

MAKATI STOCK EXCHANGE, INC., PETITIONER, VS. SECURITIES AND EXCHANGE COMMISSION AND MANILA STOCK EXCHANGE, RESPONDENTS.

G.R. No. L-23004. June 30, 1965

Ponente: BENGZON, C.J.

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BENGZON, C.J.:

This is a review of the resolution of the Securities and Exchange Commission which would deny the Makati Stock Exchange, Inc., permission to operate a stock exchange unless it agreed not to list for trading on its board, securities already listed in the Manila Stock Exchange.

Objecting to the requirement, Makati Stock Exchange, Inc., contends that the Commission has no power to impose it and that, anyway, it is illegal, discriminatory and unjust.

Under the law, no stock exchange may do business in the Philippines unless it is previously registered with the Commission by filing a statement containing the information described in sec. 17 of the Securities act (Commonwealth 83, as amended).

It is assumed that the Commission may permit registration if the section is complied with; if not, it may refuse. And there is now no question that the section has been complied with, or would be complied with, except that the Makati Stock Exchange, upon challenging this particular requirement of the Commission (rule against double listing) may be deemed to have shown inability or refusal to abide by its rules, and thereby to have given ground for denying registration, [sec. 17(a) (1) and (d)].

Such rule provides: * * * nor shall a security already listed in any securities exchange be listed anew in any other securities exchange * * *.

The objection of Makati Stock Exchange, Inc., to this rule is understandable. There is actually only one securities exchange—The Manila Stock Exchange,—that has been operating alone for the past 25 years; and all—or presumably all—available or worthwhile securities for trading in the market are now listed there. In effect, the Commission permits the Makati Exchange, Inc., to deal only with other securities. Which is tantamount to permitting a store to open provided it sells only those goods not sold in other stores. And if there's only one existing store,[1] the result is a monopoly.

It is not far-fetched to assert—as petitioner does[2]— that for all practical purposes, the Commission's order of resolution, would make it impossible for the Makati Stock Exchange to operate. So, its "permission" amounted to a "prohibition".

Apparently, the Commission acted "in the public interest".[3] Hence, it is pertinent to inquire whether the Commission may "in the public interest" prohibit (or make impossible) the establishment of another stock exchange (besides the Manila Stock Exchange), on the ground that the operation of two or more exchanges adversely affects the public interest.

At first glance, the answer should be in the negative, because the law itself contemplated, and, therefore, tacitly-permitted or tolerated at least, the operation of two or more exchanges.

"Wherever two or more exchanges exist, the Commission, by order, shall require and enforce uniformity of trading regulations in and/ or between said exchanges." [Italics Ours] (Sec. 28b-13, Securities Act.)

In fact, as admitted by respondents, there were five stock exchanges in Manila, before the Pacific War (p. 10, brief), when the Securities Act was approved or amended. (Respondent Commission even admits that dual listing was practiced then.) So if the existence of more than one exchange were contrary to public interest, it is strange that the Congress having from time to time enacted legislation amending the Securities Act[4], has not barred multiplicity of exchanges.

Forgetting for the moment the monopolistic aspect of the Commission's resolution, let us examine the authority of the Commission to promulgate and implement the rule in question.

It is fundamental that an administrative officer has only such powers as are expressly granted to him by the statute, and these necessarily implied in the exercise thereof.

In its brief and its resolution now subject to review, the Commission cites no provision expressly supporting its rule. Nevertheless, it suggests that the power is "necessary for the execution of the functions vested in it"; but it makes no explanation, perhaps relying on the reasons advanced in support of its position that trading of the same securities in two or more stock exchanges, fails to give protection to the investors, besides contravening public interest. (Of this, we shall treat later.)

On the legality of its rule, the Commission's argument is that: (a) it was approved by the Department Head—before the War; and (b) it is not in conflict with the provisions of the Securities Act. In our opinion, the approval of the Department[5], by itself, adds no weight in a judicial litigation; and the test is not whether the Act forbids the Commission from imposing a prohibition; but whether it empowers the Commission to prohibit. No specific portion of the statute has been cited to uphold this power. It is not found in sec. 28 (of the Securities Act), which is entitled "Powers (of the Commission) with respect to Exchanges and Securities" [6].

