

KILOSBAYAN, INCORPORATED, JOVITO R. SALONGA, CIRILO A. RIGOS, ERME CAMBA, EMILIO C. CAPULONG, JR., JOSE T. APOLO, EPHRAIM TENDERO, FERNANDO SANTIAGO, JOSE ABCEDE, CHRISTINE TAN,...

G.R. No. 118910. November 16, 1995

Ponente: MENDOZA, J.

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MENDOZA, J.:

Petitioners seek reconsideration of our decision in this case. They insist that the decision in the first case has already settled (1) whether petitioner Kilosbayan, Inc. has a standing to sue and (2) whether under its charter (R.A. No. 1169, as amended) the Philippine Charity Sweepstakes Office can enter into any form of association or collaboration with any party in operating an on-line lottery. Consequently, petitioners contend, these questions can no longer be reopened.

Because two members of the Court did not consider themselves bound by the decision in the first case, petitioners suggest that the two, in joining the dissenters in the first case in reexamining the questions in the present case, acted otherwise than according to law. They cite the following statement in the opinion of the Court:

The voting on petitioners' standing in the previous case was a narrow one, with seven (7) members sustaining petitioners' standing and six (6) denying petitioners' right to bring the suit. The majority was thus a tenuous one that is not likely to be maintained in any subsequent litigation. In addition, there have been changes in the membership of the Court, with the retirement of Justices Cruz and Bidin and the appointment of the writer of this opinion and Justice Francisco. Given this fact it is hardly tenable to insist on the maintenance of the ruling as to petitioners' standing.

Petitioners claim that this statement "conveys a none too subtle suggestion, perhaps a Freudian slip, that the two new appointees, regardless of the merit of the Decision in the first Kilosbayan case against the lotto (Kilosbayan, et al. v. Guingona, 232 SCRA 110 (1994)) must of necessity align themselves with all the Ramos appointees who were dissenters in the first case and constitute the new majority in the second lotto case." And petitioners ask, "why should it be so?"

Petitioners ask a question to which they have made up an answer. Their attempt at psychoanalysis, detecting a Freudian slip where none exists, may be more revealing of their own unexpressed wish to find motives where there are none which they can impute to some members of the Court.

For the truth is that the statement is no more than an effort to explain ? rather than to justify ? the majority's decision to overrule the ruling in the previous case. It is simply meant to explain that because the five members of the Court who dissented in the first case (Melo, Quason, Puno, Vitug and Kapunan, JJ.) and the two new members (Mendoza and Francisco, JJ.) thought the previous ruling to be erroneous and its reexamination not to be barred by stare decisis, res judicata or conclusiveness of judgment, or law of the case, it was hardly tenable for

petitioners to insist on the first ruling.

Consequently to petitioners' question "What is the glue that holds them together," implying some ulterior motives on the part of the new majority in reexamining the two questions, the answer is: None, except a conviction on the part of the five, who had been members of the Court at the time they dissented in the first case, and the two new members that the previous ruling was erroneous. The eighth Justice (Padilla, J.) on the other hand agrees with the seven Justices that the ELA is in a real sense a lease agreement and therefore does not violate R.A. No. 1169.

The decision in the first case was a split decision: 7-6. With the retirement of one of the original majority (Cruz, J.) and one of the dissenters (Bidin, J.), it was not surprising that the first decision in the first case was later reversed.

It is argued that, in any case, a reexamination of the two questions is barred because the PCSO and the Philippine Gaming Management Corporation made a "formal commitment not to ask for a reconsideration of the Decision in the first lotto case and instead submit a new agreement that would be in conformity with the PCSO Charter (R.A. No. 1169, as amended) and with the Decision of the Supreme Court in the first Kilosbayan case against on-line, hi-tech lotto."

To be sure, a new contract was entered into which the majority of the Court finds has been purged of the features which made the first contract objectionable. Moreover, what the PCSO said in its manifestation in the first case was the following:

1. They are no longer filing a motion for reconsideration of the Decision of this Honorable Court dated May 5, 1994, a copy of which was received on May 6, 1994.
2. Respondents PCSO and PGMC are presently negotiating a new lease agreement consistent with the authority of PCSO under its charter (R.A. No. 1169, as amended by B.P. Blg. 42) and conformable with the pronouncements of this Honorable Court in its Decision of May 5, 1995.

