

**INSURANCE COMPANY OF NORTH AMERICA,
PLAINTIFF-APPELLANT, VS. OSAKA SHOSEN KAISHA (O.S.K-LINE),
AND/OR AMERICAN STEAMSHIP AGENCIES, INC., BUREAU OF
CUSTOMS AND/OR CUSTOMS ARRASTR...**

G.R. No. L-22784. March 28, 1969

Ponente: BARREDO, J.

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BARREDO, J.:

Appeal from the order of the Court of First Instance of Manila dated February 17, 1964 dismissing its Civil Case No. 55836 as to therein defendants Bureau of Customs and/or Customs Arrastre Service upon a motion to dismiss filed by said defendants before answer, under Rule 8 of the Rules of Court of 1940. (Rule 16 of the present Rules.)

On December 27, 1963, plaintiff-appellant Insurance Company of North America instituted the action above-mentioned before the a quo against defendants-appellees Osaka Shosen Kaisha (O.S.K.-Line) and/or American Steamship Agencies, Inc., and Bureau of Customs and/or Customs Arrastre Service. The complaint filed therein alleged, that: On or about October 29, 1962, the SS "HAGUE MARU" took on board at the port of Hamburg, Germany, 22 cases of carpenter's and mechanic's tools, valued at \$3,648.92 C & F Manila, shipped by H. Beutler & Co. of Germany to the consignee of the goods, Solex Tool Corporation, Manila; in Japan, the said cargo was transhipped from the SS "HAGUE MARU" on board the SS "KIKUKO MARU" which supposedly discharged the same in Manila in good order condition with the exception of three(3) cases which were landed in bad order, unto the custody of defendant Bureau of Customs and/or Customs Arrastre Service; the latter thereafter failed to deliver (to the consignee) portion of the goods, and claims for the value of the lost goods, in the amount of P1,279.49, were filed against both defendants Osaka Shosen Kaisha (O.S.K.-Line) and/or American Steamship Agencies, Inc., as owners and/or operators of the above-named vessels and as agent and/or representative of said owners, respectively, defendants Bureau of Customs, operator of the arrastre service at the port of Manila and its subsidiary, Customs Arrastre Service, as well as against plaintiff Insurance Company of North America, as insurer of the said goods; said defendants failed and refused to pay; herein plaintiff was compelled to pay the value of the lost goods and was thereby subrogated to the rights of the owners thereof; the loss occurred while defendant carrier had custody of the cargo and failed to discharge the same or, after discharge of the cargo, while defendant Customs Arrastre Service had custody of the goods, in either of which case, there was violation of the duty to properly and safely carry and discharge, the goods on the part of the carrier or, in the alternative, to make delivery of the goods on the part of defendant Customs Arrastre Service after discharge; demands for reimbursement were duly made by plaintiff but defendants refused; plaintiff was there-upon compelled to obtain the services of counsel incurring thereby further damages as or by way of attorney's fees; and plaintiff is at present uncertain against whom of defendants it is entitled to relief.

As to the personality of the defendants Bureau of Customs and/or Customs Arrastre Service, the allegation in said complaint reads:

"3. Defendant Bureau of Customs is to the best information, knowledge and belief of plaintiff, a government office organized under the Customs Law, the operator of the arrastre service at the Port of Manila since November 21, 1962 through its Branch office/subsidiary, defendant Customs Arrastre Service, charged with the duty of receiving imported cargo discharged from ocean vessels and of safekeeping the same for delivery to consignees or owners thereof upon delivery being authorized by defendant Bureau of Customs and upon the arrastre fee being paid, with office address at the Terminal Building, Port Area, Manila, where it may be served with summons." (Record on Appeal, p. 3)

On these premises, plaintiff prayed for judgment ordering defendants to pay, inter alia, "jointly and severally or whichever of defendants may be found liable to pay plaintiff", the value of the lost goods.

