

THE HOLY SEE, PETITIONER, VS. THE HON. ERIBERTO U. ROSARIO, JR., AS PRESIDING JUDGE OF THE REGIONAL TRIAL COURT OF MAKATI, BRANCH 61 AND STARBRIGHT SALES ENTERPRISES, INC., RESP...

G.R. No. 101949. December 01, 1994

Ponente: QUIASON, J.

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QUIASON, J.:

This is a petition for certiorari under Rule 65 of the Revised Rules of Court to reverse and set aside the Orders dated June 20, 1991 and September 19, 1991 of the Regional Trial Court, Branch 61, Makati, Metro Manila in Civil Case No. 90-183.

The Order dated June 20, 1991 denied the motion of petitioner to dismiss the complaint in Civil Case No. 90--183, while the Order dated September 19, 1991 denied the motion for reconsideration of the June 20, 1991 Order.

Petitioner is the Holy See who exercises sovereignty over the Vatican City in Rome, Italy, and is represented in the Philippines by the Papal Nuncio.

Private respondent, Starbright Sales Enterprises, Inc., is a domestic corporation engaged in the real estate business.

This petition arose from a controversy over a parcel of land consisting of 6,000 square meters (Lot 5-A, Transfer Certificate of Title No. 390440) located in the Municipality of Paranaque, Metro Manila and registered in the name of petitioner.

Said Lot 5-A is contiguous to Lots 5-B and 5-D which are covered by Transfer Certificates of Title Nos. 271108 and 265388 respectively and registered in the name of the Philippine Realty Corporation (PRC).

The three lots were sold to Ramon Licup, through Msgr. Domingo A. Cirilos, Jr., acting as agent of the sellers. Later, Licup assigned his rights to the sale to private respondent.

In view of the refusal of the squatters to vacate the lots sold to private respondent, a dispute arose as to who of the parties has the responsibility of evicting and clearing the land of squatters. Complicating the relations of the parties was the sale by petitioner of Lot 5-A to Tropicana Properties and Development Corporation (Tropicana).

I

On January 23, 1990, private respondent filed a complaint with the Regional Trial Court, Branch 61, Makati, Metro Manila for annulment of the sale of the three parcels of land, and specific performance and damages against petitioner, represented by the Papal Nuncio, and three other defendants: namely, Msgr. Domingo A. Cirilos, Jr., the PRC and Tropicana (Civil Case No. 90-183).

The complaint alleged that: (1) on April 17, 1988, Msgr. Cirilos, Jr., on behalf of petitioner and the PRC, agreed to sell to Ramon Licup Lots 5-A, 5-B and 5-D at the price of P1,240.00 per square meter; (2) the agreement to sell was made on the condition that earnest money of P100,000.00 be paid by Licup to the sellers, and that the sellers clear the said lots of squatters who were then occupying the same; (3) Licup paid the earnest money to Msgr. Cirilos; (4) in the same month, Licup assigned his rights over the property to private respondent and informed the sellers of the said assignment; (5) thereafter, private respondent demanded from Msgr. Cirilos that the sellers fulfill their undertaking and clear the property of squatters; however, Msgr. Cirilos informed private respondent of the squatters' refusal to vacate the lots, proposing instead either that private respondent undertake the eviction or that the earnest money be returned to the latter; (6) private respondent counterproposed that if it would undertake the eviction of the squatters, the purchase price of the lots should be reduced from P1,240.00 to P1,150.00 per square meter; (7) Msgr. Cirilos returned the earnest money of P100,000.00 and wrote private respondent giving it seven days from receipt of the letter to pay the original purchase price in cash; (8) private respondent sent the earnest money back to the sellers, but later discovered that on March 30, 1989, petitioner and the PRC, without notice to private respondent, sold the lots to Tropicana, as evidenced by two separate Deeds of Sale, one over Lot 5-A, and another over Lots 5-B and 5-D; and that the sellers' transfer certificate of title over the lots were cancelled, transferred and registered in the name of Tropicana; (9) Tropicana induced petitioner and the PRC to sell the lots to it and thus enriched itself at the expense of private respondent; (10) private respondent demanded the rescission of the sale to Tropicana and the reconveyance of the lots, to no avail; and (11) private respondent is willing and able to comply with the terms of the contract to sell and has actually made plans to develop the lots into a townhouse project, but in view of the sellers' breach, it lost profits of not less than P30,000,000.00.