The PGMC made substantially the same manifestation as the PCSO.

There was thus no "formal commitment" ? but only a manifestation ? that the parties were not filing a motion for reconsideration. Even if the parties made a "formal commitment," the six (6) dissenting Justices certainly could not be bound thereby not to insist on their contrary view on the question of standing. Much less were the two new members bound by any "formal commitment" made by the parties. They believed that the ruling in the first case was erroneous. Since in their view reexamination was not barred by the doctrine of stare decisis, res judicata or conclusiveness of judgment or law of the case, they voted the way they did with the remaining five (5) dissenters in the first case to form a new majority of eight.

Petitioners ask, "Why should this be so?" Because, as explained in the decision, the first decision was erroneous and no legal doctrine stood in the way of its reexamination. It can, therefore, be asked "with equal candor": "Why should this not be so?"

Nor is this the first time a split decision was tested, if not reversed, in a subsequent case because of change in the membership of a court. In 1957, this Court, voting 6-5, held in *Feliciano v. Aquino*, G.R. No. L-10201, Sept. 23, 1957 that the phrase "at the time of the election" in §2174 of the Revised Administrative Code of 1917 meant that a candidate for municipal elective position must be at least 23 years of age on the date of the election. On the other hand, the dissenters argued that it was enough if he attained that age on the day he assumed office.

Less than three years later, the same question was before the Court again, as a candidate for municipal councilor stated under oath in her certificate of candidacy that she was eligible for that position although she attained the

requisite age (23 years) only when she assumed office. The question was whether she could be prosecuted for falsification. In *People v. Yanza*, 107 Phil. 888 (1960), the Court ruled she could not. Justice, later Chief Justice, Bengzon, who dissented in the first case, *Feliciano v. Aquino*, supra, wrote the opinion of the Court, holding that while the statement that the accused was eligible was "inexact or erroneous, according to the majority in the *Feliciano* case," the accused could not be held liable for falsification, because the question [whether the law really required candidates to have the required age on the day of the election or whether it was sufficient that they attained it at the beginning of the term of office] has not been discussed anew, despite the presence of new members; we simply assume for the purpose of this decision that the doctrine stands.

Thus because in the meantime there had been a change in the membership of the Court with the retirement of two members (Reyes and Felix, JJ.) who had taken part in the decision in the first case and their replacement by new members (Barrera and Gutierrez-David, JJ.) and the fact that the vote in the first case was a narrow one (6 to 5), the Court allowed that the continuing validity of its ruling in the first case might well be doubted. For this reason it gave the accused the benefit of the doubt that she had acted in the good faith belief that it was sufficient that she was 23 years of age when she assumed office.

In that case, the change in the membership of the Court and the possibility of change in the ruling were noted without anyone ? much less would-be psychoanalysts ? finding in the statement of the Court any Freudian slip. The possibility of change in the rule as a result of change in membership was accepted as a sufficient reason for finding good faith and lack of criminal intent on the part of the accused.

Indeed, a change in the composition of the Court could prove the means of undoing an erroneous decision. This was the lesson of *Knox v. Lee*, 12 Wall. 457 (1871). The Legal Tender Acts, which were passed during the Civil War, made U.S. notes (greenbacks) legal tender for the payment of debts, public or private, with certain exceptions. The validity of the acts, as applied to preexisting debts, was challenged in *Hepburn v. Griswold*, 8 Wall. 603 (1869). The Court was then composed of only eight (8) Justices because of Congressional effort to limit the appointing power of President Johnson. Voting 5-3, the Court declared the acts void. Chief Justice Chase wrote the opinion of the Court in which four others, including Justice Grier, concurred. Justices Miller, Swayne and Davis dissented. A private memorandum left by the dissenting Justices described how an effort was made "to convince an aged and infirm member of the court [Justice Grier] that he had not understood the question on which he voted," with the result that what was originally a 4-4 vote was converted into a majority (5-3) for holding the acts invalid.

