. Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market.
3. Any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, or any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, processed, or imported merchandise or object of commerce is used."

There are other legislation in this jurisdiction, which prohibit monopolies and combinations in restraint of trade.³³ Basically, these anti-trust laws or laws against monopolies or combinations in restraint of trade are aimed at raising levels of competition by improving the consumers' effectiveness as the final arbiter in free markets. These laws are designed to preserve free and unfettered competition as the rule of trade. "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices and the highest quality * * *."³⁴ They operate to forestall concentration of economic power.³⁵ The law against monopolies and combinations in restraint of trade is aimed at contracts and combinations that, by reason of the inherent nature of the contemplated acts, prejudice the public interest by unduly restraining competition or unduly obstructing the course of trade.³⁶

The terms "monopoly," "combination in restraint of trade" and "unfair competition" appear to have a well defined meaning in other jurisdictions. A "monopoly" embraces any combination the tendency of which is to prevent competition in the broad and general sense, or to control prices to the detriment of the public.³⁷ In short, it is the concentration of business in the hands of a few. The material consideration in determining its existence is not that prices are raised and competition actually excluded, but that power exists to raise prices or exclude competition when desired.³⁸ Further, it must be considered that the idea of monopoly is now understood to include a condition produced by the mere act of individuals. Its dominant thought is the notion of exclusiveness or unity, or the suppression of competition by the unification of interest or management, or it may be thru agreement and concert of action. It is, in brief, unified tactics with regard to prices.³⁹

From the foregoing definitions, it is apparent that the contentions of petitioner are not in accord with reality. The election of petitioner to the Board of respondent corporation can bring about an illegal situation. This is because an express agreement is not necessary for the existence of a combination or conspiracy in restraint of trade.⁴⁰ It is enough that a concert of action is contemplated and that the defendants conformed to the arrangements,⁴¹ and what is to be considered is what the parties actually did and not the words they used. For instance, the Clayton Act prohibits a person from serving at the same time as a director in any two or more corporations, if such corporations are, by virtue of their business and location of operation, competitors so that the elimination of competition between them would constitute violation of any provision of the anti-trust laws.⁴² There is here a statutory recognition of the anti-competitive dangers which may arise when an individual simultaneously acts as a director of two or more competing corporations. A common director of two or more competing corporations would have access to confidential sales, pricing and marketing information and would be in a position to coordinate policies or to aid one corporation at the expense of another, thereby stifling competition. This situation has been aptly explained by Travers, thus:

"The argument for prohibiting competing corporations from sharing even one director is that the interlock permits the coordination of policies between nominally independent firms to an extent that competition between them may be completely eliminated. Indeed, if a director, for example, is to be faithful to both corporations, some accommodation must result. Suppose X is a director of both Corporation A and Corporation B. X could hardly vote for a policy by A that would injure B without violating his duty of loyalty to B; at the same time he could hardly abstain from voting without depriving A of his best judgment. If the firms really do compete -- in the sense of vying economic advantage at the expense of the other -- there can hardly be any reason for an interlock between competitors other than the suppression of competition."⁴³ (Italics supplied.)

According to the Report of the House Judiciary Committee of the U.S. Congress on section 9 of the Clayton Act, it was established that: "By means of the interlocking directorates one man or group of men have been able to dominate and control a great number of corporations * * * to the detriment of the small ones dependent upon them and to the injury of the public."⁴⁴

Shared information on cost accounting may lead to price fixing. Certainly, shared information on production, orders, shipments, capacity and inventories may lead to control of production for the purpose of controlling prices.

Obviously, if a competitor has access to the pricing policy and cost conditions of the products of San Miguel Corporation, the essence of competition in a free market for the purpose of serving the lowest priced goods to the consuming public would be frustrated. The competitor could so manipulate the prices of his products or vary its marketing strategies by region or by brand in order to get the most out of the consumers. Where the two competing firms control a substantial segment of the market this could lead to collusion and combination in restraint of trade. Reason and experience point to the inevitable conclusion that the inherent tendency of

interlocking directorates between companies that are related to each other as competitors is to blunt the edge of rivalry between the corporations, to seek out ways of compromising opposing interests, and thus eliminate competition. As respondent SMC aptly observes, knowledge by CFC-Robina of SMC's costs in various industries and regions in the country will enable the former to practice price discrimination. CFC-Robina can segment the entire consuming population by geographical areas or income groups and change varying prices in order to maximize profits from every market segment. CFC-Robina could determine the most profitable volume at which it could produce for every product line in which it competes with SMC. Access to SMC pricing policy by CFC-Robina would in effect destroy free competition and deprive the consuming public of opportunity to buy goods of the highest possible quality at the lowest prices.

Finally, considering that both Robina and SMC are, to a certain extent, engaged in agriculture, then the election of petitioner to the Board of SMC may constitute a violation of the prohibition contained in section 13(5) of the Corporation Law. Said section provides in part that "any stockholder of more than one corporation organized for the purpose of engaging in agriculture may hold his stock in such corporations solely for investment and not for the purpose of bringing about or attempting to bring about a combination to exercise control of such corporations * * *."

Neither are We persuaded by the claim that the by-law was intended to prevent the candidacy of petitioner for election to the Board. If the by-law were to be applied in the case of one stockholder but waived in the case of another, then it could be reasonably claimed that the by-law was being applied in a discriminatory manner. However, the by-law, by its terms, applies to all stockholders. The equal protection clause of the Constitution requires only that the by-law operate equally upon all persons of a class. Besides, before petitioner can be declared ineligible to run for director, there must be hearing and evidence must be submitted to bring his case within the ambit of the disqualification. Sound principles of public policy and management, therefore, support the view that a by-law which disqualifies a competition from election to the Board of Directors of another corporation is valid and reasonable.

In the absence of any legal prohibition or overriding public policy, wide latitude may be accorded to the corporation in adopting measures to protect legitimate corporate interests. Thus, "where the reasonableness of a by-law is a mere matter of judgment, and upon which reasonable minds must necessarily differ, a court would not be warranted in substituting its judgment instead of the judgment of those who are authorized to make by-laws and who have expressed their authority."⁴⁵

Although it is asserted that the amended by-laws confer on the present Board powers to perpetuate themselves in power, such fears appear to be misplaced. This power, by its very nature, is subject to certain well established limitations. One of these is inherent in the very concept and definition of the terms "competition" and "competitor." "Competition" implies a struggle for advantage between two or more forces, each possessing, in substantially similar if not identical degree, certain characteristics essential to the business sought. It means an independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade.⁴⁶ The test must be whether the business does in fact compete, not whether it is capable of an indirect and highly unsubstantial duplication of an isolated or non-characteristic activity.⁴⁷ It is, therefore, obvious that not every person or entity engaged in business of the same kind is a competitor. Such factors as quantum and place of business, identity of products and area of competition should be taken into consideration. It is, therefore, necessary to show that petitioner's business covers a substantial portion of the same markets for similar products to the extent of not less than 10% of respondent corporation's market for competing products. While We here sustain the validity of the amended by-laws, it does not follow as a necessary consequence that petitioner is ipso facto disqualified. Consonant with the requirement of

due process, there must be due hearing at which the petitioner must be given the fullest opportunity to show that he is not covered by the disqualification. As trustees of the corporation and of the stockholders, it is the responsibility of directors to act with fairness to the stockholders.⁴⁸ Pursuant to this obligation and to remove any suspicion that this power may be utilized by the incumbent members of the Board to perpetuate themselves in power, any decision of the Board to disqualify a candidate for the Board of Directors should be reviewed by the Securities and Exchange Commission en banc and its decision shall be final unless reversed by this Court on certiorari.⁴⁹ Indeed, it is a settled principle that where the action of a Board of Directors is an abuse of discretion, or forbidden by statute, or is against public policy, or is ultra vires, or is a fraud upon minority stockholders or creditors, or will result in waste, dissipation or misapplication of the corporate assets, a court of equity has the power to grant appropriate relief.⁵⁰

III

Whether or not respondent SEC gravely abused its discretion in denying petitioner's request for an examination of the records of San Miguel International, Inc., a fully owned subsidiary of San Miguel Corporation -

Respondent San Miguel Corporation stated in its memorandum that petitioner's claim that he was denied inspection rights as stockholder of SMC "was made in the teeth of undisputed facts that, over a specific period, petitioner had been furnished numerous documents and information," to wit: (1) a complete list of stockholders and their stockholdings; (2) a complete list of proxies given by the stockholders for use at the annual stockholders' meeting of May 18, 1975; (3) a copy of the minutes of the stockholders' meeting of March 18, 1976; (4) a breakdown of SMC's P186.6 million investment in associated companies and other companies as of December 31, 1975; (5) a listing of the salaries, allowances, bonuses and other compensations or remunerations received by the directors and corporate officers of SMC; (6) a copy of the US\$100 million Euro-Dollar Loan Agreement of SMC; and (7) copies of the minutes of all meetings of the Board of Directors from January 1975 to May 1976, with deletions of sensitive data, which deletions were not objected to by petitioner.

