

CONGRESSMAN ENRIQUE T. GARCIA (SECOND DISTRICT OF BATAAN), PETITIONER, VS. THE EXECUTIVE SECRETARY, THE NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, THE BOARD OF INVESTMENTS, TH...

G.R. No. 100883. December 02, 1991

Ponente: CRUZ, J.

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CRUZ, J.:

The petitioner challenges RA 7042 on the ground that it defeats the constitutional policy of developing a self-reliant and independent national economy effectively controlled by Filipinos and the protection of Filipino enterprises against unfair foreign competition and trade practices. He claims that the law abdicates all regulation of foreign enterprises in this country and gives them unfair advantages over local investments which are practically elbowed out in their own land with the complicity of their own government.

Specifically, he argues that under Section 5 of the said law a foreign investor may do business in the Philippines or invest in a domestic enterprise up to 100% of its capital without need of prior approval. All that it has to do is register with the Securities and Exchange Commission or the Bureau of Trade Regulation and Consumer Protection in the case of a single proprietorship. The said section makes certain that "the SEC or BTRCP, as the case may be, shall not impose any limitations on the extent of foreign ownership in an enterprise additional to those provided in this Act."

Furthermore, Section 7 provides that "non-Philippine nationals may own up to one hundred percent (100%) of domestic market enterprises unless foreign ownership therein is prohibited or limited by existing law or the Foreign Investment Negative List under Section 8 hereof." The provision for a Foreign Investment Negative List in Section 8 does not satisfy the constitutional mandate for the government to regulate and exercise authority over foreign investments. The system of negative list abandons the positive aspect of regulation and exercise of authority over foreign investments. In effect, it assumes that so long as foreign investments are not in areas covered by the list, such investments are not detrimental to but are good for the national economy.

The petitioner attacks List A as not a true negative list in the strict sense of the term. It would merely enumerate areas of activities already reserved to Philippine nationals by mandate of the Constitution and specific laws. List B would contain areas of activities and enterprises already regulated according to law and includes small and medium-sized domestic market enterprises or export enterprises which utilize raw materials from depleting natural resources with paid-in equity capital of less than the equivalent of US\$500,000.00. In other words, "small to medium" are reserved to Philippine nationals; in effect Filipinos are not encouraged to go big. List C would merely contain areas of investment in which "existing enterprises already serve adequately the needs of the economy and the consumers and do not need further foreign investments." The category of "existing enterprises" should be qualified by the term "Filipino." Otherwise, List C would protect existing foreign enterprises as well.

The petitioner also attacks Section 9 because if a Philippine national believes that an area of investment should be

included in List C, the burden is on him to show that the criteria enumerated in said section are met.

It is alleged that Articles 2, 32, & 35 of the Omnibus Investments Code of 1982 are done away with by RA 7042. It is also argued that by repealing Articles 49, 50, 54 and 56 of the 1987 Omnibus Investments Code, RA No. 7042 further abandons the regulation of foreign investments by doing away with important requirements for doing business in the Philippines.

Finally, the petitioner claims that the transitory provisions of RA 7042, which allow practically unlimited entry of foreign investments for three years, subject only to a supposed Transitory Foreign Investment Negative List, not only completely deregulates foreign investments but would place Filipino enterprises at a fatal disadvantage in their own country.

In his Comment, the Solicitor General counters that the phrase "without need of prior approval" applies to equity restrictions alone. This is well explained by the fact that prior to the effectivity of RA 7042, Article 46 of the Omnibus Investments Code of 1987 (EO No. 226), provided that a non-Philippine national could, without need of prior authority from the Board of Investments (BOI), invest in: (1) any enterprise registered under Book I (Investments with Incentives); and (2) enterprises not registered under Book I, to the extent that the total investment of the non-Philippine national did not exceed 40% of the outstanding capital. On the other hand, under Article 47 thereof, if an investment by a non-Philippine national in an enterprise not registered under Book I was such that the total participation by non-Philippine nationals in the outstanding capital thereof exceeded 40%, prior authority from the BOI was required.