On the day the decision was announced, President Grant nominated to the Court William Strong and Joseph P. Bradley to fill the vacancy caused by the resignation of Justice Grier and to restore the membership of the Court to nine. In 1871, *Hepburn v. Griswold* was overruled in the Legal Tender Cases, as *Knox v. Lee* came to be known, in an opinion by Justice Strong, with a dissenting opinion by Chief Justice Chase and the three other surviving members of the former majority. There were allegations that the new Justices were appointed for their known views on the validity of the Legal Tender Acts, just as there were others who defended the character and independence of the new Justices. History has vindicated the overruling of the *Hepburn* case by the new majority. The Legal Tender Cases proved to be the Court's means of salvation from what Chief Justice Hughes later described as one of the Court's "self inflicted wounds." [1]

We now consider the specific grounds for petitioners' motion for reconsideration.

I. We have held that because there are no genuine issues of constitutionality in this case, the rule concerning real party in interest, applicable to private litigation rather than the more liberal rule on standing, applies to petitioners. Two objections are made against that ruling: (1) that the constitutional policies and principles invoked by

petitioners, while not supplying the basis for affirmative relief from the courts, may nonetheless be resorted to for striking down laws or official actions which are inconsistent with them and (2) that the Constitution, by guaranteeing to independent people's organizations "effective and reasonable participation at all levels of social, political and economic decision-making" (Art. XIII, §16), grants them standing to sue on constitutional grounds.

The policies and principles of the Constitution invoked by petitioner read:

ART. II, §5. The maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.

Id., §12. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.

Id., §13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.

Id., §17. The State shall give priority to education, science and technology, arts, culture, and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development.

As already stated, however, these provisions are not self-executing. They do not confer rights which can be enforced in the courts but only provide guidelines for legislative or executive action. By authorizing the holding of lottery for charity, Congress has in effect determined that consistently with these policies and principles of the Constitution, the PCSO may be given this authority. That is why we said with respect to the opening by the PAGCOR of a casino in Cagayan de Oro, "the morality of gambling is not a justiciable issue. Gambling is not illegal per se It is left to Congress to deal with the activity as it sees fit." (*Magtajas v. Pryce Properties Corp., Inc.*, 234 SCRA 255, 268 (1994))

It is noteworthy that petitioners do not question the validity of the law allowing lotteries. It is the contract entered into by the PCSO and the PGMC which they are assailing. This case, therefore, does not raise issues of constitutionality but only of contract law, which petitioners, not being privies to the agreement, cannot raise.

Nor does Kilosbayan's status as a people's organization give it the requisite personality to question the validity of the contract in this case. The Constitution provides that "the State shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means," that their right to "effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged." (Art. XIII, §§ 15-16)

These provisions have not changed the traditional rule that only real parties in interest or those with standing, as the case may be, may invoke the judicial power. The jurisdiction of this Court, even in cases involving constitutional questions, is limited by the "case and controversy" requirement of Art. VIII, §5. This requirement lies at the very heart of the judicial function. It is what differentiates decisionmaking in the courts from decisionmaking in the political departments of the government and bars the bringing of suits by just any party.

Petitioners quote extensively from the speech of Commissioner Garcia before the Constitutional Commission, explaining the provisions on independent people's organizations. There is nothing in the speech, however, which supports their claim of standing. On the contrary, the speech points the way to the legislative and executive branches of the government, rather than to the courts, as the appropriate fora for the advocacy of petitioners' views.[2] Indeed, the provisions on independent people's organizations may most usefully be read in connection

with the provision on initiative and referendum as a means whereby the people may propose or enact laws or reject any of those passed by Congress. For the fact is that petitioners' opposition to the contract in question is nothing more than an opposition to the government policy on lotteries.

It is nevertheless insisted that this Court has in the past accorded standing to taxpayers and concerned citizens in cases involving "paramount public interest." Taxpayers, voters, concerned citizens and legislators have indeed been allowed to sue but then only (1) in cases involving constitutional issues and (2) under certain conditions. Petitioners do not meet these requirements on standing.