According to many court precedents, the general power to "regulate" which the Commission has (Sec. 33) does not imply authority to prohibit.[7]

The Manila Stock Exchange, obviously the beneficiary of the disputed rule, contends that the power may be inferred from the express power of the Commission to suspend trading in a security, under said sec. 28 which reads partly:

"* * * and if in its opinion, the public interest so requires: summarily to suspending trading in any registered security on any Securities exchange. * * *." (Sec. 28(3), Securities Act.)

However, the Commission has not acted—nor claimed to have acted—in pursuance of such authority, for the simple reason that suspension under it, may only be for ten days. Indeed, this section, if applicable, precisely argues against the position of the Commission because the "suspension", if it is, and as applied to Makati Stock Exchange, continues for an indefinite period, if not forever; whereas this section 28 authorizes suspension for ten days only. Besides, the suspension of trading in the security should not be on one exchange only, but on all exchanges; bearing in mind that suspension should be ordered "for the protection of investors" (first par., sec. 28) in all exchanges, naturally, and "if the public interest so requires" [sec. 28(3)].

This brings up the Commission's principal conclusions underlying its determination, viz, (a) that the establishment of another exchange in the environs of Manila would be inimical to the public interest; and (b) that double or

multiple listing of securities should be prohibited for the "protection of the investors."

(a) Public Interest.—Having already adverted to this aspect of the matter, and the emerging monopoly of the Manila Stock Exchange, we may, at this juncture, emphasize that by restricting free competition in the marketing of stocks, and depriving the public of the advantages thereof, the Commission all but permits what the law punishes as monopolies as "crimes against public interest".

"A stock exchange is essentially monopolistic" the Commission states in its resolution (p. 14-a, Appendix, Brief for Petitioner). This reveals the basic foundation of the Commission's process of reasoning. And yet, a few pages afterwards, it recalls the benefits to be derived "from the existence of two or more exchanges", and the desirability of "a healthy and fair competition in the securities market", even as it expresses the belief that "a fair field of competition among stock exchanges should be encouraged"; only to resolve, paradoxically enough, that Manila Stock Exchange shall, in effect, continue to be the only stock exchange in Manila or in the Philippines.[8]

"Double listing of a security," explains the Commission, "divides the sellers and the buyers, thus destroying the essence of a stock exchange as a two-way auction market for the securities, where all the buyers and sellers in one geographical area converge in one defined place, and the bidders compete with each other to purchase the security at the lowest possible price and those seeking to sell it compete with each other to get the highest price therefor. In this sense, a stock exchange is essentially monopolistic."

Inconclusive premises, for sure. For it is debatable whether the buyer of stock may get the lowest price where all the sellers assemble in only one place. The price there, in one sale, will tend to fix the price for the succeeding sales, and he has no chance to get a lower price except at another stock exchange. Therefore, the arrangement desired by the Commission may, at most, be beneficial to sellers of stock—not to buyers;—although what applies to buyers, should obtain equally as to sellers (looking for higher prices). Besides, there is the brokerage fee, which must be considered. Not to mention the personality of the broker.

(b) Protection of investors.—At any rate, supposing the arrangement contemplated is beneficial to investors (as the Commission says), it is to be doubted whether it is "necessary" for their "protection" within the purview of the Securities Act. As the purpose of the Act is to give adequate and effective protection to the investing public against fraudulent representations, or false promises, and the imposition of worthless ventures", it is hard to see how the proposed concentration of the market, has a necessary bearing to the prevention of deceptive devices or unlawful practices. For it is not mere semantics to declare that acts for the protection of investors are necessarily beneficial to them; but not everything beneficial to them is necessary for their protection.

And yet, the Commission realizes that if there were two or more exchanges "the same security may sell for more in one exchange and sell for less in the other. Variance in price of the same security would be the rule * * *." Needless to add, the brokerage rates will also differ.