As already stated, upon motion of defendants Bureau of Customs and/or Customs Arrastre Service, based on the ground that the cause of action alleged against them did not come within the jurisdiction of the court of first instance but within that of the City Court of Manila, on February 17, 1964, the court a quo dismissed the case against said defendants. Upholding the contention of said defendants, His Honor held that "in the instant case the defendant Osaka Shosen Kaisha (O.S.K) is sued for breach of contract of carriage while the Bureau of Customs and/or Customs Arrastre Service is sued for breach of contract of deposit. The contract of carriage here involved is a maritime transaction and actions arising from it are cognizable by the local Court of First Instance. The contract of deposit, on the other hand, is, not maritime and actions arising from it in an amount not exceeding P10,000 are cognizable by the local City Court. Section 5 of Rule 2 subjects the joinder of causes of action 'to rules regarding jurisdiction, venue, and joinder of parties.' In view of the fact that the action against movant is cognizable by the local City Court while the action against Osaka Shosen Kaisha is cognizable by the local Court of First Instance, permissive joinder of parties or causes of action in the instant case cannot be properly allowed. x x x. The plaintiff must, therefore, determine for sure which party to sue and where." (pp. 13-14, Record on Appeal.)

From this order of dismissal, plaintiff has appealed to this Court assigning only two errors, namely:

I

"THE LOWER COURT ERRED IN DISMISSING THE ACTION AS TO THE BUREAU OF CUSTOMS AND/OR CUSTOMS ARRASTRE SERVICE ON A FINDING THAT IT HAD NO JURISDICTION OVER THE APPELLANT'S CAUSE OF ACTION AS TO SAID DEFENDANT FOR AN AMOUNT LESS THAN P10,000.00.

II

"THE LOWER COURT ERRED IN FINDING THAT THE JOINDER OF PARTIES AND OF THE CAUSE OF ACTION IN THE INSTANT SUIT CANNOT BE PROPERLY ALLOWED."

which are discussed together in appellant's brief.

While the two errors thus assigned by appellant are, in view of the majority of this Court, sustainable, considering the already existing long line of precedents^[1] holding that the ground of dismissal invoked by the trial court, as above-quoted, is erroneous,^[2] We are, nevertheless, of the unanimous opinion that the present appeal cannot prosper, because the case of the plaintiff-appellant suffers from a more obvious and indubitable fatal defect. It is already definitely settled that herein defendants-appellees, the Bureau of Customs and/or the Customs Arrastre Service, being mere arms of the national government, are protected by the non-suability of the Republic of the Philippines whenever, it has not given its consent to be sued,^[3] particularly, where, as in this case, there is no allegation in the complaint that said defendants, much less the Republic, has given such

consent.[4] The fact that defendants-appellees have not raised such defense at any stage of this case is of no moment. Indeed, whether We hold that the matter of non-suability is jurisdictional, either over the subject-matter or of the person of the defendants, or We consider it as failure to state a cause of action, when the consent of the State is not alleged in the complaint,[5] as in this case, in line with the decision of this Court in *American Insurance Co. vs. Macondray & Co.*, (see footnote No. 4) We are all agreed that whichever of these three views may be the most accurate one, said defense may be invoked by the courts sua sponte at any stage of the proceedings. Since February 27, 1968, this Court has dismissed cases similar to the one before Us now even without awaiting for the briefs of the parties, in order to save them and this Court needless expenses of time, money and effort." (*Do-mestic Ins. Co. of the Phil. vs. American Pioneer Line*, supra, and later in *Firemen's Fund Ins. Co. vs. Maersk Line Far East Service, et al.*, G. R. No. L-27189, 1969).

WHEREFORE, the order of dismissal of the lower court is affirmed, with costs against appellant.

Concepcion, C.J., Reyes, JBL, Dizon, Makalintal, Zaldivar, Sanchez, Capistrano, and Teehankee, JJ., concur.
Ruiz Castro, Fernando, JJ., concur in the result.

[1] *Rizal Surety & Insurance Company vs. MRR*, L-20875, April 30, 1966; *Switzerland General Insurance Co. Ltd. vs. Java Pacific & Hoegh Lines, et al.*, L-21760, April 30, 1966; *The American Insurance Co. vs. Ma-condray & Co., Inc.*, L-24031, August 19, 1967; *Fire-men's Insurance Co. vs. Manila Port Service, et al.*, L-22810, August 31, 1967; *Hanover Insurance Co. vs. Manila Port Service, et al.*, L-20976, January 23, 1967; *Fulton Insurance Co. vs. Manila Railroad, et al.*, L-24263, November 18, 1967; *Insurance Company of North America vs. Manila Port Service, et al.*, L--24887, April 22, 1968; *Insurance Company of North America vs. United States Lines Co., et al.*, L--21839, April 30, 1968.