Further, it was averred that upon request, petitioner was informed in writing on September 18, 1976: (1) that SMC's foreign investments are handled by San Miguel International, Inc., incorporated in Bermuda and wholly owned by SMC; this was SMC's first venture abroad, having started in 1948 with an initial outlay of P500,000.00, augmented by a loan of Hongkong \$6 million from a foreign bank under the personal guaranty of SMC's former President, the late Col. Andres Soriano; (2) that as of December 31, 1975, the estimated value of SMI would amount to almost P400 million; (3) that the total cash dividends received by SMC from SMI since 1953 has amounted to US\$9.4 million; and (4) that from 1972-1975, SMI did not declare cash or stock dividends, all earnings having been used in line with a program for the setting up of breweries by SMI.

These averments are supported by the affidavit of the Corporate Secretary, enclosing photocopies of the afore-mentioned documents.⁵¹

Pursuant to the second paragraph of section 51 of the Corporation Law, "(t)he record of all business transactions of the corporation and minutes of any meeting shall be open to the inspection of any director, member or stockholder of the corporation at reasonable hours."

The stockholder's right of inspection of the corporation's books and records is based upon their ownership of the assets and property of the corporation. It is, therefore, an incident of ownership of the corporate property, whether this ownership or interest be termed an equitable ownership, a beneficial ownership, or a quasi-ownership.⁵² This right is predicated upon the necessity of self-protection. It is generally held by majority of the courts that where the right is granted by statute to the stockholder, it is given to him as such and must be exercised by him with respect to his interest as a stockholder and for some purpose germane thereto or in the interest of the

corporation.⁵³ In other words, the inspection has to be germane to the petitioner's interest as a stockholder, and has to be proper and lawful in character and not inimical to the interest of the corporation.⁵⁴ In *Grey v. Insular Lumber*,⁵⁵ this Court held that "the right to examine the books of the corporation must be exercised in good faith, for specific and honest purpose, and not to gratify curiosity, or for speculative or vexatious purposes." The weight of judicial opinion appears to be, that on application for mandamus to enforce the right, it is proper for the court to inquire into and consider the stockholder's good faith and his purpose and motives in seeking inspection.⁵⁶ Thus, it was held that "the right given by statute is not absolute and may be refused when the information is not sought in good faith or is used to the detriment of the corporation."⁵⁷ But the "impropriety of purpose such as will defeat enforcement must be set up by the corporation defensively if the Court is to take cognizance of it as a qualification. In other words, the specific provisions take from the stockholder the burden of showing propriety of purpose and place upon the corporation the burden of showing impropriety of purpose or motive."⁵⁸ It appears to be the "general rule that stockholders are entitled to full information as to the management of the corporation and the manner of expenditure of its funds, and to inspection to obtain such information, especially where it appears that the company is being mismanaged or that it is being managed for the personal benefit of officers or directors or certain of the stockholders to the exclusion of others."⁵⁹

While the right of a stockholder to examine the books and records of a corporation for a lawful purpose is a matter of law, the right of such stockholder to examine the books and records of a wholly-owned subsidiary of the corporation in which he is a stockholder is a different thing.

Some state courts recognize the right under certain conditions, while others do not. Thus, it has been held that where a corporation owns approximately no property except the shares of stock of subsidiary corporations which are merely agents or instrumentalities of the holding company, the legal fiction of distinct corporate entities may be disregarded and the books, papers and documents of all the corporations may be required to be produced for examination,⁶⁰ and that a writ of mandamus may be granted, as the records of the subsidiary were, to all intents and purposes, the records of the parent even though the subsidiary was not named as a party.⁶¹ Mandamus was likewise held proper to inspect both the subsidiary's and the parent corporation's books upon proof of sufficient control or dominion by the parent showing the relation of principal or agent or something similar thereto.⁶²

On the other hand, mandamus at the suit of a stockholder was refused where the subsidiary corporation is a separate and distinct corporation domiciled and with its books and records in another jurisdiction, and is not legally subject to the control of the parent company, although it owned a vast majority of the stock of the subsidiary.⁶³ Likewise, inspection of the books of an allied corporation by a stockholder of the parent company which owns all the stock of the subsidiary has been refused on the ground that the stockholder was not within the class of "persons having an interest."⁶⁴

In the *Nash* case,⁶⁵ The Supreme Court of New York held that the contractual right of former stockholders to inspect books and records of the corporation "included the right to inspect corporation's subsidiaries' books and records which were in corporation's possession and control in its office in New York."

In the *Bailey* case,⁶⁶ stockholders of a corporation were held entitled to inspect the records of a controlled subsidiary corporation which used the same offices and had identical officers and directors.

In his "Urgent Motion for Production and Inspection of Documents" before respondent SEC, petitioner contended that respondent corporation "had been attempting to suppress information from the stockholders" and that petitioner, "as stockholder of respondent corporation, is entitled to copies of some documents which for some reason or another, respondent corporation is very reluctant in revealing to the petitioner notwithstanding the fact that no harm would be caused thereby to the corporation."⁶⁷ There is no question that stockholders are entitled to

inspect the books and records of a corporation in order to investigate the conduct of the management, determine the financial condition of the corporation, and generally take an account of the stewardship of the officers and directors.⁶⁸

In the case at bar, considering that the foreign subsidiary is wholly owned by respondent San Miguel Corporation and, therefore, under its control, it would be more in accord with equity, good faith and fair dealing to construe the statutory right of petitioner as stockholder to inspect the books and records of the corporation as extending to books and records of such wholly owned subsidiary which are in respondent corporation's possession and control.

IV

Whether or not respondent SEC gravely abused its discretion in allowing the stockholders of respondent corporation to ratify the investment of corporate funds in a foreign corporation

Petitioner reiterates his contention in SEC Case No. 1423 that respondent corporation invested corporate funds in SMI without prior authority of the stockholders, thus violating section 17-1/2 of the Corporation Law, and alleges that respondent SEC should have investigated the charge, being a statutory offense, instead of allowing ratification of the investment by the stockholders.

Respondent SEC's position is that submission of the investment to the stockholders for ratification is a sound corporate practice and should not be thwarted but encouraged.

Section 17-1/2 of the Corporation Law allows a corporation to "invest its funds in any other corporation or business or for any purpose other than the main purpose for which it was organized" provided that its Board of Directors has been so authorized by the affirmative vote of stockholders holding shares entitling them to exercise at least two-thirds of the voting power. If the investment is made in pursuance of the corporate purpose, it does not need the approval of the stockholders. It is only when the purchase of shares is done solely for investment and not to accomplish the purpose of its incorporation that the vote of approval of the stockholders holding shares entitling them to exercise at least two-thirds of the voting power is necessary.⁶⁹

As stated by respondent corporation, the purchase of beer manufacturing facilities by SMC was an investment in the same business stated as its main purpose in its Articles of Incorporation, which is to manufacture and market beer. It appears that the original investment was made in 1947-1948, when SMC, then San Miguel Brewery, Inc., purchased a beer brewery in Hongkong (Hongkong Brewery & Distillery, Ltd.) for the manufacture and marketing of San Miguel beer thereat. Restructuring of the investment was made in 1970-1971 thru the organization of SMI in Bermuda as a tax free reorganization.

