44 Phil. 551

[G.R. No. 19857. March 02, 1923]

THE ILOILO ICE AND COLD STORAGE COMPANY, PETITIONER, VS. PUBLIC UTILITY BOARD, RESPONDENT.

D E C I S I O N

MALCOLM, J.:

This action in certiorari is for the purpose of reviewing a decision of the Public Utility Commissioner, affirmed by the Public Utility Board, holding that the petitioner, the Iloilo Ice and Cold Storage Company, is a public utility and, as such, subject to the control and jurisdiction of the Public Utility Commissioner.

The case can be best understood by a consideration of of its various phases, under the following topics: Statement of the issue, statement of the case, statement of the facts, statement of the law, statement of the authorities, statement of the petitioner's case, and of the government's case, and judgment.

STATEMENT OF THE ISSUE

The issue is whether the Iloilo Ice and Cold Storage Company is a public utility, as that term is defined by section 9 of Act No. 2694.

STATEMENT OF THE CASE

Francisco Villanueva, jr., secretary of the Public Utility Commission, investigated the operation of ice plants in Iloilo early in November, 1921. He reported to the Public Utility Commissioner that the Iloilo Ice and Cold Storage Company should be considered a public utility, and that, accordingly, the proper order should issue.

Agreeable to the recommendation of Secretary Villanueva, the Public Utility Commissioner promulgated an order on December 19, 1921, reciting the facts abovementioned, and directing the Iloilo Ice and Cold Storage Company to show cause why it should not be considered a public utility and as such required to comply with each and every duty of public utilities provided in Act No. 2307, as amended by Act No. 2694. To this order, John Bordman, treasurer of the Iloilo Ice and Cold Storage Company, interposed a special answer, in which it was alleged that the company is, and always has been, operated as a private enterprise.

Hearing was then had, at which the testimonies of Francisco Villanueva, jr., and of John Bordman were received. Various exhibits were presented and received in evidence. Mr. Bordman, as the managing director and treasurer of the company, later submitted an affidavit.

The Public Utility Commissioner rendered a decision, holding in effect that the Iloilo Ice and Cold Storage Company was a public utility, and that, accordingly, it should file in the office of the Public Utility Commissioner, a statement of its charges for ice. This decision was affirmed on appeal to the Public Utility Board. From this last decision, petitioner has come before this court, asking that the proceedings below be reviewed, and the decisions set aside.

STATEMENT OF THE FACTS

The petitioner, the Iloilo Ice and Cold Storage Company, is a corporation organized under the laws of the Philippine Islands in 1908, with a capital stock of P60,000. Continuously since that date, the company has maintained and operated a plant for the manufacture and sale of ice in the City of Iloilo. It also does business to a certain extent in the Provinces of Negros, Capiz, and Antique, and with boats which stop at the port of Iloilo. At the time its operations were started, two additional ice plants were operating in Iloilo. Subsequently, however, the other plants ceased to operate, so that the petitioner now has no competitor in the field.

The normal production of ice of the Iloilo Ice and Cold Storage Company is about 3 tons per day. In the month of January, 1922, a total of 83,837 kilos of

ice were sold, of which 56,400 kilos were on written contracts in the City of Iloilo and adjoining territory, 14,214 kilos, also on written contracts, to steamers calling at the port of Iloilo, and 13,233 kilos on verbal contracts. Although new machinery has been installed in, the plant, this was merely for replacement purposes, and did not add to its capacity. The demand for ice has usually been much more than the plant could produce and no effort has been made to provide sufficient ice to supply all who might apply.

Since 1908, the business of the Iloilo Ice and Cold Storage Company, according to its managing director and treasurer, has been carried on with selected customers only. Preference, however, is always given to hospitals, the requests of practicing physicians, and the needs of sick persons. The larger part of the company's business is perfected by written contracts signed by the parties served, which, in the present form, includes an agreement that no right to future service is involved.

The coupon books of the company contain on the outside the following:

> "This agreement witnesseth, that The Iloilo Ice and Cold Storage Co. will furnish the undersigned with ice as indicated herein at the rate of one coupon per day. These coupons are not transferable. It is further agreed that the company is not obligated to similar service in future except by special agreement.
>
> "Iloilo, _____, 192 __
> (Signed) _____
> "No. _____"

Cash sales of ice are accomplished on forms reading: "In receiving the ice represented by this ticket I hereby agree that the Iloilo Ice & Cold Storage Co. is not bound in future to extend to me further service." A notice posted in the Iloilo store reads: "No ice is sold to the public by this plant. Purchases can only be made by private contract." In August, 1918, all storage facilities were abolished, and resumed in 1920 only with contracts, a copy of the form at present in use waiving any right to continued service.