Taxpayers are allowed to sue, for example, where there is a claim of illegal disbursement of public funds. (*Pascual v. Secretary of Public Works*, 110 Phil. 331 (1960); *Sanidad v. Comelec*, 73 SCRA 333 (1976); *Bugnay Const. & Dev. v. Laron*, 176 SCRA 240 (1989); *City Council of Cebu v. Cuizon*, 47 SCRA 325 (1972)) or where a tax measure is assailed as unconstitutional. (VAT Cases [*Tolentino v. Secretary of Finance*], 235 SCRA 630 (1994)) Voters are allowed to question the validity of election laws because of their obvious interest in the validity of such laws. (*Gonzales v. Comelec*, 21 SCRA 774 (1967)) Concerned citizens can bring suits if the constitutional question they raise is of "transcendental importance" which must be settled early. (Emergency Powers Cases [*Araneta v. Dinglasan*], 84 Phil. 368 (1949); *Iloilo Palay and Corn Planters Ass'n v. Feliciano*, 121 Phil. 358 (1965); *Philconsa v. Gimenez*, 122 Phil. 894 (1965); *CLU v. Executive Secretary*, 194 SCRA 317 (1991)) Legislators are allowed to sue to question the validity of any official action which they claim infringes their prerogatives qua legislators. (*Philconsa v. Enriquez*, 235 506 (1994); *Guingona v. PCGG*, 207 SCRA 659 (1992); *Gonzales v. Macaraig*, 191 SCRA 452 (1990); *Tolentino v. Comelec*, 41 SCRA 702 (1971); *Tatad v. Garcia*, G.R. No. 114222, April 16, 1995 (Mendoza, J., concurring))

Petitioners do not have the same kind of interest that these various litigants have. Petitioners assert an interest as taxpayers, but they do not meet the standing requirement for bringing taxpayer's suits as set forth in *Dumlao v. Comelec*, 95 SCRA 392, 403 (1980), to wit:

While, concededly, the elections to be held involve the expenditure of public moneys, nowhere in their Petition do said petitioners allege that their tax money is "being extracted and spent in violation of specific constitutional protections against abuses of legislative power" (*Flast v. Cohen*, 392 U.S., 83 [1960]), or that there is a misapplication of such funds by respondent COMELEC (see *Pascual vs. Secretary of Public Works*, 110 Phil. 331 [1960]), or that public money is being deflected to any improper purpose. Neither do petitioners seek to restrain respondent from wasting public funds through the enforcement of an invalid or unconstitutional law. (*Philippine Constitution Association vs. Mathay*, 18 SCRA 300 [1966]), citing *Philippine Constitution Association vs. Gimenez*, 15 SCRA 479 [1965]). Besides, the institution of a taxpayer's suit, per se, is no assurance of judicial review. As held by this Court in *Tan vs. Macapagal* (43 SCRA 677 [1972]), speaking through our present Chief Justice, this Court is vested with discretion as to whether or not a taxpayer's suit should be entertained. (Emphasis added)

Petitioners' suit does not fall under any of these categories of taxpayers' suits.

Neither do the other cases cited by petitioners support their contention that taxpayers have standing to question government contracts regardless of whether public funds are involved or not. In *Gonzales v. National Housing, Corp.*, 94 SCRA 786 (1979), petitioner filed a taxpayer's suit seeking the annulment of a contract between the NHC and a foreign corporation. The case was dismissed by the trial court. The dismissal was affirmed by this Court on the grounds of *res judicata* and pendency of a prejudicial question, thus avoiding the question of petitioner's standing.

On the other hand, in *Gonzales v. Raquiza*, 180 SCRA 254 (1989), petitioner sought the annulment of a contract

made by the government with a foreign corporation for the purchase of road construction equipment. The question of standing was not discussed, but even if it was, petitioner's standing could be sustained because he was a minority stockholder of the Philippine National Bank, which was one of the defendants in the case.

In the other case cited by petitioners, *City Council of Cebu v. Cuizon*, 47 SCRA 325 (1972), members of the city council were allowed to sue to question the validity of a contract entered into by the city government for the purchase of road construction equipment because their contention was that the contract had been made without their authority. In addition, as taxpayers they had an interest in seeing to it that public funds were spent pursuant to an appropriation made by law.

But, in the case at bar, there is no allegation that public funds are being misapplied or misappropriated. The controlling doctrine is that of *Gonzales v. Marcos*, 65 SCRA 624 (1975) where it was held that funds raised from contributions for the benefit of the Cultural Center of the Philippines were not public funds and petitioner had no standing to bring a taxpayer's suit to question their disbursement by the President of the Philippines.

Thus, petitioners' right to sue as taxpayers cannot be sustained. Nor as concerned citizens can they bring this suit because no specific injury suffered by them is alleged. As for the petitioners, who are members of Congress, their right to sue as legislators cannot be invoked because they do not complain of any infringement of their rights as legislators.