Under these circumstances, the ruling in *De la Rama v. Ma-ao Sugar Central Co., Inc.*, supra, appears relevant. In said case, one of the issues was the legality of an investment made by Ma-ao Sugar Central Co., Inc., without prior resolution approved by the affirmative vote of 2/3 of the stockholders' voting power, in the Philippine Fiber Processing Co., Inc., a company engaged in the manufacture of sugar bags. The lower court said that "there is more logic in the stand that if the investment is made in a corporation whose business is important to the investing corporation and would aid it in its purpose, to require authority of the stockholders would be to unduly curtail the power of the Board of Directors." This Court affirmed the ruling of the court a quo on the matter and, quoting Prof. Sulpicio S. Guevara, said:

"j. Power to acquire or dispose of shares or securities. - A private corporation, in order to accomplish its purpose as stated in its articles of incorporation, and subject to the limitations imposed by the Corporation Law, has the power to acquire, hold, mortgage, pledge or dispose of shares, bonds, securities, and other evidences of indebtedness of any domestic or foreign corporation. Such an act, if done in pursuance of the

corporate purpose, does not need the approval of stockholders; but when the purchase of shares of another corporation is done solely for investment and not to accomplish the purpose of its incorporation, the vote of approval of the stockholders is necessary. In any case, the purchase of such shares or securities must be subject to the limitations established by the Corporation Law; namely, (a) that no agricultural or mining corporation shall in anywise be interested in any other agricultural or mining corporation; or (b) that a non-agricultural or non-mining corporation shall be restricted to own not more than 15% of the voting stock of any agricultural or mining corporation; and (c) that such holdings shall be solely for investment and not for the purpose of bringing about a monopoly in any line of commerce or combination in restraint of trade.' (The Philippine Corporation Law by Sulpicio S. Guevara, 1967 Ed., p. 89) (Italics ours.)

"40. Power to invest corporate funds. A private corporation has the power to invest its corporate funds "in any other corporation or business, or for any purpose other than the main purpose for which it was organized, provided that 'its board of directors has been so authorized in a resolution by the affirmative vote of stockholders holding shares in the corporation entitling them to exercise at least two-thirds of the voting power on such a proposal at a stockholders' meeting called for that purpose,' and provided further, that no agricultural or mining corporation shall in anywise be interested in any other agricultural or mining corporation. When the investment is necessary to accomplish its purpose or purposes as stated in its articles of incorporation, the approval of the stockholder is not necessary.'" (Id., p. 108.) (Italics ours.)" (pp. 258-259.)

Assuming arguendo that the Board of Directors of SMC had no authority to make the assailed investment, there is no question that a corporation, like an individual, may ratify and thereby render binding upon it the originally unauthorized acts of its officers or other agents.⁷⁰ This is true because the questioned investment is neither contrary to law, morals, public order or public policy. It is a corporate transaction or contract which is within the corporate powers, but which is defective from a purported failure to observe in its execution the requirement of the law that the investment must be authorized by the affirmative vote of the stockholders holding two-thirds of the voting power. This requirement is for the benefit of the stockholders. The stockholders for whose benefit the requirement was enacted may, therefore, ratify the investment and its ratification by said stockholders obliterates any defect which it may have had at the outset. "Mere ultra vires acts," said this Court in *Pirovano*,⁷¹ "or those which are not illegal and void ab initio, but are not merely within the scope of the articles of incorporation, are merely voidable and may become binding and enforceable when ratified by the stockholders."

Besides, the investment was for the purchase of beer manufacturing and marketing facilities which is apparently relevant to the corporate purpose. The mere fact that respondent corporation submitted the assailed investment to the stockholders for ratification at the annual meeting of May 10, 1977 cannot be construed as an admission that respondent corporation had committed an ultra vires act, considering the common practice of corporations of periodically submitting for the ratification of their stockholders the acts of their directors, officers and managers.

WHEREFORE, judgment is hereby rendered as follows:

The Court voted unanimously to grant the petition insofar as it prays that petitioner be allowed to examine the books and records of San Miguel International, Inc., as specified by him.

On the matter of the validity of the amended by-laws of respondent San Miguel Corporation, six (6) Justices, namely, Justices Barredo, Makasiar, Antonio, Santos, Abad Santos and De Castro, voted to sustain the validity per se of the amended by-laws in question and to dismiss the petition without prejudice to the question of the actual disqualification of petitioner John Gokongwei, Jr. to run and if elected to sit as director of respondent San Miguel Corporation being decided, after a new and proper hearing by the Board of Directors of said corporation, whose decision shall be appealable to the respondent Securities and Exchange Commission deliberating and acting en banc, and ultimately to this Court. Unless disqualified in the manner herein provided, the prohibition in the afore-mentioned amended by-laws shall not apply to petitioner.

The afore-mentioned six (6) Justices, together with Justice Fernando, voted to declare the issue on the validity of the foreign investment of respondent corporation as moot.

Chief Justice Fred Ruiz Castro reserved his vote on the validity of the amended by-laws, pending hearing by this Court on the applicability of section 13(5) of the Corporation Law to petitioner.

Justice Fernando reserved his vote on the validity of subject amendment to the by-laws but otherwise concurs in the result.

Four (4) Justices, namely, Justices Teehankee, Concepcion Jr., Fernandez and Guerrero filed a separate opinion, wherein they voted against the validity of the questioned amended by-laws and that this question should properly be resolved first by the SEC as the agency of primary jurisdiction. They concur in the result that petitioner may be allowed to run for and sit as director of respondent SMC in the scheduled May 6, 1979 election and subsequent elections until disqualified after proper hearing by the respondent's Board of Directors and petitioner's disqualification shall have been sustained by respondent SEC en banc and ultimately by final judgment of this Court.

In resume, subject to the qualifications afore-stated, judgment is hereby rendered GRANTING the petition by allowing petitioner to examine the books and records of San Miguel International, Inc. as specified in the petition. The petition,* insofar as it assails the validity of the amended by-laws and the ratification of the foreign investment of respondent corporation, for lack of necessary votes, is hereby DISMISSED. No costs.

Makasiar, Santos, Abad Santos, and De Castro, JJ., concur.

Castro, C.J., reserves his right to file a separate opinion.

Fernando, J., concurs in the result and reserves his right to file a separate opinion.

Teehankee, J. with Concepcion, Jr., Fernandez, and Guerrero, JJ., file a joint separate opinion.

Barredo, J., concurs and reserves the filing of a separate opinion.

Aquino and Melencio-Herrera, JJ., did not take part.

[1] The pertinent amendment reads as follows:

"RESOLVED, That Section 2, Article III of the By-laws of San Miguel Corporation, which reads as follows:

'SECTION 2. Any stockholder having at least five thousand shares registered in his name may be elected director, but he shall not be qualified to hold office unless he pledges said five thousand shares to the Corporation to answer for his conduct.'

be, and the same hereby is, amended, to read as follows:

'SECTION 2. Any stockholder having at least five thousand shares registered in his name may be elected Director, provided, however, that no person shall qualify or be eligible for nomination or election to the Board of Directors if he is engaged in any business which competes with or is antagonistic to that of the Corporation. Without limiting the generality of the foregoing, a person shall be deemed to be so engaged:

(a) if he is an officer, manager or controlling person of, or the owner (either of record or beneficially) of 10% or more of any outstanding class of shares of, any corporation (other than one in which the corporation owns at least 30% of the capital stock) engaged in a business which the Board, by at least three-fourths vote, determines to be competitive or antagonistic to that of the Corporation; or

(b) If he is an officer, manager or controlling person of, or the owner (either of record or beneficially) of 10% or

more of any outstanding class of shares of, any other corporation or entity engaged in any line of business of the Corporation, when in the judgment of the Board, by at least three-fourths vote, the laws against combinations in restraint of trade shall be violated by such person's membership in the Board of Directors.

(c) If the Board, in the exercise of its judgment in good faith, determines by at least three-fourths vote that he is the nominee of any person set forth in (a) or (b).