With the effectivity of RA 7042, a certain layer of bureaucracy has been removed, specifically, the case-to-case authorization by BOI. Furthermore, with the introduction of the Negative List under Sections 8 & 15, the areas of investments not open to foreign investors are already determined and outlined; hence, registration with the SEC or BTRCP, as the case may be, is now the initial step to be taken by foreign investors.

This registration constitutes regulation and exercise of authority over foreign investments. Under SEC and BTRCP rules and regulations, foreign investors must first comply with certain requirements before they can be issued a license to do business in the Philippines. The SEC has PD 902-A, as amended, and BP 68 for its governing laws. Pertinent provisions of these laws are contained in the SEC Licensing Procedure of Foreign Corporations. For BTRCP, the applicable laws are EO No. 133 in conjunction with EO No. 913.

Section 7 of RA 7042 allows non-Philippine nationals to own up to 100% of domestic market enterprises only in areas of investments outside the prohibitions and limitations imposed by law to protect Filipino ownership and interest. Furthermore, the Foreign Investment Negative List under Section 8 reserves to Filipinos sensitive areas of investments. List C prohibits foreign investors from engaging in areas of activities where existing enterprises already serve adequately the needs of the economy and the consumer.

The Act opens the door to foreign investments only after securing to Filipinos their rights and interests over the national economy.

The provisions of the Constitution and other specific laws (which would be used as a basis for List A) regulate or limit the extent of foreign ownership in enterprises engaged in areas of activity reserved for Filipinos. To insist otherwise would be tantamount to saying that those laws are useless and should therefore be erased from the statute books.

The fact that List B contains areas already regulated pursuant to law already makes it clear that it is regulatory. It channels efforts at promoting foreign investments to bigger enterprises where there is an acute lack of Filipino capital. However, this should not be construed as a scheme to discourage Filipino enterprises from going into big

enterprises. On the contrary, the scheme is for foreign investments to supplement Filipino capital in big enterprises.

Activities which do not adequately meet the needs of the consumers should not be included in List C so as to allow healthy competition. Otherwise, consumers would be at the mercy of unscrupulous producers. Foreign corporations already doing business in the Philippines under a valid license prior to the enactment of RA 7042 necessarily come within the protection of the law.

The Solicitor General adds that Section 9 provides for the criteria to be used by NEDA in determining the areas of investment for inclusion in List C. The petition for inclusion therein requires "a public hearing at which affected parties will have the opportunity to show whether the petitioner industry adequately serves the economy and the consumers." But this does not mean that the Act is shifting the burden of proof to Filipino enterprises while deregulating foreign investments at the same time. On the contrary, this provision is designed to protect the consumers as not all existing enterprises satisfy the criteria for inclusion in List C. The requisite proof and public hearing under Section 9 are, therefore, necessary to prevent detriment to the economy and the consumers.

Regarding the alleged elimination of certain rules in the Code, the Solicitor General stresses that Section 16 of the Act provides that only "Articles forty-four (44) to fifty-six (56) of Book II of EO No. 226 are repealed." The approval by the BOI and the other regulatory requirements set forth in the aforementioned articles were purposely removed because the determination of the areas of investment open to foreign investors is made easy by the Foreign Investment Negative List formulated and recommended by NEDA following the process and criteria provided in Sections 8 & 9 of the Act.

Concluding, he argues that the Transitory Foreign Investment Negative List is not imaginary. In fact, it practically includes the same areas of investment reserved to Filipinos under Section 5. Moreover, during the transitory period, "SEC shall disallow registration of the applying non-Philippine national if the existing joint venture enterprises, particularly the Filipino partners therein, can reasonably prove they are capable to make the investment needed for the domestic market activities to be undertaken by the competing applicant."