This precisely, strengthens the objection to the Commission's ruling. Such difference in prices and rates gives the buyer of shares alternative options, with the opportunity to invest at lower expense; and the seller, to dispose at higher prices. Consequently, for the investors' benefit (protection is not the word), duality of listing¹ should be permitted, nay, encouraged, and other exchanges allowed to operate. The circumstance that some people "made a lot of money due to the difference in prices of securities traded in the stock exchanges of Manila before the war" as the Commission noted, furnishes no sufficient reason to let one exchange corner the market. If there was undue manipulation or unfair advantage in exchange trading the Commission should have other means to correct the specific abuses.

Granted that, as the Commission observes, "what the country needs is not another" market for securities already

listed on the Manila Stock Exchange, but "one that would focus its attention and energies to the listing, of now securities and thus effectively help in raising capital sorely needed by our * * * unlisted industries and enterprises."

Nonetheless, we discover no legal authority for it to shore up (and stifle) free enterprise and individual liberty along channels leading to that economic desideratum.[11]

The Legislature has specified the conditions under which a stock exchange may legally obtain a permit (sec. 17, Securities Act) ; it is not for the Commission to impose others. If the existence of two competing exchanges jeopardizes public interest which is doubtful—let the Congress speak.[12] Undoubtedly, the opinion and recommendations of the Commission will be given weight by the Legislature, in judging whether or not to restrict individual enterprises and business opportunities. Cut until otherwise directed by law, the operation of exchanges should not be so regulated as practically to create a monopoly by preventing the establishment of other stock exchanges, and thereby contravening

- (a) the organizers' (Makati's) Constitutional right to equality before the law;
- (b) their guaranteed civil liberty to pursue any lawful employment or trade; and
- (c) the investors' right to choose where to buy or to sell, and his privilege to select the brokers in his employment.[13]

And no extended elucidation is needed to conclude that for a licensing officer to deny license solely on the basis of what he believes is best for the economy or the country, may amount to regimentation or, in this instance, the exercise of undelegated legislative powers and discretion.

Thus, it has been held that where the licensing statute does not expressly or impliedly authorize the officer in charge, he may not refuse to grant a license simply on the ground that a sufficient number of licenses to serve the needs of the public, have already been issued. (53 C.J.S. p. 636.)

Concerning res judicata.—Calling attention to the Commission order of May 27, 1963, which Makati Stock did not appeal, the Manila Stock Exchange pleads the doctrine of res judicata [14] (The order now reviewed is dated May 7, 1964.)

It appears that when Makati Stock Exchange, Inc. presented its articles of incorporation to the Commission, the later, after making some inquiries, issued on May 27, 1963, an order reading as follows:

"Let the certificate of incorporation of the MAKATI STOCK EXCHANGE be issued, and if the organizers thereof are willing to abide by the foregoing conditions, they may file the proper application for the registration and licensing of the said Exchange."

In that order, the Commission advanced the opinion that "it would permit the establishment and operation of the proposed Makati Stock Exchange, provided * * * it shall not

list for trading on its board, securities already listed in The Manila Stock Exchange * * *."

Admittedly, Makati Stock Exchange, Inc., has not appealed from that order of May 27, 1963. Now, Manila Stock insists on res judicata.

Why should Makati have appealed? It got the certificate of incorporation which it wanted. The condition or proviso mentioned would only apply if and when it subsequently filed the application for registration as stock exchange. It had not yet applied. It was not the time to question the condition [15]; Makati was still exploring the convenience of soliciting the permit to operate subject to that condition. And it could have logically thought that,

since the condition did not affect its articles of incorporation, it should not appeal the order (of May 27, 1963) which after all, granted the certificate of incorporation (corporate existence) it wanted at that time.

And when the Makati Stock Exchange finally found that it could not successfully operate with the condition attached, it took the issue by the horns, and expressing its desire for registration and license, it requested that the condition (against double listing) be dispensed with. The order of the Commission denying such request is dated May 7, 1964, and is now under review.