In determining whether or not a person is a controlling person, beneficial owner, or the nominee of another, the Board may take into account such factors as business and family relationship.

For the proper implementation of this provision, all nominations for election of Directors by the stockholders shall be submitted in writing to the Board of Directors at least five working days before the date of the Annual Meeting." (Rollo, pp. 462-463.)

[2] Annex "H", Petition, pp. 168-169, Rollo.

[3] L-27812, September 26, 1975, 67 SCRA 146.

[4] *Gayos v. Gayos*, *ibid.*, citing *Marquez v. Marquez*, No. 47792, July 24, 1941, 73 Phil. 74, 78; *Keramik Industries, Inc. v. Guerrero*, L-38866, November 29, 1974, 61 SCRA 265.

[5] L-20654, December 24, 1964, 12 SCRA 628.

[6] L-20583, January 23, 1967, 19 SCRA 58.

[7] L-27802, October 26, 1968, 25 SCRA 641.

8 *Samal v. Court at of Appeals*, L-8579, May 25, 1956, 99 Phil. 230.

8a 2 Am. Jur. 2d 696, 697.

8b *Pan American P. Corp. v. Supreme Court Delaware*, 336 US 656, 6 L. ed. 2d 584.

9 *Fleisher v. Botica Nolasco Co., Inc.*, No. 23241, March 14, 1925, 47 Phil. 583, 590.

10 18 C.J.S. Corporations, Sec. 189, p. 603.

11 *People ex rel. Wildi v. Ittner*, 165 Ill. App. 360, 367 (1911), cited in *Fletcher, Cyclopedia Corporations*, Sec. 4191.

12 *McKee & Company v. First National Bank of San Diego*, 265 F. Supp. 1 (1967), citing *Olinco v. Merle Norman Cosmetics, Inc.*, 200 Cal. App. 20, 260, 19 Cal. Repr. 387 (1962).

13 *Fletcher, Cyclopedia Corporations*, Sec. 4171, cited in *McKee & Company*, *supra*.

14 No. 26649, July 13, 1927, 50 Phil. 399, 441.

15 6 Thompson 369, Sec. 4490.

16 *Ibid.*

17 *Mobile Press Register, Inc. v. McGowin*, 277 Ala. 414, 124 So. 2d 812; *Brundage v. The New Jersey Zinc Co.*, 226 A 2d 585.

18 *Fletcher, Cyclopedia Corporations*, 1975 Ed., Vol. 3, p. 144, Sec. 838.

19 101 Fed. 2d 85, cited in *Aleck, Modern Corporation Law*, Vol. 2, Sec. 959.

20 308 U.S. 309; 84 L. ed. 281, 289-291.

21 16 S.E. 587, 18 L.R.A. 582.

22 265 F. Supp., pp. 8-9.

23 Barreto v. Tuason, No. 23923, Mar. 23, 1926, 50 Phil. 888; Severino v. Severino, No. 18058, Jan. 16, 1923, 44 Phil. 343; Thomas v. Pineda, L-2411, June 28, 1951, 89 Phil. 312, 326.

24 2 Fletcher Cyclopedia Corporations, Sec. 297 (1969), p. 87.

25 Costello v. Thomas Cusack Co., 125 A. 15, 94 N.J. Eq. 923, (1923).

26 Hall v. Dekker, 115 P. 2d 15, July 9, 1941.

27 Thauer v. Gaebler, 232 NW 563.

28 Sialkot Importing Corporation v. Berlin, 68 NE 2d 501, 503.

29 Schildberg Rock Products Co. v. Brooks, 140 NW 2d 132, 137. Chief Justice Garfield quotes the doctrine as follows:

"(5) The doctrine 'corporate opportunity' is not new to the law and is but one phase of the cardinal rule of undivided loyalty on the part of the fiduciaries. 3 Fletcher Cyc. Corporations, Perm. Ed., 1965 Revised Volume, section 861.1, page 227; 19 Am. Jur. 2d, Corporations, section 1311, page 717. Our own consideration of the quoted terms as such is mainly in *Ontjes v. MacNider*, supra, 232 Iowa 562, 579, 5 N.W., 2d 860, 869, which quotes at length with approval from *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 270, 5 A 2d 503, 511, a leading case in this area of the law. The quotation cites several precedents for this: '* * * if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. And, if, in such circumstances, the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired."

30 *Paulman v. Kritzer*, 74 Ill. App. 2d 284, 291 NE 2d 541; *Tower Recreation, Inc. v. Beard*, 141 Ind. App. 649, 231 NE 2d 154.

31 *Oleck*, *Modern Corporation Law*, Vol. 2, Section 960.

32 "The CFC and Robina companies, which are reportedly worth more than P500 Million, are principally owned and controlled by Mr. Gokongwei and are in substantial competition to San Miguel. As against his almost 100% ownership in these basically family companies, Mr. Gokongwei's holdings in San Miguel are approximately 4% of the total shareholdings of your Company. As a consequence, One Peso (P1.00) of profit resulting from a sale by CFC and Robina in the lines competing with San Miguel, is earned almost completely by Mr. Gokongwei, his immediate family and close associates. On the other hand, the loss of that sale to San Miguel, resulting in a One Peso (P1.00) loss of profit to San Miguel, in the lines competing with CFC and Robina, would result in a loss in profit of only Four Centavos (P0.04) to Mr. Gokongwei." (Letter to stockholders of SMC, dated April 3, 1978, Annex "R", Memo for respondent San Miguel Corporation, rollo, p. 1867).

33 Article 28, Civil Code; Section 4, par. 5, of Rep. Act No. 5455; and Section 7 (g) of Rep. Act No. 6173. Cf.

Section 17, paragraph 2, of the Judiciary Act.

34 Standard Oil Co. v. United States, 55 L. Ed. 619.

35 Blake & Jones, Contracts in Antitrust Theory, 65 Columbia L. Rev. 377, 383 (1965).

36 Filipinas Compania de Seguros v. Mandanas, L-19638, June 20, 1966, 17 SCRA 391.

37 Love v. Kozy Theater Co., 236 SW 243, 245, 26 ALR 364.

38 Aldea-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, D.D. N.Y., 80 F. Suppl. 888, 893.

39 National Cotton Oil Co. v. State of Texas, 25 S.T. 379, 383, 49 L. Ed. 689.

40 Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700; U.S. v. General Motors Corp., 384 U.S. 127.

41 U.S. v. Paramount Pictures, 334 U.S. 131.

42 Section 8, 15 U.S.C.A. 19.

43 Travers, Interlocks in Corporate Management and the Anti-Trust Laws, 46 Texas L. Rev. 819, 840 (1968).

44 51 Cong. Rec. 9091.

45 People ex rel. Wildi v. Ittner, supra, citing Thompson on Corporations, Section 1002 (2nd Ed.).

46 Schill v. Remington Putnam Book Co., 17 A 2d 175, 180, 179 Md. 83.

47 People ex rel. Broderick v. Goldfogle, 205 NYS 870, 877, 123 Misc. 399.

48 Swanson v. American Consumer Industries, Inc., 288 F. Supp. 60.

49 Sections 3 and 5 of Presidential Decree No. 902-A provides:

"SEC. 3. The Commission shall have absolute jurisdiction, supervision and control over all corporations * * * who are grantees of * * * license or permit issued by the government * * *."

"SEC. 5. In addition to the regulatory and adjudicative functions of the Securities and Exchange Commission over corporations, partnerships and other forms of associations registered with its as expressly granted under existing laws and decrees, it shall have original and exclusive jurisdiction to hear and decide cases involving:

a) Devices or schemes employed by or any acts, of the board of directors, business associates, its officers or partners, amounting to fraud and misrepresentation which may be detrimental to the interest of the public and/or of the stockholders, partners, members of associations or organizations registered with the Commission.

b) Controversies arising out of intra-corporate or partnership relations, between and among stockholders, members, or associates; between any or all of them and the corporation, partnership or association of which they are stockholders, members or associates, respectively; and between such corporation, partnership or association and the state insofar as it concerns their individual franchise or right to exist as such entity;

c) Controversies in the election or appointments of directors, trustees, officers or managers of such corporations, partnerships or associations."