On only one point of fact is there any divergence, and this is relatively

unimportant. Secretary Villanueva reported, and the Public Utility Commissioner found, that the Iloilo Ice and Cold Storage Company sold ice to the public, and advertised its sale through the papers; while managing director Bordman claims that only once have the instructions of the board of directors prohibiting public advertising been violated.

STATEMENT OF THE LAW

The original public utility law, Act No. 2307, in its section 14, in speaking of the jurisdiction of the Board of Public Utility Commissioners, and in defining the term "public utility," failed to include ice, refrigeration, and cold storage plants. This deficiency was, however, remedied by Act No. 2694, enacted in 1917, which amended section 14 of Act No. 2307, to read as follows:

> "* * * The term 'public utility' is hereby defined to include every individual, copartnership, association, corporation or joint stock company, whether domestic or foreign, their lessees, trustees or receivers appointed by any court whatsoever, or any municipality, province or other department of the Government of the Philippine Islands, that now or hereafter may own, operate, manage or control within the Philippine Islands any common carrier, railroad, street railway, traction railway, steamboat or steamship line, small water craft, such as *bancas*, *virais*, *lorchas*, and others, engaged in the transportation of passengers and cargo, line of freight and passenger automobiles, shipyard, marine railway, marine repair shop, ferry, freight or any other car service, public warehouse, public wharf or dock not under the jurisdiction of the Insular Collector of Customs, ice, refrigeration, cold storage, canal, irrigation, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone, wire or wireless telegraph system, plant or equipment, for public use: *Provided*, That the Commission or Commissioner shall have no jurisdiction over ice plants, cold storage plants, or any other kind of public utilities operated by the Federal Government exclusively for its own and not for public use." * * *

It will thus be noted that the term "public utility," in this jurisdiction, includes every individual, copartnership, association, corporation, or joint

stock company that now or hereafter may own, operate, manage, or control, within the Philippine Islands, any ice, refrigeration, cold storage system, plant, or equipment, for public use. Particular attention is invited to the last phrase, "for public use."

STATEMENT OF THE AUTHORITIES

The authorities are abundant, although some of them are not overly instructive. Selection is made of the pertinent decisions coming from our own Supreme Court, the Supreme Court of the United States, and the Supreme Court of California.

In the case of United States *vs*. Tan Piaco ([1920], 40 Phil., 853), the facts were that the trucks of the defendant furnished service under special agreements to carry particular persons and property. Following the case of Terminal Taxicab Co. *vs*. Kutz ([1916], 241 U. S., 252), it was held that since the defendant did not hold himself out to carry all passengers and freight for all persons who might offer, he was not a public utility and, therefore, was not criminally liable for his failure to obtain a license from the Public Utility Commissioner. It was said:

> "Under the provisions of said section, two things are necessary: (*a*) The individual, copartnership, etc., etc., must be a public utility; and (*b*) the business in which such individual, copartnership, etc., etc., is engaged must be for public use. So long as the individual or copartnership, etc., etc., is engaged in a purely private enterprise, without attempting to render service to all who may apply, he can in no sense be considered a public utility, for public use.
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> " 'Public use' means the same as 'use by the public' The essential feature of the public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. In determining whether a use is public, we must look not only to the character of the business to be done, but also to the proposed mode of doing it. If the use is merely optional with the owners, or the public benefit is merely incidental, it is not a public use, authorizing the exercise of the jurisdiction of the public utility commission. There must be, in

> general, a right which the law compels the owner to give to the general public. It is not enough that the general prosperity of the public is promoted. Public use is not synonymous with public interest. The true criterion by which to judge of the character of the use is whether the public may enjoy it *by right* or only by permission."