The effect of the holding in the above-cited cases was stated in *Fulton Insurance Co. vs. Manila Railroad Co.*, supra, in the following language:

"The prevailing rule is that a con-signee when uncertain of the place and time of the loss or damage to its goods, may in one case seek relief alternatively, against the arrastre operators under a con-tract of deposit and the steamship company under a contract of carriage by sea. The action calls for the exercise of admiralty jurisdiction, which municipal courts do not have, and is within the original exclusive jurisdiction of courts of first instance; and since section 5, Rule 2 of the Rules of Court permits the joinder of causes of action in the alternative, it follows that even if one of the causes of action were within the exclusive jurisdict-ion of a lower court by reason of the amount of the demand involved, the Court of First Instance has jurisdiction over both."

[2] True it is that section 5 of Rule 2 of the Revised Rules of Court provides that:

"SEC. 5. Joinder of causes of action.- Subject to rules regarding jurisdiction, venue and joinder of parties, a party may in one pleading state, in the alter-native or otherwise, as many causes of action as he may have against an oppos-ing party (a) if the said causes of act-ion arise out of the same contract, trans-action or relation between the parties, or (b) if the causes of action are for demands for money, or are of the same nature and character.

In the cases falling under clause (a) of the preceding paragraph, the act-ion shall be filed in the inferior court unless any of the causes joined falls within the jurisdiction of the Court of First Instance, in which case it shall be filed in the latter court.

In the cases falling under clause the jurisdiction shall be determined by the aggregate amount of the demands, if for money, or by their nature and character, if otherwise."

and that under the second paragraph of this provision, it is permissible to join in a single action in the Court of First Instance a cause of action which per se is within the exclusive original jurisdiction of the inferior court with another cause of action coming under the exclusive original jurisdiction of the court of first instance, provided that both causes arise out of the same contract, transaction or relation between the parties or are for demands for money.

My doubt is as to the power of this Court to promulgate such a rule as this. Indisputably, jurisdiction can be conferred only by, a law of Congress, not by a rule of court, even as this Court has constitutional powers of rule-making. Matters of jurisdiction involve the conferment of power to act and are definitely substantive in character. On the other hand, the constitutional inhibition is unequivocal: " Said rule ... shall not diminish, increase or modify substantive rights." (sec. 13, Art. VIII, Constitution of the Philippines.)

Only the other day, precisely on this point, the Chief Justice spoke for the Court in the case of Makati Development Corporation vs. Pedro C. Tanjuatco, et al., G. R. No. L-26443 1969, thiswise:

x x x To begin with, the jurisdiction of our courts over the subject-matter of justiciable controversies is governed by Rep. Act No. 296, as amended, pursuant to which (Sec. 7 of Republic Act No. 3828) municipal courts shall have exclusive original jurisdiction in all civil cases in which the demand, exclusive of interest, or the value of the property in controversy' amounts to not more than 'ten thousand pe-sos.' Secondly, 'the power to define, prescribe, and apportion the jurisdiction of the various courts' belongs to Congress (Sec. 2, Art. VIII of the Constitution) and is beyond the rule-making power of the Sup-reme Court, which is limited to matters 'concerning pleading, practice, and procedure in all courts, and the admission to the practice of law.'(Sec. 13, Art VIII of the Cons-titution) x x x."

Can this Court declare by the exercise of its rule-making power, not by jurisprudential inter-pretation, that a case may be filed in a certain court, when the Judiciary Act or any other law vests jurisdiction over said case in another court? And when We do it by interpretation, would that not amount to unconstitutional judicial legislation, considering that the Constitution gives this Court the rule-making only as to mat-ters of pleading, practice and procedure and the admission of members of the bar? Until these questions are properly and definitely resolved, I will choose to dispose of cases of the nature of the present one by invoking non-suability of the Bureau of Customs and/or the Customs Arrastre Ser-vice, the adjective aspects of which, I have also discussed in another footnote to this decision.

[3] Equitable Insurance & Casualty Co., Inc. vs. Smith Bell & Co., (Phil.), Inc., L-24388, August 26, 1967; Insurance Company of North America vs. Republic of the Philippines, et al., L-27515, September 5, 1967; Philippine First Insurance Company vs. Customs Ar-rastre Service, L-26951, September 12, 1967; Caltex (Phil.), Inc. vs. Customs Arrastre Service, L-26947, December 26, 1967; Domestic Insurance Company of the Philippines vs. American Pioneer Line, L-28651, Feb-ruary 27, 1968; Domestic Insurance Company of the Philippines vs. Republic of the Philippines, L- 29362, September 27, 1968.