Indeed, there can be no valid objection to the discussion of this issue of double listing now in[16], because even if the Makati Stock Exchange, Inc. may be held to have accepted the permission to operate with the condition against double listing (for having failed to appeal the order of May 27, 1963), still it was not precluded from afterwards contesting[17] the validity of such condition or rule:

"(1) An Agreement (which shall not be construed as a waiver of tiny count it constitutional right or any right to contest the validiy of any rule or regulation) to comply and to enforce so fur as is within its powers, compliance by its numbers, with the provisions of this Act, and any amendment thereto, and any rule or regulation made or to be made thereunder. (Sec. 17-a-l, Securities Act) Italics Ours]

Surely, this petition for review has suitably been coursed. And making reasonable allowances for the presumption of regularity and validity of administrative action, we feel constrained to reach the conclusion that the respondent Commission possesses no power to impose the condition or rule, which, additionally, results in discrimination and violation of constitutional rights.

Accordingly, the license of the petitioner to operate a stock exchange is approved without such condition. Costs shall be paid by the Manila Stock Exchange. So ordered.

Bautista Angelo, Concepcion, Reyes, J.B.L., Parades, Dizon, Regala, Makalintal, Bengzon, J.P., and Zaldivar, JJ., concur.

Petition granted.

[1] Selling all goods usually needed in the community.

[2] "Its members (Makati's) will not * * * spend their time exclusively in securities which are new and unknown to the public; with prospect of losing their capital and wasting (heir time." (quoted on p. 37, Brief of Commission.)

[3] The Commission's brief denies this (p. 15); but it is contradicted by the brief of Manila Stock Exchange, p. 3.

[4] Commonwealth Acts 283 and 290; Republic Acts 635 and 1145.

[5] The present Department Head is quoted as hinting a desire for review thereof, (p. 3, Brief of Commission.)

[6] In its brief, the Commission points to its authority (under Sec. 28b-3) "to alter or supplement the Rules of such exchange * * * in respect of such matters as: * * * the listing or striking from listing of any security."

The argument has no merit, since no change of the Rules of Makati Exchange is involved here. And a mere reading of the whole paragraph (b) will show its inapplicability to the pending controversy.

[7] "Regulate" does not include "prohibit". See many decisions collected in Words and Phrases, Permanent Edition, Vol. 36A, pp. 315-317. (Sea Republic vs. Esguerra, 81 Phil. 33; Primieias vs. Fugoso, 80 Phil. 71.)

[8] Art. 186, Revised Penal Code; Commonwealth Act 146.

[9] *People vs. Rosenthal*, 8 Phil. 425; *People vs. Fernandez & Trinidad*, G. R. No. L-45G55; *Lawyers Journal*, Vol. VI, 589, June 18, 1938.

[10] It is allowed in the U. S. (p. 33, Commission's brief.)

[11] Figuratively speaking, why compel this new farmer (Makati Slink) to till virgin forest in order to let the other farmer (Manila Stock) occupy the plain, which after all does not belong to him? (In the absence, of course, of special reasons calling for the exercise of the police power by the Congress).

[12] *Lacson vs. Roque*, 92 Phil. 456.

[13] Unreasonably discriminatory regulation may lie set aside on such basis.—*Rivera*, *Law of Public Administration*, citing 42 Am. Jur. 429-430 and some cases.

[14] The Commission's printed brief does not raise it probably because although apprised of that circumstance, it refused to act on the Makati's request, (p. 42 brief) and issued the order of May 7.

[15] It was a mere anticipatory statement of what the Commission would do when the petition for registration is filed. Neither binding nor appealable. (See *Moran*, *Rules of Court*, 1963 Ed Vol. III, p. 295.)

[16] Indeed, hinting some doubts about the rule, the Department Head expected a judicial review, (p. 3, Brief for Commission.)

[17] This incidentally disposes of the alleged acceptance of the condition by one Mr. Gaberman on which the respondents enlarged. (pp. 19-21 Brief for Commission.)

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