In the decision of the Supreme Court of the United States in Terminal Taxicab Company *vs*. Kutz, *supra*, it was held: "A taxicab company is a common carrier within the meaning of the Act of March 4, 1913 (37 Stat. at L., 938, chap. 150), sec. 8, and hence subject to the jurisdiction of the Public Utilities Commission of the District of Columbia as a 'public utility' in respect of its exercise of its exclusive right under lease from the Washington Terminal Company, the owner of the Washington Union Railway Station, to solicit livery and taxicab business from persons passing to or from trains, and of its exclusive right under contracts with certain Washington hotels to solicit taxicab business from guests, but that part of its business which consists in furnishing automobiles from its central garage on individual orders, generally by telephone, cannot be regarded as a public utility, and the rates charged for such service are therefore not open to inquiry by the Commission." Mr. Justice Holmes, delivering the opinion of the court, in part said:

> "The rest of the plaintiff's business, amounting to four tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service, and no doubt would do so if the pay was uncertain, but it advertises extensively, and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price, probably
> have not quite the mechanical fixity of charges that attends the use of taxicabs from the station and hotels. There is no contract with a third person to serve the public generally. The question whether, as to this part of its business, it is an agency for public use within the meaning of the statute, is more difficult. * * * Although I have not been able to free my mind from doubt, the court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and, for the matter of that, every

> life in all its details, has a public aspect, some bearing' upon the welfare of the community in which it is passed. But, however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive (233 U. S., 407), it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable. It follows that the plaintiff is not bound to give information as to its garage rates."

The Supreme Court of California in the case of Thayer and Thayer *vs*. California Development Company ([1912], 164 Cal., 117), announced, among other things, that the essential feature of a public use is that "it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character." Continuing, reference was made to the decision of the United States Supreme Court in Fallbrook Irrigation District *vs*. Bradley ([1896], 164 U. S., 161), where the United States Supreme Court considered the question of whether or not the water belonging to an irrigation district organized under the California statute of 1887, and acquired for and applied to its authorized uses and purposes, was water dedicated to a public use. Upon this question, the Supreme Court on appeal said:

> "The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that *every resident* in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes,

> and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. * * * We think it clearly appears that all who by reason of their ownership of or connection with any portion of the lands would have occasion to use the water, would in truth have the opportunity to use it upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is public *because all persons have the right to use the water under the same circumstances*. This is sufficient."

The latest pronouncement of the United States Supreme Court here available is found in the case of Producers Transportation Company *vs*. Railroad Commission of the State of California ([1920], 251 U. S., 228). Mr. Justice Van Devanter, delivering the opinion of the court, in part said:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment. * * * On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation. Munn *vs*. Illinois, *supra*.
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> "The state court, upon examining the evidence, concluded that the company voluntarily had devoted the pipe line to the use of the public in transporting oil, and it rested this conclusion upon the grounds * * * that, looking through the maze of contracts, agency agreements and the like, under which the transportation was effected, subordinating form to substance, and having due regard to the agency's ready admission of new members and its exclusion of none,

> it was apparent that the company did in truth carry oil for all producers seeking its service, in other words, for the public. (*See* Pipe Line Cases, 234 U. S., 548.)"

Lastly, we take note of the case of Allen *vs*. Railroad Commission of the State of California ([1918], 179 Cal., 68; 8 A. L. R., 249). It was here held that a water company does not, by undertaking to furnish a water supply to a municipality which will require only a small percentage of its product, become a public utility as to the remainder, which it sells under private contracts. The court observed that its decisions fully recognize that a private water company may be organized to sell water for purposes of private gain, and that in so doing, it does not become a public utility. "To hold that property has been dedicated to a public use," reads the opinion, "is not a trivial thing, and such dedication is never presumed without evidence of unequivocal intention." Continuing, the court discusses what is a public utility in the following language:

> "What is a public utility, over which the state may exercise its regulatory control without regard to the private interests which may be affected thereby? In its broadest sense everything upon which man bestows labor for purposes other
> than those for the benefit of his immediate family is impressed with a public use. No occupation escapes it, no merchant can avoid it, no professional man can deny it. As an illustrative type one may instance the butcher. He deals with the public; he invites and is urgent that the public should deal with him. The character of his business is such that, under the police power of the state, it may well be subject to regulation, and in many places and instances is so regulated. The preservation of cleanliness, the inspection of meats to see that they are wholesome, all such matters are within the due and reasonable regulatory powers of the state or nation. But these regulatory powers are not called into exercise because the butcher has devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility is this, and this only: That the devotion

> to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right."