Private respondent thus prayed for: (1) the annulment of the Deeds of Sale between petitioner and the PRC on the one hand, and Tropicana on the other; (2) the reconveyance of the lots in question; (3) specific performance of the agreement to sell between it and the owners of the lots; and (4) damages.

On June 8, 1990, petitioner and Msgr. Cirilos separately moved to dismiss the complaint - petitioner for lack of jurisdiction based on sovereign immunity from suit, and Msgr. Cirilos for being an improper party. An opposition to the motion was filed by private respondent.

On June 20, 1991, the trial court issued an order denying, among others, petitioner's motion to dismiss after finding that petitioner "shed off [its] sovereign immunity by entering into the business contract in question" (Rollo, pp. 20-21).

On July 12, 1991, petitioner moved for reconsideration of the order. On August 30, 1991, petitioner filed a "Motion for a Hearing for the Sole Purpose of Establishing Factual Allegation for Claim of Immunity as a Jurisdictional Defense." So as to facilitate the determination of its defense of sovereign immunity, petitioner prayed that a hearing be conducted to allow it to establish certain facts upon which the said defense is based. Private respondent opposed this motion as well as the motion for reconsideration.

On October 1, 1991, the trial court issued an order deferring the resolution on the motion for reconsideration until after trial on the merits and directing petitioner to file its answer (Rollo, p. 22).

Petitioner forthwith elevated the matter to us. In its petition, petitioner invokes the privilege of sovereign immunity only on its own behalf and on behalf of its official representative, the Papal Nuncio.

On December 9, 1991, a Motion for Intervention was filed before us by the Department of Foreign Affairs, claiming that it has a legal interest in the outcome of the case as regards the diplomatic immunity of petitioner, and that it "adopts by reference, the allegations contained in the petition of the Holy See insofar as they refer to arguments relative to its claim of sovereign immunity from suit" (Rollo, p. 87).

Private respondent opposed the intervention of the Department of Foreign Affairs. In compliance with the resolution of this Court, both parties and the Department of Foreign Affairs submitted their respective memoranda.

II

A preliminary matter to be threshed out is the procedural issue of whether the petition for certiorari under Rule 65 of the Revised Rules of Court can be availed of to question the order denying petitioner's motion to dismiss. The general rule is that an order denying a motion to dismiss is not reviewable by the appellate courts, the remedy of the movant being to file his answer and to proceed with the hearing before the trial court. But the general rule admits of exceptions, and one of these is when it is very clear in the records that the trial court has no alternative but to dismiss the complaint (*Philippine National Bank v. Florendo*, 206 SCRA 582 [1992]; *Zagada v. Civil Service Commission*, 216 SCRA 114 [1992]). In such a case, it would be a sheer waste of time and energy to require the parties to undergo the rigors of a trial.

The other procedural question raised by private respondent is the personality or legal interest of the Department of Foreign Affairs to intervene in the case in behalf of the Holy See (*Rollo*, pp. 186-190).

In Public International Law, when a state or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, it requests the Foreign Office of the state where it is sued to convey to the court that said defendant is entitled to immunity.

In the United States, the procedure followed is the process of "suggestion," where the foreign state or the international organization sued in an American court requests the Secretary of State to make a determination as to whether it is entitled to immunity. If the Secretary of State finds that the defendant is immune from suit, he, in turn, asks the Attorney General to submit to the court a "suggestion" that the defendant is entitled to immunity. In England, a similar procedure is followed, only the Foreign Office issues a certification to that effect instead of submitting a "suggestion" (*O'Connell*, 1 International Law 130 [1965]; Note: Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations, 50 Yale Law Journal 1088 [1941]).