50 Moore v. Keystone Macaroni Mfg. Co., 29 ALR 2d 1256.

- 51 Annex "A" of SMC's Comment on Supplemental Petition, pp. 680-688, Rollo.
- 52 Fletcher Cyc. Private Corporations, Vol. 5, 1976 Rev. Ed. Section 2213, p. 693.
- 53 Fletcher, Ibid., Section 2218, p. 709.
- 54 Fletcher, Ibid., Section 2222, p. 725.
- 55 40 O.G., 1st Suppl. 1, April 3, 1939, citing 14 C.J.S. 854, 855.
- 56 Fletcher, supra, p. 716.
- 57 State v. Monida & Yellowstone Stage Co., 110 Minn. 193, 124 NW 791, 125 NW 676; State v. Cities Service Co., 114 A 463.
- 58 Fletcher, supra, Section 2220, p. 717.
- 59 Fletcher, supra, Section 2223, p. 728.
- 60 Martin v. D. B. Martin Co., 10 Del. Ch. 211, 88 A. 612, 102 A. 373.
- 61 Woodward v. Old Second National Bank, 154 Mich. 459, 117 NW 893, 118 NW 581.
- 62 Martin v. D.B. Martin Co., supra.
- 63 State. v. Sherman Oil Co., 1 W.W. Harr. (31 Del) 570, 117 A. 122.
- 64 Lisle v. Shipp, 96 Cal. App. 264, 273 P. 1103.
- 65 Nash v. Gay Apparel Corp., 193 NYS 2d 246.
- 66 Bailey v. Boxboard Products Co., 314 Pa. 45, 170 A, 127.
- 67 Rollo, pp. 50-51.
- 68 18 Am. Jur. 2d 718.
- 69 De la Rama v. Ma-ao Sugar Central Co., Inc., L-17504 and L-17506, February 28, 1969, 27 SCRA 247, 260.
- 70 Boyce v. Chemical Plastics, 175 F 2d 839, citing 13 Am. Jur., Section 972.
- 71 Pirovano v. De la Rama Steamship Co., L-53-7, 96 Phil. 335, December 29, 1954.
- * Includes the Supplemental Petitions filed by petitioner.

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ADVANCE SEPARATE OPINION

BARREDO, J.:

I reserved the filing of a separate opinion in order to state my own reasons for voting in favor of the validity of the amended by-laws in question. Regrettably, I have not yet finished preparing the same. In view, however, of the joint separate opinion of Justices Teehankee, Concepcion Jr., Fernandez and Guerrero, the full text of which has

just come to my attention, and which I am afraid might produce certain misimpressions as to the import of the decision in this case, I consider it urgent to clarify my position in respect to the rights of the parties resulting from the dismissal of the petition herein and the outlining of the procedure by which the disqualification of petitioner Gokongwei can be made effective, hence this advance separate opinion.

To start with, inasmuch as petitioner Gokongwei himself placed the issue of the validity of said amended by-laws squarely before the Court for resolution, because he feels, rightly or wrongly, he can no longer have due process or justice from the Securities and Exchange Commission, and the private respondents have joined with him in that respect, the six votes cast by Justices Makasiar, Antonio, Santos, Abad Santos, de Castro and this writer in favor of validity of the amended by-laws in question, with only four members of this Court, namely, Justices Teehankee, Concepcion Jr., Fernandez and Guerrero opining otherwise, and with Chief Justice Castro and Justice Fernando reserving their votes thereon, and Justices Aquino and Melencio Herrera not voting, thereby resulting in the dismissal of the petition "insofar as it assails the validity of the amended by-laws . . . for lack of necessary votes," has no other legal consequence than that it is the law of the case as far as the parties herein are concerned, albeit the majority opinion of six against four Justices is not doctrinal in the sense that it cannot be cited as necessarily a precedent for subsequent cases. This means that petitioner Gokongwei and the respondents, including the Securities and Exchange Commission, are bound by the foregoing result, namely, that the Court en banc has not found merit in the claim that the amended by-laws in question are invalid. Indeed, it is one thing to say that dismissal of the case is not doctrinal and entirely another thing to maintain that such dismissal leaves the issue unsettled. It is somewhat of a misreading and misconstruction of Section II of Rule 56, contrary to the well-known established norm observed by this Court, to state that the dismissal of a petition for lack of the necessary votes does not amount to a decision on the merits. Unquestionably, the Court is deemed to find no merit in a petition in two ways, namely, (1) when eight or more members vote expressly in that sense and (2) when the required number of justices needed to sustain the same cannot be had.

I reiterate, therefore, that as between the parties herein, the issue of validity of the challenged by-laws is already settled. From which it follows that the same are already enforceable insofar as they are concerned. Petitioner Gokongwei may not hereafter act on the assumption that he can revive the issue of validity whether in the Securities and Exchange Commission, in this Court or in any other forum, unless he proceeds on the basis of a factual milieu different from the setting of this case. Not even the Securities and Exchange Commission may pass on such question anymore at the instance of herein petitioner or anyone acting in his stead or on his behalf. The vote of four justices to remand the case thereto cannot alter the situation.

It is very clear that under the decision herein, the issue of validity is a settled matter for the parties herein as the law of the case, and it is only the actual implementation of the impugned amended by-laws in the particular case of petitioner that remains to be passed upon by the Securities and Exchange Commission, and on appeal therefrom to Us, assuming the board of directors of San Miguel Corporation should, after the proper hearing, disqualify him.

To be sure, the record is replete with substantial indications, nay admissions of petitioner himself, that he is a controlling stockholder of corporations which are competitors of San Miguel Corporation. The very substantial areas of such competition involving hundreds of millions of pesos worth of businesses stand uncontroverted in the records hereof. In fact, petitioner has even offered, if he should be elected, as director, not to take part when the board takes up matters affecting the corresponding areas of competition between his corporations and San Miguel. Nonetheless, perhaps, it is best that such evidence be formally offered at the hearing contemplated in Our decision.

As to whether or not petitioner may sit in the board, if he wins, definitely, under the decision in this case, even if petitioner should win, he will have to immediately leave his position or should be ousted, the moment this Court

settles the issue of his actual disqualification, either in a full blown decision or by denying the petition for review of corresponding decision of the Securities and Exchange Commission unfavorable to him. And, of course, as a matter of principle, it is to be expected that the matter of his disqualification should be resolved expeditiously and within the shortest possible time, so as to avoid as much juridical injury as possible, considering that the matter of the validity of the prohibition against competitors embodied in the amended by-laws is already unquestionable among the parties herein and to allow him to be in the board for sometime would create an obviously anomalous and legally incongruous situation that should not be tolerated. Thus, all the parties concerned must act promptly and expeditiously.

Additionally, my reservation to explain my vote on the validity of the amended by-laws still stands.

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SUPPLEMENT TO JOINT SEPARATE OPINION

TEEHANKEE, CONCEPCION JR., FERNANDEZ and GUERRERO, JJ.:

This supplemental opinion is issued with reference to the advance separate opinion of Mr. Justice Barredo issued by him as to "certain misimpressions as to the import of the decision in this case" which might be produced by our joint separate opinion of April 11, 1979 and "urgent(ly) to clarify (his) position in respect to the rights of the parties resulting from the dismissal of the petition herein and the outline of the procedure by which the disqualification of petitioner Gokongwei can be made effective."

1. Mr. Justice Barredo's advance separate opinion "that as between the parties herein, the issue of the validity of the challenged by-laws is already settled" has, of course, no binding effect. The judgment of the Court is found on pages 59-61 of the decision of April 11, 1979, penned by Mr. Justice Antonio, wherein on the question of the validity of the amended by-laws the Court's inconclusive voting is set forth as follows:

"Chief Justice Fred Ruiz Castro reserved his vote on the validity of the amended by-laws, pending hearing by this Court on the applicability of section 13(5) of the Corporation Law to petitioner.