STATEMENT OF THE PETITIONER'S CASE AND OF THE GOVERNMENT'S CASE

Petitioner contends on the facts, that the evidence shows that the petitioner is operating a small ice plant in Iloilo; that no attempt has been made to supply the needs of all who may apply for accommodation or to expand the plant to meet all demands; that sales have been made to selected customers only, and that the right has been freely exercised to refuse sales not only to whole districts, but constantly to individuals as well; that the greater portion of the business is conducted through signed contracts with selected individuals, and on occasions, when there is a surplus, the same is sold for cash to selected applicants; that no sales are made except to persons who have waived all claim of right to similar accommodation in the future; and that no offer, agreement, or tender of service to the public has ever been made. Petitioner contends, as to the law, that the decisions heretofore referred to are controlling.

The Government has no quarrel with the petitioner as to the facts. But the Attorney-General attempts to differentiate the authorities from the instant situation. The Attorney-General also argues that to sanction special contracts would "open a means of escape from the application of the law."

The result is, therefore, that we have substantial agreement between the petitioner and the government as to the issue, as to the facts, as to the law, and as to the applicable authorities. The question, however, remains as puzzling as before.

Planting ourselves on the authorities, which discuss the subject of public use, the criterion by which to judge of the character of the use is whether the public may enjoy it by right or only by permission. (U. S. *vs*. Tan Piaco, *supra*.) The essential feature of a public use is that it is not confined

to privileged individuals, but is open to the indefinite public. (Thayer and Thayer *vs*. California Development Company, *supra*.) The use is public if all persons have the right to the use under the same circumstances. (Fall brook Irrigation District *vs*. Bradley, *supra*.) If the company did in truth sell ice to all persons seeking its service, it would be a public utility. But if on the other hand, it was organized solely for particular persons under strictly private contracts, and never was devoted by its owners to public use, it could not be held to be a public utility without violating the due process of law clause of the Constitution. (Producers Transportation Co. *vs*. Railroad Commission, *supra*.) And the apparent and continued purpose of the Iloilo Ice and Cold Storage Company has been, and is, to remain a private enterprise and to avoid submitting to the Public Utility law.

The argument for the Government, nevertheless, merits serious consideration. The attempt of the Public Utility Commissioner to intervene in corporate affairs, to protect the public, is commendable. Sympathetic thought should always be given to the facts laid before the Commissioner, with reference to the law under which he is acting.

Aware of the foregoing situation, the members of the Court are of the opinion that the present case is governed by the authorities mentioned in this decision, which means, of course, that, upon the facts shown in the record, the Iloilo Ice and Cold Storage Company is not a public utility within the meaning of the law. Like Mr. Justice Holmes, in his opinion in Terminal Taxicab Company *vs*. Kutz, *supra*, when, in speaking for himself personally, he admitted that he had not been able to free his mind from doubt, so has the writer not been able to free his mind from doubt, but is finally led to accept the authorities as controlling.

JUDGMENT

It is declared that the business of the Iloilo Ice and Cold Storage Company is not a public utility, subject to the control and jurisdiction of the Public Utility Commissioner, and that, accordingly, the decisions of the Public Utility Commissioner and of the Public Utility Board must be revoked, without special finding as to costs. So ordered.

Araullo, C.J., Street, Avanceña,
Johns, and *Romualdez, JJ.,* concur.

CONCURRING

OSTRAND, J.:

I concur in the result on the ground that an ice plant is not a public utility by common law, but is only made so by statute; that in the present case the plant existed in approximately its present form and as, in a then legal sense, a private enterprise, before the statute making such plants public utilities was enacted; and that under these circumstances to deprive the owner of a part of the control over his property amounts to a taking of property without compensation and without due process of law, and cannot be regarded as being within the police power of the State.

I find it difficult to agree to the proposition that an ice plant, the product of which is not intended primarily for the use of the owners thereof but for general consumption, is for private use, merely, and not for "public use" within the meaning of Act No. 2307, the Public Utilities Act. The fact that sales of ice are made under special contracts and that some individuals have been denied the privilege of purchasing cannot alter the fact that the plant is designed to supply the trade and to serve the public as far as the Quantity of ice produced permits and the purchasers are acceptable. To hold that a utility of a public character can escape regulatory control by the simple expedient of arbitrarily excluding a limited number of persons from the enjoyment of its benefits and by posting notices to the effect that it does not deal with the public, will seriously impair the efficacy of the Public Utilities Act. I think a tendency may be discerned in later decisions to give the expression "public use" a broader significance than that given it by the earlier authorities.

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