[4] American Insurance Company vs. Macondray & Company, Inc., supra.

[5] This footnote is purely the opinion of the writer of this decision and is not intended to bind this Court. The chief purpose is to clarify points of procedure which have long been assailing my mind.

In my humble opinion, the decisions of this Court upholding the non-suability of the Bureau of Customs and/or the Customs Arrastre Service do not reveal a uniform, definite and concrete rul-ing as to the exact ground why the case against said bureau and service have been dismissed, even when such defense was raised for the first time only in this Court in the course of the appeal and, in fact, even if it had not been raised at all by said entities, and

what is more, even before the parties have filed their briefs. As I see it, three approaches are discernible from the opinions in these decided cases, albeit they are not clearly expressed as such, namely: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction of the person of the defendant; and (3) failure of the complaint to state a cause of action, in cases where the consent of the Republic to be sued is not alleged in the complaint. I consider it imperative that this point should be squarely resolved, if only to erase any possible doubt as to the power of this Court to dismiss sua sponte cases against the Republic, filed without its consent, and at any stage the appeals therein is found.

As we all know it, there would be no doubt as to such power, if the real ground of such dismissal were that the lack of consent of the state for the bringing of the suit against it is that because of such lack of consent, the court has no jurisdiction over the subject matter, since it is elementary that this defense can be raised at any stage of the proceedings and may even be raised collaterally.

In *American Insurance Co. vs. Macondray*, supra, (see footnote No. 4) however, this Court held;

“Non-suability of the State without its consent is one of the basic principles which underlie our republican form of government. It derives its force from the will of the people in freely creating a representative government through which they have agreed to exercise the powers and discharge the duties of the sovereignty for the common good and general welfare. (*Metran vs. Paredes*, L-1232, January 12, 1948) Justice Holmes has aptly stated the basis for the principle thus: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the legal and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." (*Kawanana-kaoa vs. Polyblank*, 206 U.S. 349) A contrary principle would dissipate the time and energy of the State in endless suits against it, which would be subversive of the public interest. (20 Supreme Court Reports Annotated 1108)

My considered view is that, in effect, this ruling means that the real reason why, from the procedural point of view, a suit against the state filed without its consent must be dismissed is because, necessarily, any such complaint cannot state a cause of action, since, as the above decision confirms, "there can be no legal right as against the authority that makes the law on which the right depends." That a cause of action cannot exist unless the plaintiff has a legal right which the defendant is under obligation to respect is such an unquestioned proposition in remedial law that the citation of authorities to support it is superfluous.

The question that arises now is, may failure to state a cause of action be alleged as a ground of dismissal for the first time on appeal? In the case of *Reyes vs. Court of Appeals*, this Court did hold that this ground of dismissal or defense may not be raised for the first time on appeal but only in the trial court, but not without some misgivings which were expressed in the separate concurring opinion of then Mr. Justice, now Chief Justice Roberto Concepcion, in this succinct manner:

"Failure of defendant Ismaela Dimagiba to allege in the Court of First Instance that plaintiffs have no cause of action, cannot vest one to the latter if they have none. Said admission would not warrant, therefore, a judgment for the plaintiffs if the records do not show that they have a cause of action against the defendant. Hence, I find myself unable to subscribe the view expressed in the main opinion of the Court, insofar as it might seem to justify the opposite conclusion." (G. R. Nos. L-5616 & 5620, July 31, 1954.)

To my mind, this very apt observations of the Chief Justice provide the perspective for the solution of the problem I have posed. Indeed, if a complaint suffers from the infirmity of not stating facts sufficient to constitute a cause of action in the trial court, how could there be a cause of action in it just because the case is already on appeal? Again, if a complaint should be dismissed by the trial court because it states no cause of action, how could such a complaint be the basis of a proceeding on appeal? The answer, I submit, is found in section 2 of Rule

9 which provides:

"SEC. 2. Defenses and objections not pleaded deemed waived.- Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived; except the failure to state a cause of action which may be alleged in a later pleading, if one is permitted, or by motion for judgment on the pleadings, or at the trial on the merits; but in the last instance, the motion shall be disposed of as provided in section 5 of Rule 10 in the light of any evidence which may have been received. Whenever it appears that the court has no jurisdiction over the subject-matter, it shall dismiss the action."