Finally, in *Valmonte v. PCSO*, G.R. No. 78716, September 22, 1987, we threw out a petition questioning another form of lottery conducted by the PCSO on the ground that petitioner, who claimed to be a "citizen, lawyer, taxpayer and father of three minor children," had no direct and personal interest in the lottery. We said: "He must be able to show, not only that the law is invalid, but also that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that the person complaining has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute complained of." In the case at bar, petitioners have not shown why, unlike petitioner in the *Valmonte* case, they should be accorded standing to bring this suit.

The case of *Oposa v. Factoran, Jr.* 224 SCRA 792 (1993) is different. Citizens' standing to bring a suit seeking the cancellation of timber licenses was sustained in that case because the Court considered Art. II, §16 a right-conferring provision which can be enforced in the courts. That provision states:

The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature. (Emphasis)

In contrast, the policies and principles invoked by petitioners in this case do not permit of such categorization.

Indeed, as already stated, petitioners' opposition is not really to the validity of the ELA but to lotteries which they regard to be immoral. This is not, however, a legal issue, but a policy matter for Congress to decide and Congress has permitted lotteries for charity.

Nevertheless, although we have concluded that petitioners do not have standing, we have not stopped there and dismissed their case. For in the view we take, whether a party has a cause of action and, therefore, is a real party in interest or one with standing to raise a constitutional question must turn on whether he has a right which has been violated. For this reason the Court has not ducked the substantive issues raised by petitioners.

II. R.A. No. 1169, as amended by B.P No. 42, states:

§1. The Philippine Charity Sweepstakes Office. -- The Philippine Charity Sweepstakes Office, hereinafter

designated the Office, shall be the principal government agency for raising and providing for funds for health programs, medical assistance and services and charities of national character, and as such shall have the general powers conferred in section thirteen of Act Numbered One Thousand Four Hundred Fifty-Nine, as amended, and shall have the authority:

A. To hold and conduct charity sweepstakes races, lotteries and other similar activities, in such frequency and manner, as shall be determined, and subject to such rules and regulations as shall be promulgated by the Board of Directors.

B. Subject to the approval of the Minister of Human Settlements, to engage in health and welfare-related investments, programs, projects and activities which may be profit-oriented, by itself or in collaboration, association or joint venture with any person, association, company or entity, whether domestic or foreign, except for the activities mentioned in the preceding paragraph (A), for the purpose of providing for permanent and continuing sources of funds for health programs, including the expansion of existing ones, medical assistance and services, and/or charitable grants: Provided, That such investments will not compete with the private sector in areas where investments are adequate as may be determined by the National Economic and Development Authority.

Petitioners insist on the ruling in the previous case that the PCSO cannot hold and conduct charity sweepstakes, lotteries and other similar activities in collaboration, association or joint venture with any other party because of the clause "except for the activities mentioned in the preceding paragraph (A)" in paragraph (B) of §1. Petitioners contend that the ruling is the law of this case because the parties are the same and the case involves the same issue, i.e., the meaning of this statutory provision.

The "law of the case" doctrine is inapplicable, because this case is not a continuation of the first one. Petitioners also say that inquiry into the same question as to the meaning of the statutory provision is barred by the doctrine of res judicata. The general rule on the "conclusiveness of judgment," however, is subject to the exception that a question may be reopened if it is a legal question and the two actions involve substantially different claims. This is generally accepted in American law from which our Rules of Court was adopted. (*Montana v. United States*, 440 U.S. 59 L. Ed. 2d 147, 210 (1979); RESTATEMENT OF THE LAW 2d, ON JUDGMENTS, §28; P. BATOR, D. MELTZER, P. MISHKIN AND D. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1058, n.2 (3rd Ed., 1988)) There is nothing in the record of this case to suggest that this exception is inapplicable in this jurisdiction.

Indeed, the questions raised in this case are legal questions and the claims involved are substantially different from those involved in the prior case between the parties. As already stated, the ELA is substantially different from the Contract of Lease declared void in the first case.

Borrowing from the dissenting opinion of Justice Feliciano, petitioners argue that the phrase "by itself or in collaboration, association or joint venture with any other party" qualifies not only §1 (B) but also §1 (A), because the exception clause ("except for the activities mentioned in the preceding paragraph (A)") "operates, as it were, as a renvoi clause which refers back to Section 1(A) and in this manner avoids the necessity of simultaneously amending the text of Section 1 (A)."