Allowed to intervene,* Senator Vicente T. Paterno, raises substantially the same points stressed by the Solicitor General in defense of the Act and amplifies the argument that the Act does not deregulate foreign investments to the disadvantage of the Filipino entrepreneur. He discusses at length the different regulatory requirements for doing business in the Philippines and explains the over-all strategy embodied in the Act to develop a self-reliant economy, as well as the provisions designed to promote full employment for Filipinos. He also suggests that the constitutional challenge should be rejected outright for non-compliance with the requisites of a judicial inquiry into a constitutional question, to wit: (1) there must be an actual case of controversy; (2) the constitutional question must be raised by a proper party; (3) the constitutional question must be raised at the earliest opportunity; and (4) the resolution of the constitutional question must be necessary to the decision of the case.[1]

The Court has carefully gone over the petition and wryly observes that it could have been pruned and limited to the strictly legal principles involved in the interest of a speedier disposition of the case. A considerable portion of the petition, and this is also true of the reply (if not more so), sounds too much like speechifying that is better addressed to a political audience than to a court of justice. Much valuable time would have been saved in the presentation of a leaner, strictly legal tract.

Coming first to the procedural objections to the petition, we agree that there is at this point no actual case or controversy, particularly because of the absence of the implementing rules that are supposed to carry the Act into effect. A controversy must be one that is appropriate or "ripe" for determination, not conjectural or anticipatory. We hold, however, that the petitioner, as a citizen and taxpayer, and particularly as a member of the House of

Representatives, comes under the definition that a proper party is one who has sustained or is in danger of sustaining an injury as a result of the act complained of.[2] We will also hold that the constitutional question has not been raised tardily but in fact, as just remarked, prematurely.

On the merits, we find that the constitutional challenge must be rejected for failure to show that there is an indubitable ground for it, not to say even a necessity to resolve it. The policy of the courts is to avoid ruling on constitutional questions and to presume that the acts of the political departments are valid in the absence of a clear and unmistakable showing to the contrary. To doubt is to sustain. This presumption is based on the doctrine of separation of powers which enjoins upon each department a becoming respect for the acts of the other departments. The theory is that as the joint act of Congress and the President of the Philippines, a law has been carefully studied and determined to be in accordance with the fundamental law before it was finally enacted.

In the case at bar, the law is challenged on broad constitutional principles and the proposition that the Filipino investor is unduly discriminated against in his own land. Due process is invoked. The provisions on nationalism are cited. Economic dependency is deplored. In the light, however, of the explanation given by the Solicitor General and of the Intervenor in their respective Comments, we hold that the cause of unconstitutionality has not been proved by the petitioner. On the contrary, we are satisfied that the Act does not violate any of the constitutional provisions the petitioner has mentioned.

What we see here is a debate on the wisdom or the efficacy of the Act, but this is a matter on which we are not competent to rule. As Cooley observed: "Debatable questions are for the legislature to decide. The courts do not sit to resolve the merits of conflicting issues." [3] In *Angara v. Electoral Commission*, [4] Justice Laurel made it clear that "the judiciary does not pass upon questions of wisdom, justice or expediency of legislation." And fittingly so for in the exercise of judicial power, we are allowed only "to settle actual controversies involving rights which are legally demandable and enforceable," [5] and may not annul an act of the political departments simply because we feel it is unwise or impractical. It is true that, under the expanded concept of the political question, we may now also "determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." [6] We find, however, that that irregularity does not exist in the case at bar.

The petitioner is commended for his high civic spirit and his zeal in the protection of the Filipino investors against unfair foreign competition. His painstaking study and analysis of the Foreign Investments Act of 1991 reveals not only his nationalistic fervor but also an impressive grasp of this complex subject. But his views are expressed in the wrong forum. The Court is not a political arena. His objections to the law are better heard by his colleagues in the Congress of the Philippines, who have the power to rewrite it, if they so please, in the fashion he suggests.

WHEREFORE, the petition is DISMISSED, without any pronouncement as to costs. It is so ordered.

Narvasa, Melencio-Herrera, Gutierrez, Jr., Paras, Feliciano, Bidin, Griño-Aquino, Medialdea, Regalado, Davide, Jr., and Romero, JJ., concur.

Padilla, J., no part.

Fernan, C.J., on leave.

* The Philippine Association of Battery Manufacturers was also allowed to intervene but merely supported the allegations and arguments of the petitioner.

[1] *Dumlao v. Commission on Elections*, 95 SCRA 392.

[2] *Ex Parte Levitt*, 303 U.S. 63.

[3] Constitutional Limitations, 8th ed., 379-80.

[4] 63 Phil. 139.

[5] Constitution, Art. VIII, Sec. 1.

[6] Ibid.

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