"Justice Fernando reserved his vote on the validity of subject amendment to the by-laws but otherwise concurs in the result.

"Four (4) Justices, namely, Justices Teehankee, Concepcion Jr., Fernandez and Guerrero filed a separate opinion, wherein they voted against the validity of the questioned amended by-laws and that this question should properly be resolved first by the SEC as the agency of primary jurisdiction x x x." [1]

As stated in said judgment itself, for lack of the necessary votes, the petition, insofar as it assails the validity of the questioned by-laws, was dismissed.

2. Mr. Justice Barredo now contends contrary to the undersigned's understanding, as stated on pages 8 and 9 of our joint separate opinion of April 11, 1979 that the legal effect of the dismissal of the petition on the question of validity of the amended by-laws for lack of the necessary votes simply means that "the Court has thereby dismissed the petition which prayed that the Court by-pass the commission and directly resolve the issue and therefore the respondent commission may now proceed, as announced in its Order No. 450, Series of 1977, to

hear the case before it and receive all relevant evidence bearing on the issue as hereinabove indicated, and resolve the 'unresolved and genuine issues of fact' (as per Order No. 451, Series of 1977) and the issue of legality of the disputed by-laws amendment," that such dismissal "has no other legal consequence than that it is the law of the case as far as the parties are concerned, albeit the majority of the opinion of six against four Justices is not doctrinal in the sense that it cannot be cited as necessarily a precedent for subsequent cases."

We hold on our part that the doctrine of the law of the case invoked by Mr. Justice Barredo has no applicability for the following reasons:

a) Our jurisprudence is quite clear that this doctrine may be invoked only where there has been a final and conclusive determination of an issue in the first case later invoked as the law of the case.

Thus, in *People vs. Olarte*[2], we held that

"'Law of the case' has been defined as the opinion delivered on a former appeal. More specifically, it means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts of the case before the court. x x x

"It need not be stated that the Supreme Court, being the court of last resort, is the final arbiter of all legal questions properly brought before it and that its decision in any given case constitutes the law of that particular case. Once its judgment becomes final it is binding on all inferior courts, and hence beyond their power and authority to alter or modify (*Kabigting vs. Acting Director of Prisons*, G.R. No. L-15548, October 30, 1962).

"'The decision of this Court on that appeal by the government from the order of dismissal, holding that said appeal did not place the appellants, including Absalon Bignay, in double jeopardy, signed and concurred in by six Justices as against three dissenters headed by the Chief Justice, promulgated way back in the year 1952, has long become the law of the case. It may be erroneous, judged by the law on double jeopardy as recently interpreted by this same Tribunal. Even so, it may not be disturbed and modified. Our recent interpretation of the law may be applied to new cases, but certainly not to an old one finally and conclusively determined. As already stated, the majority opinion in that appeal is now the law of the case.'" (*People vs. Pinuila*)

The doctrine of the law of the case, therefore, has no applicability whatsoever herein insofar as the question of the validity or invalidity of the amended by-laws is concerned. The Court's judgment of April 11, 1979 clearly shows that the voting on this question was inconclusive with six against four Justices and two other Justices (the Chief Justice and Mr. Justice Fernando) expressly reserving their votes thereon, and Mr. Justice Aquino while taking no part in effect likewise expressly reserved his vote thereon. No final and conclusive determination could be reached on the issue and pursuant to the provisions of Rule 56, section 11, since this special civil action originally commenced in this Court, the action was simply dismissed with the result that no law of the case was laid down insofar as the issue of the validity or invalidity of the questioned by-laws is concerned, and the relief sought herein by petitioner that this Court by-pass the SEC which has yet to hear and determine the same issue pending before it below and that this Court itself directly resolve the said issue stands denied.

b) The contention of Mr. Justice Barredo that the result of the dismissal of the case was that "petitioner Gokongwei may not hereafter act on the assumption that he can revive the issue of the validity whether in the Securities and Exchange Commission, in this Court or in any other forum, unless he proceeds on the basis of a factual milieu different from the setting of this case. Not even the Securities and Exchange Commission may pass on such question anymore at the instance of herein petitioner or anyone acting in his stead or on his behalf,"

appears to us to be untenable.

The Court through the decision of April 11, 1979, by the unanimous votes of the twelve participating Justices headed by the Chief Justice, ruled that petitioner Gokongwei was entitled to a "new and proper hearing" by the SMC board of directors on the matter of his disqualification under the questioned by-laws and that the board's "decision shall be appealable to the respondent Securities and Exchange Commission deliberating and acting en banc and ultimately to this Court (and) unless disqualified in the manner herein provided, the prohibition in the aforementioned amended by-laws shall not apply to petitioner."

The entire Court, therefore, recognized that petitioner had not been given procedural due process by the SMC board on the matter of his disqualification and that he was entitled to a "new and proper hearing." It stands to reason that in such hearing, petitioner could raise not only questions of fact but questions of law, particularly questions of law affecting the investing public and their right to representation on the board as provided by law - not to mention that as borne out by the fact that no restriction whatsoever appears in the Court's decision, it was never contemplated that petitioner was to be limited to questions of fact and could not raise the fundamental questions of law bearing on the invalidity of the questioned amended by-laws at such hearing before the SMC board. Furthermore, it was expressly provided unanimously in the Court's decision that the SMC board's decision on the disqualification of petitioner ("assuming the board of directors of San Miguel Corporation should, after the proper hearing, disqualify him" as qualified in Mr. Justice Barredo's own separate opinion, at page 2) shall be appealable to respondent Securities and Exchange Commission "deliberating and acting en banc" and "ultimately to this Court." Again, the Court's judgment as set forth in its decision of April 11, 1979 contains nothing that would warrant the opinion now expressed that respondent Securities and Exchange Commission may not pass anymore on the question of the invalidity of the amended by-laws. Certainly, it cannot be contended that the Court in dismissing the petition for lack of necessary votes actually by-passed the Securities and Exchange Commission and directly ruled itself on the invalidity of the questioned by-laws when it itself could not reach a final and conclusive vote (a minimum of eight votes) on the issue and three other Justices (the Chief Justice and Messrs. Justices Fernando and Aquino) had expressly reserved their vote until after further hearings (first before the Securities and Exchange Commission and ultimately in this Court).

Such a view espoused by Mr. Justice Barredo could conceivably result in an incongruous situation where supposedly under the law of this case the questioned by-laws would be held valid as against petitioner Gokongwei and yet the same may be stricken off as invalid as to all other SMC shareholders in a proper case.

3. It need only be pointed out that Mr. Justice Barredo's advance separate opinion can in no way affect or modify the judgment of this Court as set forth in the decision of April 11, 1979 and discussed hereinabove. The same bears the unqualified concurrence of only three Justices out of the six Justices who originally voted for the validity per se of the questioned by-laws namely, Messrs. Justices Antonio, Santos and De Castro. Messrs. Justices Fernando and Makasiar did not concur therein but they instead concurred with the limited concurrence of the Chief Justice touching on the law of the case which guardedly held that the Court has not found merit in the claim that the amended by-laws in question are invalid but without in any manner foreclosing the issue and as a matter of fact and law, without in any manner changing or modifying the above-quoted vote of the Chief Justice as officially rendered in the decision of April 11, 1979, wherein he precisely "reserved (his) vote on the validity of the amended by-laws."

4. A word on the separate opinion of Mr. Justice Pacifico de Castro attached to the advance separate opinion of Mr. Justice Barredo. Mr. Justice De Castro advances his interpretation as to a restrictive construction of section 13(5) of the Philippine Corporation Law, ignoring or disregarding the fact that during the Court's deliberations it was brought out that this prohibitory provision was and is not raised in issue in this case whether here or in the

Securities and Exchange Commission below (outside of a passing argument by Messrs. Angara, Abello, Concepcion, Regala & Cruz, as counsels for respondent Sorianos in their Memorandum of June 26, 1978 that "(T)he disputed By-Laws does not prohibit petitioner from holding onto, or even increasing his SMC investment; it only restricts any shifting on the part of petitioner from passive investor to a director of the company." [3])

As a consequence, the Court abandoned the idea of calling for another hearing wherein the parties could properly raise and discuss this question as a new issue and instead rendered the decision in question, under which the question of section 13(5) could be raised at a new and proper hearing before the SMC board and in the Securities and Exchange Commission and in due course before this Court (but with the clear understanding that since both corporations, the Robina and SMC are engaged in agriculture as submitted by the Sorianos' counsel in their said memorandum, the issue could be raised likewise against SMC and its other shareholders, directors, if not against SMC itself). As expressly stated in the Chief Justice's reservation of his vote, the matter of the question of the applicability of the said section 13(5) to petitioner would be heard by this Court at the appropriate time after the proceedings below (and necessarily the question of the validity of the amended by-laws would be taken up anew and the Court would at that time be able to reach a final and conclusive vote).