This interpretation, however, fails to take into account not only the location of the phrase in paragraph (B), when it should be in paragraph (A) had that been the intention of the lawmaking authority, but also the phrase "by itself." In other words, under paragraph (B), the PCSO is prohibited from "engag[ing] in . . . investments, programs, projects and activities" if these involve sweepstakes races, lotteries and other similar activities not only "in collaboration, association or joint venture" with any other party but also "by itself." Obviously, this prohibition

cannot apply when the PCSO conducts these activities itself. Otherwise, what paragraph (A) authorizes the PCSO to do, paragraph (B) would prohibit.

The fact is that the phrase in question does not qualify the authority of the PCSO under paragraph (A), but rather the authority granted to it by paragraph (B). The amendment of paragraph (B) by B.P. Blg. 42 was intended to enable the PCSO to engage in certain investments, programs, projects and activities for the purpose of raising funds for health programs and charity. That is why the law provides that such investments by the PCSO should "not compete with the private sector in areas where investments are adequate as may be determined by the National Economic and Development Authority." Justice Davide, then an Assemblyman, made a proposal which was accepted, reflecting the understanding that the bill they were discussing concerned the authority of the PCSO to invest in the business of others. The following excerpt from the Record of the Batasan Pambansa shows this to be the subject of the discussion:

MR. DAVIDE.

May I introduce an amendment after "adequate". The intention of the amendment is not to leave the determination of whether it is adequate or not to anybody. And my amendment is to add after "adequate" the words AS MAY BE DETERMINED BY THE NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY. As a matter of fact, it will strengthen the authority to invest in these areas, provided that the determination of whether the private sector's activity is already adequate must be determined by the National Economic and Development Authority.

Mr. ZAMORA.

Mr. Speaker, the committee accepts the proposed amendment.

MR. DAVIDE.

Thank you, Mr. Speaker.

(2 RECORD OF THE BATASAN PAMBANSA, Sept. 6, 1979, p. 1007)

Thus what the PCSO is prohibited from doing is from investing in a business engaged in sweepstakes races, lotteries and other similar activities. It is prohibited from doing so whether "in collaboration, association or joint venture" with others or "by itself." This seems to be the only possible interpretation of §1 (A) and (B) in light of its text and its legislative history. That there is today no other entity engaged in sweepstakes races, lotteries and the like does not detract from the validity of this interpretation.

III. The Court noted in its decision that the provisions of the first contract, which were considered to be features of a joint venture agreement, had been removed in the new contract. For instance, §5 of the ELA provides that in the operation of the on-line lottery, the PCSO must employ "its own competent and qualified personnel." Petitioners claim, however, that the "contemporaneous interpretation" of PGMC officials of this provision is otherwise. They cite the testimony of Glen Barroga of the PGMC before a Senate committee to the effect that under the ELA the PGMC would be operating the lottery system "side by side" with PCSO personnel as part of the transfer of technology.

Whether the transfer of technology would result in a violation of PCSO's franchise should be determined by facts and not by what some officials of the PGMC state by way of opinion. In the absence of proof to the contrary, it must be presumed that §5 reflects the true intention of the parties. Thus, Art. 1370 of the Civil Code says that "If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control." The intention of the parties must be ascertained from their "contemporaneous and subsequent acts." (Art. 1371; *Atlantic Gulf Co. v. Insular Government*, 10 Phil. 166

(1908)) It cannot simply be judged from what one of them says. On the other hand, the claim of third parties, like petitioners, that the clause on upgrading of equipment would enable the parties after a while to change the contract and enter into something else in violation of the law is mere speculation and cannot be a basis for judging the validity of the contract.

IV. It is contended that §1 of E.O. No. 301 covers all types of "contract[s] for public services or for furnishing of supplies, materials and equipment to the government or to any of its branches, agencies or instrumentalities" and not only contracts of purchase and sale. Consequently, a lease of equipment, like the ELA, must be submitted to public bidding in order to be valid. This contention is based on two premises: (1) that §1 of E.O. No. 301 applies to any contract whereby the government acquires title to or the use of the equipment and (2) that the words "supplies," "materials," and "equipment" are distinct from each other so that when an exception in §1 speaks of "supplies," it cannot be construed to mean "equipment."