According to this provision, while it is true that failure to state a cause of action may be raised at the trial on the merits, the motion in such respect must be resolved in the light of the evidence that the plaintiff might have already presented at the time the question is raised, such that, if plaintiff has already cured the defect by introducing evidence on the omitted matter without objection of the defendant, the motion should be denied; otherwise, it should be upheld. Consequently, it follows logically that in cases where the defect of failure to state a cause of action is under circumstances incurable, because there is no evidence that can be presented to establish the missing element of the purported cause of action, there is no reason why such a defense may not be invoked for the first time on appeal, since even by then the defect would still subsist. The requirement that this defense should be raised at the trial is only to give the plaintiff a chance to cure the defect of his complaint, but if, as in this case, the lack of consent of the state cannot be cured because it is a matter of judicial notice that there is no law allowing the present suit, (only Congress that can give such consent) the reason for the rule cannot obtain, hence it is clear that such non-suability may be raised even on appeal. After all, the record on appeal can be examined to find out if the consent of the state is alleged in the complaint.

How about lack of jurisdiction of the person of the defendant? There are reported cases in this jurisdiction wherein dismissal on the ground of non-suability was premised on lack of jurisdiction of the person of the defendant. In *Merritt vs. Government*, 34 Phil. 311, this Court held:

"By consenting to be sued a state simply waives its immunity from suit. It does not thereby concede its liability to plaintiff, or create any cause of action in his favor, or extend its liability to any cause not previously recognized. It merely gives a remedy to enforce a preexisting liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense."

Likewise, in *Dizon vs. Rodriguez*, G. R. Nos. L-20300-01, 20355-56, April 30, 1965, a ruling of similar view was laid down, thus:

"With respect to the contention of the Republic of the Philippines that the order for the reimbursement by it of such necessary expenses constitutes a judgment against the government in a suit not consented by it, suffice it to say that the Republic, on its own initiative, asked and was permitted to intervene in the case and thereby submitted itself voluntarily to the jurisdiction of the court."

More explicitly, this Court ruled in *Salgado vs. Ramos*, 64 Phil. 724, as follows:

"For the foregoing considerations, this court is of the opinion and so holds: (1) That the Insular Government, as principal, is the really, interested party to an action brought to recover from the Director of Lands interest allegedly charged in excess by said official in the performance of his duties; and (2) that the presentation of the claim to the Insular Auditor and the disapproval thereof are indispensable requisites for the competent courts to acquire jurisdiction over the Government of the Philippine Islands in actions involving moneyed claims."

So, the question that arises again is this: May such lack of jurisdiction of the person of the defendant be raised for the first time on appeal? Ordinarily, once the defendant enters his appearance or files an answer or otherwise

submits effectively to the jurisdiction of the court, he cannot later on question such jurisdiction over his person. It is plain, however, that as far as the state is concerned, this rule of waiver cannot apply, for the simple reason that in the case of the state, as already stated, the waiver may not be made by anyone other than Congress, so any appearance in any form made on its behalf would be ineffective and invalid if not authorized by a law duly passed by Congress. Besides, the state has to act thru subalterns who are not always prepared to act in the premises with the necessary capability, and instances, there can be when thru ignorance, negligence or malice, the interests of the state may not be properly protected because of the erroneous appearance made on its behalf by a government lawyer, or some other officer, hence, as a matter of public policy, the law must be understood as insulating the state from such undesirable contingencies and leaving it free to invoke its sovereign attributes at any time and at any stage of a judicial proceeding, under the principle that the mistakes and omissions of its officers do not bind it.

It is my hope that with this discussion as a starting point, this Court will soon adopt what in its opinion is the most acceptable view and thereby establish a definite, clear and uniform line of legal reasoning in cases of this nature. I would have wanted to ask the Court to do it in this case, but as there are so many pending cases awaiting our attention, and after all, the result under any of these theories I have explained is the same and justifies the decisions I have referred to as well as the others of similar import, I am satisfied with voicing my humble personal observations in this footnote. I will, announce my own conclusion as to which of the three approaches is, in my view, correct, after the Court has had full opportunity to fully deliberate on the matter, as then my conclusion will carry with it the benefit of a full exchange of views with the rest of the members of the Court who, I am sure, can give me all the light I need to arrive at a correct position.

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