Mr. Justice De Castro's personal interpretation of the decision of April 11, 1979 that petitioner may be allowed to run for election despite adverse decision of both the SMC board and the Securities and Exchange Commission "only if he comes to this Court and obtains an injunction against the enforcement of the decision disqualifying him" is patently contradictory of his vote on the matter as expressly given in the judgment in the Court's decision of April 11, 1979 (at page 59) that petitioner could run and if elected, sit as director of the respondent SMC and could be disqualified only after a "new and proper hearing by the board of directors of said corporation, whose decision shall be appealable to the respondent Securities and Exchange Commission deliberating and acting en banc and ultimately to this Court. Unless disqualified in the manner herein provided, the prohibition in the aforementioned amended by-laws shall not apply to petitioner."

[1] At p. 60; emphasis supplied.

[2] 19 SCRA 494, 498; citing *People vs. Pinuila*, L-11374, May 30, 1958, cited in *Lee vs. Aligaen*, 76 SCRA 416 (1977) per Antonio, J.

[3] Soriano's Memorandum at page 94.

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SEPARATE OPINION

DE CASTRO, J.:

As stated in the decision penned by Justice Antonio, I voted to uphold the validity of the amendment to the by-laws in question. What induced me to this view is the practical consideration easily perceived in the following illustration: If a person becomes a stockholder of a corporation and gets himself elected as a director, and while he is such a director, he forms his own corporation competitive or antagonistic to the corporation of which he is a director, and becomes Chairman of the Board and President of his own corporation, he may be removed from his

position as director, admittedly one of trust and confidence. If this is so, as seems undisputably to be the case, a person already controlling, and also the Chairman of the Board and President of, a corporation, may be barred from becoming a member of the board of directors of a competitive corporation. This is my view, even as I am for a restrictive interpretation of Section 13(5) of the Philippine Corporation Law, under which I would limit the scope of the provision to corporations engaged in agricultural, but only as the word "agriculture" refers to its more limited meaning as distinguished from its general and broad connotation. The term would then mean "farming" or raising the natural products of the soil, such as by cultivation, in the manner as is required by the Public Land Act in the acquisition of agricultural land, such as by homestead, before the patent may be issued. It is my opinion that under the public land statute, the development of a certain portion of the land applied for as specified in the law as a condition precedent before the applicant may obtain a patent, is cultivation, not let us say, poultry raising or piggery, which may be included in the term "agriculture" in its broad sense. For under Section 13(5) of the Philippine Corporation Law, construed not in the strict way as I believe it should, because the provision is in derogation of property rights, the petitioner in this case would be disqualified from becoming an officer of either the San Miguel Corporation or his own supposedly agricultural corporations. It is thus beyond my comprehension why, feeling as though I am the only member of the Court for a restricted interpretation of Section 13(5) of Act 1459, doubt still seems to be in the minds of other members giving the cited provision an unrestricted interpretation, as to the validity of the amended by-laws in question, or even holding them null and void.

I concur with the observation of Justice Barredo that despite that less than six votes are for upholding the validity of the by-laws, their validity is deemed upheld, as constituting the "law of the case." It could not be otherwise, after the present petition is dismissed with the relief sought to declare null and void the said by-laws being denied in effect. A vicious circle would be created if, should petitioner Gokongwei be barred or disqualified from running by the Board of Directors of San Miguel Corporation and the Securities and Exchange Commission sustain the Board, petitioner could come again to Us, raising the same question he has raised in the present petition, unless the principle of the "law of the case" is applied.

Clarifying therefore, my position, I am of the opinion that with the validity of the by-laws in question standing unimpaired, it is now for petitioner to show that he does not come within the disqualification as therein provided, both to the Board and later to the Securities and Exchange Commission, it being a foregone conclusion that, unless petitioner disposes of his stockholdings in the so-called competitive corporations, San Miguel Corporation would apply the by-laws against him. His right, therefore, to run depends on what, on election day, May 8, 1979, the ruling of the Board and/or the Securities and Exchange Commission on his qualification to run would be, certainly, not the final ruling of this Court in the event recourse thereto is made by the party feeling aggrieved, as intimated in the "Joint Separate Opinion" of Justices Teehankee, Concepcion, Jr., Fernandez and Guerrero, that only after petitioner's "disqualification" has ultimately been passed upon by this Court should petitioner not be allowed to run. Petitioner may be allowed to run, despite an adverse decision of both the Board and the Securities and Exchange Commission, only if he comes to this Court and obtain an injunction against the enforcement of the decision disqualifying him. Without such injunction being required, all that petitioner has to do is to take his time in coming to this Court, and in so doing, he would in the meantime, be allowed to run, and if he wins, to sit. This would, however, be contrary to the doctrine that gives binding, if not conclusive, effect of findings of facts of administrative bodies exercising quasi-judicial functions upon appellate courts, which should, accordingly, be enforced until reversed by this Tribunal.

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JOINT SEPARATE OPINION

TEEHANKEE, CONCEPCION JR., FERNANDEZ and GUERRERO, JJ.:

I

As correctly stated in the main opinion of Mr. Justice Antonio, the Court is unanimous in its judgment granting the petitioner as stockholder of respondent San Miguel Corporation the right to inspect, examine and secure copies of the records of San Miguel International, Inc. (SMI), a wholly owned foreign subsidiary corporation of respondent San Miguel Corporation. Respondent commission's en banc Order No. 449, Series of 1977, denying petitioner's right of inspection for "not being a stockholder of San Miguel International, Inc." has been accordingly set aside. It need be only pointed out that:

a) The commission's reasoning grossly disregards the fact that the stockholders of San Miguel Corporation are likewise the owners of San Miguel International, Inc. as the corporation's wholly owned foreign subsidiary and therefore have every right to have access to its books and records. Otherwise, the directors and management of any Philippine corporation by the simple device of organizing with the corporation's funds foreign subsidiaries would be granted complete immunity from the stockholders' scrutiny of its foreign operations and would have a conduit for dissipating, if not misappropriating, the corporate funds and assets by merely channeling them into foreign subsidiaries' operations; and

b) Petitioner's right of examination herein recognized refers to all books and records of the foreign subsidiary SMI which are "in respondent corporation's possession and control"[1], meaning to say regardless of whether or not such books and records are physically within the Philippines. All such books and records of SMI are legally within respondent corporation's "possession and control" and if any books or records are kept abroad, (e.g. in the foreign subsidiary's state of domicile, as is to be expected), then the respondent corporation's board and management are obliged under the Court's judgment to bring and make them (or true copies thereof) available within the Philippines for petitioner's examination and inspection.

II

On the other main issue of the validity of respondent San Miguel Corporation's amendment of its by-laws[2] whereby respondent corporation's board of directors under its resolution dated April 29, 1977 declared petitioner ineligible to be nominated or to be voted or to be elected as member of the board of directors, the Court, composed of 12 members (since Mme. Justice Ameurfina Melencio Herrera inhibited herself from taking part herein, while Mr. Justice Ramon C. Aquino upon submittal of the main opinion of Mr. Justice Antonio decided not to take part), failed to reach a conclusive vote or the required majority of 8 votes to settle the issue one way or the other.