Petitioners' contention will not bear analysis. For example, the term "supplies" is used in paragraph (a), which provides that a contract for the furnishing of "supplies" in order to meet an emergency is exempt from public bidding. Unless "supplies" is construed to include "equipment," however, the lease of heavy equipment needed for rescue operations in case of a calamity will have to be submitted to public bidding before it can be entered into by the government.

In dissent Justice Feliciano says that in such a situation the government can simply resort to expropriation, paying compensation afterward. This is just like purchasing the equipment through negotiation when the question is whether the purchase should be by public bidding, not to mention the fact that the power to expropriate may not be exercised when the government can very well negotiate with private owners.

Indeed, there are fundamental difficulties in simultaneously contending (1) that E.O. No. 301, §1 covers both contracts of sale and lease agreements and (2) that the words "supplies," "materials" and "equipment" can not be interchanged. Thus, under paragraph (b) of §1, public bidding is not required "whenever the supplies are to be used in connection with a project or activity which cannot be delayed without causing detriment to the public service." Following petitioners' theory, there should be a public bidding before the government can enter into a contract for the lease of bulldozers and dredging equipment even if these are urgently needed in areas ravaged by lahar because, first, lease contracts are covered by the general rule and, second, the exception to public bidding in paragraph (b) covers only "supplies" but not equipment.

To take still another example. Paragraph (d), which does away with the requirement of public bidding "whenever the supplies under procurement have been unsuccessfully placed on bid for at least two consecutive times, either due to lack of bidders or the offers received in each instance were exorbitant or nonconforming to specifications." Again, following the theory of the petitioners, a contract for the lease of equipment cannot be entered into even if there are no bids because, first, lease contracts are governed by the general rule on public bidding and, second, the exception to public bidding in paragraph (d) applies only to contracts for the furnishing of "supplies."

Other examples can be given to show the absurdity of interpreting §1 as applicable to any contract for the furnishing of supplies, materials and equipment and of considering the words "supplies," "materials" and "equipment" to be not interchangeable. Our ruling that §1 of E.O. No. 301 does not cover the lease of equipment avoids these fundamental difficulties and is supported by the text of §1, which is entitled "Guidelines for Negotiated Contracts" and by the fact that the only provisions of E.O. No. 301 on leases, namely, §§6 and 7, concern the lease of buildings by or to the government. Thus the text of §1 reads:

§1. Guidelines for Negotiated Contracts. -- Any provision of law, decree, executive order or other issuances to the contrary notwithstanding, no contract for public services or for furnishing supplies, materials and equipment to

the government or any of its branches, agencies or instrumentalities shall be renewed or entered into without public bidding, except under any of the following situations:

- a. Whenever the supplies are urgently needed to meet an emergency which may involve the loss of, or danger to, life and/or property;
- b. Whenever the supplies are to be used in connection with a project or activity which cannot be delayed without causing detriment to the public service;
- c. Whenever the materials are sold by an exclusive distributor or manufacturer who does not have subdealers selling at lower prices and for which no suitable substitute can be obtained elsewhere at more advantageous terms to the government;
- d. Whenever the supplies under procurement have been unsuccessfully placed on bid for at least two consecutive times, either due to lack of bidders or the offers received in each instance were exorbitant or non-conforming to specifications;
- e. In cases where it is apparent that the requisition of the needed supplies through negotiated purchase is most advantageous to the government to be determined by the Department Head concerned; and
- f. Whenever the purchase is made from an agency of the government.

Indeed, the purpose for promulgating E.O. No. 301 was merely to decentralize the system of reviewing negotiated contracts of purchase for the furnishing of supplies, materials and equipment as well as lease contracts of buildings. Theretofore, E.O. No. 298, promulgated on August 12, 1940, required consultation with the Secretary of Justice and the Department Head concerned and the approval of the President of the Philippines before contracts for the furnishing of supplies, materials and equipment could be made on a negotiated basis, without public bidding. E.O. No. 301 changed this by providing as follows:

§2. Jurisdiction over Negotiated Contracts. -- In line with the principles of decentralization and accountability, negotiated contracts for public services or for furnishing supplies, materials or equipment may be entered into by the department or agency head or the governing board of the government-owned or controlled corporation concerned, without need of prior approval by higher authorities, subject to availability of funds, compliance with the standards or guidelines prescribed in Section 1 hereof, and to the audit jurisdiction of the Commission on Audit in accordance with existing rules and regulations.

Negotiated contracts involving P2,000,000 up to P10,000,000 shall be signed by the Secretary and two other Undersecretaries.

x x x x x x x x

§7. Jurisdiction Over Lease Contracts. — The heads of agency intending to rent privately-owned buildings or spaces for their use, or to lease out government-owned buildings or spaces for private use, shall have authority to determine the reasonableness of the terms of the lease and the rental rates thereof, and to enter into such lease contracts without need of prior approval by higher authorities, subject to compliance with the uniform standards or guidelines established pursuant to Section 6 hereof by the DPWH and to the audit jurisdiction of COA or its duly authorized representative in accordance with existing rules and regulations.

In sum, E.O. No. 301 applies only to contracts for the purchase of supplies, materials and equipment, and it was merely to change the system of administrative review of emergency purchases, as theretofore prescribed by E.O. No. 298, that E.O. No. 301 was issued on July 26, 1987. Part B of this Executive Order applies to leases of buildings, not of equipment, and therefore does not govern the lease contract in this case. Even if it applies, it does

not require public bidding for entering into it.

Our holding that E.O. No. 301, §1 applies only to contracts of purchase and sale is conformable to P.D. No. 526, promulgated on August 2, 1974, which is in *pari materia*. P.D. No. 526 requires local governments to hold public bidding in the "procurement of supplies." By specifying "procurement of supplies" and excepting from the general rule "purchases" when made under certain circumstances, P.D. No. 526, §12 indicates quite clearly that it applies only to contracts of purchase and sale. This provision reads:

§12. Procurement without public bidding.— Procurement of supplies may be made without the benefit of public bidding in the following modes:

- (1) Personal canvass of responsible merchants;
- (2) Emergency purchases;
- (3) Direct purchases from manufacturers or exclusive distributors;
- (4) Thru the Bureau of Supply Coordination; and
- (5) Purchase from other government entities or foreign governments.

Sec. 3 broadly defines the term "supplies" as including —

everything, except real estate, which may be needed in the transaction of public business, or in the pursuit of any undertaking, project, or activity, whether of the nature of equipment, furniture, stationery, materials for construction, or personal property of any sort, including non-personal or contractual services such as the repair and maintenance of equipment and furniture, as well as trucking, hauling, janitorial, security, and related or analogous services.

Thus, the texts of both E.O. No. 301, §1 and of P.D. No. 526, §§1 and 12, make it clear that only contracts for the purchase and sale of supplies, materials and equipment are contemplated by the rule concerning public biddings.

Finally, it is contended that equipment leases are attractive and commonly used in place of contracts of purchase and sale because of "multifarious credit and tax constraints" and therefore could not have been left out from the requirement of public bidding. Obviously these credit and tax constraints can have no attraction to the government when considering the advantages of sale over lease of equipment. The fact that lease contracts are in common use is not a reason for implying that the rule on public bidding applies not only to government purchases but also to lease contracts. For the fact also is that the government leases equipment, such as copying machines, personal computers and the like, without going through public bidding.

FOR THE FOREGOING REASONS, the motion for reconsideration of petitioners is DENIED with finality.

SO ORDERED.

Melo, Puno, Kapunan, Francisco and Hermosissima, Jr., JJ., concur.

Padilla and Vitug, JJ., maintain their separate and concurring opinion.

Feliciano, Regalado, Davide, Jr., Romero, and Bellosillo, JJ., maintain and reiterate his dissenting opinion.

Narvasa, C.J. and Panganiban, J., took no part.

[1] The two other cases were *Dred Scott v. Sanford*, 19 How. 393 (1857) (which invalidated an act of Congress forbidding slavery in the South) and *Pollack v. Farmers Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895) (which held a tax on income derived from property to be a tax on the property itself which had to be apportioned

according to population under the U.S. Constitution) C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50-54 (1928).

[2] That is why in the main decision it was pointed out that petitioners might try the Commission on Audit, the Ombudsman or the Solicitor General (except that in this case the latter has found nothing wrong with the contract) in airing their grievances, a point apparently overlooked by Davide, J. in his dissent noting an alleged inconsistency in the majority's ruling that petitioners have no standing in the courts but that they can complain to the COA, the Ombudsman or the Solicitor General. The rules on standing do not obtain in these agencies; petitioners can file their complaints there ex relatione.

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