Six members of the Court, namely, Justices Barredo, Makasiar, Antonio, Santos, Abad Santos and De Castro, considered the issue purely legal and voted to sustain the validity per se of the questioned amended by-laws but nevertheless voted that the prohibition and disqualification therein provided shall not apply to petitioner Gokongwei until and after he shall have been given "a new and proper hearing" by the corporation's board of directors and the board's decision of disqualification shall have been sustained on appeal by respondent Securities and Exchange Commission and ultimately by this Court.

The undersigned Justices do not consider the issue as purely legal in the light of respondent commission's Order

No. 451, Series of 1977, denying petitioner's "Motion for Summary Judgment" on the ground that "the Commission en banc finds that there (are) unresolved and genuine issues of fact"[3] as well as its position in this case thru the Solicitor General that the case at bar is "premature" and that the administrative remedies before the commission should first be availed of and exhausted.[4]

We are of the opinion that the questioned amended by-laws, as they are, (adopted after almost a century of respondent corporation's existence as a public corporation with its shares freely purchased and traded in the open market without restriction and disqualification) which would bar petitioner from qualification, nomination and election as director and worse, grant the board by 3/4 vote the arbitrary power to bar any stockholder from his right to be elected as director by the simple expedient of declaring him to be engaged in a "competitive or antagonistic business" or declaring him as a "nominee" of the "competitive or antagonistic" stockholder are illegal, oppressive, arbitrary and unreasonable.

We consider the questioned amended by-laws as being specifically tailored to discriminate against petitioner and depriving him in violation of substantive due process of his vested substantial rights as stockholder of respondent corporation. We further consider said amended by-laws as violating specific provisions of the Corporation Law which grant and recognize the right of a minority stockholder like petitioner to be elected director by the process of cumulative voting ordained by the Law (secs. 21 and 30) and the right of a minority director once elected not to be removed from office of director except for cause by vote of the stockholders holding 2/3 of the subscribed capital stock (sec. 31). If a minority stockholder could be disqualified by such a by-laws amendment under the guise of providing for "qualifications", these mandates of the Corporation Law would have no meaning or purpose.

These vested and substantial rights granted stockholders under the Corporations Law may not be diluted or defeated by the general authority granted by the Corporation Law itself to corporations to adopt their by-laws (in section 21) which deal principally with the procedures governing their internal business. The by-laws of any corporation must be always within the charter limits. What the Corporation Law has granted stockholders may not be taken away by the corporation's by-laws. The amendment is further an instrument of oppressiveness and arbitrariness in that the incumbent directors are thereby enabled to perpetuate themselves in office by the simple expedient of disqualifying any unwelcome candidate, no matter how many votes he may have.

However, in view of the inconclusiveness of the vote, we sustain respondent commission's stand as expressed in its Orders Nos. 450 and 451, Series of 1977 that there are "unresolved and genuine issues of fact" and that it has yet to rule on and finally decide the validity of the disputed by-law provision", subject to appeal by either party to this Court.

In view of prematurity of the proceedings here (as likewise expressed by Mr. Justice Fernando), the case should as a consequence be remanded to the Securities and Exchange Commission as the agency of primary jurisdiction for a full hearing and reception of evidence of all relevant facts (which should properly be submitted to the commission instead of the piecemeal documents submitted as annexes to this Court which is not a trier of facts) concerning not only the petitioner but the members of the board of directors of respondent corporation as well, so that it may determine on the basis thereof the issue of the legality of the questioned amended by-laws, and assuming that it holds the same to be valid whether the same are arbitrarily and unreasonably applied to petitioner vis a vis other directors, who, petitioner claims, should in such event be likewise disqualified from sitting in the board of directors by virtue of conflict of interests or their being likewise engaged in "competitive or antagonistic business" with the corporation such as investment and finance, coconut oil mills, cement, milk and hotels.[5]

It should be noted that while the petition may be dismissed in view of the inconclusiveness of the vote and the

Court's failure to attain the required 8-vote majority to resolve the issue, such a dismissal (for lack of necessary votes) is of no doctrinal value and does not in any manner resolve the issue of the validity of the questioned amended by-laws nor foreclose the same. The same should properly be determined in a proper case in the first instance by the Securities and Exchange Commission as the agency of primary jurisdiction, as above indicated.

The Court is unanimous, therefore, in its judgment that petitioner Gokongwei may run for the office of, and if elected, sit as, member of the board of directors of respondent San Miguel Corporation as stated in the dispositive portion of the main opinion of Mr. Justice Antonio, to wit: Until and after petitioner has been given a "new and proper hearing by the board of directors of said corporation, whose decision shall be appealable to the respondent Securities and Exchange Commission deliberating and acting en banc and ultimately to this Court" and until "disqualified in the manner herein provided, the prohibition in the aforementioned amended by-laws shall not apply to petitioner." In other words, until and after petitioner shall have been given due process and proper hearing by the respondent board of directors as to the question of his qualification or disqualification under the questioned amended by-laws (assuming that the respondent Securities and Exchange Commission ultimately upholds the validity of said by-laws), and such disqualification shall have been sustained by respondent Securities and Exchange Commission and ultimately by final judgment of this Court, petitioner is deemed eligible for all legal purposes and effects to be nominated and voted and if elected to sit as a member of the board of directors of respondent San Miguel Corporation.

In view of the Court's unanimous judgment on this point, the portion of respondent commission's Order No. 450, Series of 1977 which imposed "the condition that he [petitioner] cannot sit as board member if elected until after the Commission shall have finally decided the validity of the disputed by-law provision" has been likewise accordingly set aside.

III

By way of recapitulation, so that the Court's decision and judgment may be clear and not subject to ambiguity, we state the following:

1. With the votes of the six Justices concurring unqualifiedly in the main opinion added to our four votes, plus the Chief Justice's vote and that of Mr. Justice Fernando, the Court has by twelve (12) votes unanimously rendered judgment granting petitioner's right to examine and secure copies of the books and records of San Miguel International, Inc. as a foreign subsidiary of respondent corporation and respondent commission's Order No. 449, Series of 1977, to the contrary is set aside;
2. With the same twelve (12) votes, the Court has also unanimously rendered judgment declaring that until and after petitioner shall have been given due process and proper hearing by the respondent board of directors as to the question of his disqualifications under the questioned amended by-laws (assuming that the respondent Securities and Exchange Commission ultimately upholds the validity of said by-laws), and such disqualification shall have been sustained by respondent Securities and Exchange Commission and ultimately by final judgment of this Court, petitioner is deemed eligible for all legal purposes and effects to be nominated and voted and if elected to sit as a member of the board of directors of respondent San Miguel Corporation. Accordingly, respondent commission's Order No. 450, Series of 1977 to the contrary has likewise been set aside; and
3. The Court's voting on the validity of respondent corporation's amendment of the by-laws (sec. 2, Art. III) is inconclusive without the required majority of eight votes to settle the issue one way or the other having been reached. No judgment is rendered by the Court thereon and the statements of the six Justices who have signed the main opinion on the legality thereof have no binding effect, much less doctrinal value.

The dismissal of the petition insofar as the question of the validity of the disputed by-laws amendment is concerned is not by any judgment with the required eight votes but simply by force of Rule 56, section 11 of the Rules of Court, the pertinent portion of which provides that "where the court en banc is equally divided in opinion, or the necessary majority cannot be had, the case shall be reheard, and if on re-hearing no decision is reached, the action shall be dismissed if originally commenced in the court x x x." The end result is that the Court has thereby dismissed the petition which prayed that the Court by-pass the commission and directly resolve the issue and therefore the respondent commission may now proceed, as announced in its Order No. 450, Series of 1977, to hear the case before it and receive all relevant evidence bearing on the issue as herein-above indicated, and resolve the "unresolved and genuine issues of fact" (as per Order No. 451, series of 1977) and the issues of legality of the disputed by-laws amendment.

[1] Main opinion, p. 55.

[2] Sec. 2, Art. III of respondent corporation's By-Laws, reproduced in footnote 1 of the main opinion, pages 3 and 4.

[3] Rollo, Vol. I, page 392-E.

[4] SEC memo, pages 9 and 10.

[5] Petitioner's memorandum in support of oral argument, pp. 18-20.

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