In the Philippines, the practice is for the foreign government or the international organization to first secure an executive endorsement of its claim of sovereign or diplomatic immunity. But how the Philippine Foreign Office conveys its endorsement to the courts varies. In *International Catholic Migration Commission v. Calleja*, 190 SCRA 130 (1990), the Secretary of Foreign Affairs just sent a letter directly to the Secretary of Labor and Employment, informing the latter that the respondent-employer could not be sued because it enjoyed diplomatic immunity. In *World Health Organization v. Aquino*, 48 SCRA 242 (1972), the Secretary of Foreign Affairs sent the trial court a telegram to that effect. In *Baer v. Tizon*, 57 SCRA 1 (1974), the U.S. Embassy asked the Secretary of Foreign Affairs to request the Solicitor General to make, in behalf of the Commander of the United States Naval Base at Olongapo City, Zambales, a "suggestion" to respondent Judge. The Solicitor General embodied the "suggestion" in a Manifestation and Memorandum as *amicus curiae*.

In the case at bench, the Department of Foreign Affairs, through the Office of Legal Affairs moved with this Court to be allowed to intervene on the side of petitioner. The Court allowed the said Department to file its memorandum in support of petitioner's claim of sovereign immunity.

In some cases, the defense of sovereign immunity was submitted directly to the local courts by the respondents through their private counsels (*Raquiza v. Bradford*, 75 Phil. 50 [1945]; *Miquiabas v. Philippine-Ryukyus Command*, 80 Phil. 262 [1948]; *United States of America v. Guinto*, 182 SCRA 644 [1990] and companion cases). In cases where the foreign states bypass the Foreign Office, the courts can inquire into the facts and make

their own determination as to the nature of the acts and transactions involved.

III

The burden of the petition is that respondent trial court has no jurisdiction over petitioner, being a foreign state enjoying sovereign immunity. On the other hand, private respondent insists that the doctrine of non-suability is not anymore absolute and that petitioner has divested itself of such a cloak when, of its own free will, it entered into a commercial transaction for the sale of a parcel of land located in the Philippines.

A. The Holy See

Before we determine the issue of petitioner's non-suability, a brief look into its status as a sovereign state is in order.

Before the annexation of the Papal States by Italy in 1870, the Pope was the monarch and he, as the Holy See, was considered a subject of International Law. With the loss of the Papal States and the limitation of the territory under the Holy See to an area of 108.7 acres, the position of the Holy See in International Law became controversial (Salonga and Yap, Public International Law 36-37 [1992]).

In 1929, Italy and the Holy See entered into the Lateran Treaty, where Italy recognized the exclusive dominion and sovereign jurisdiction of the Holy See over the Vatican City. It also recognized the right of the Holy See to receive foreign diplomats, to send its own diplomats to foreign countries, and to enter into treaties according to International Law. (Garcia, Questions and Problems In International Law, Public and Private 81 [1948]).

The Lateran Treaty established the statehood of the Vatican City "for the purpose of assuring to the Holy See absolute and visible independence and of guaranteeing to it indisputable sovereignty also in the field of international relations" (O'Connell, I International Law 311 [1965]).

In view of the wordings of the Lateran Treaty, it is difficult to determine whether the statehood is vested in the Holy See or in the Vatican City. Some writers even suggested that the treaty created two international persons - the Holy See and Vatican City (Salonga and Yap, supra., 37).

The Vatican City fits into none of the established categories of states, and the attribution to it of "sovereignty" must be made in a sense different from that in which it is applied to other states (Fenwick, International Law 124-125 [1948]; Cruz, International Law 37 [1991]). In a community of national states, the Vatican City represents an entity organized not for political but for ecclesiastical purposes and international objects. Despite its size and object, the Vatican City has an independent government of its own, with the Pope, who is also head of the Roman Catholic Church, as the Holy See or Head of State, in conformity with its traditions, and the demands of its mission in the world. Indeed, the world-wide interests and activities of the Vatican City are such as to make it in a sense an "international state" (Fenwick, supra., 125; Kelsen, Principles of International Law 160 [1956]).

One authority wrote that the recognition of the Vatican City as a state has significant implication - that it is possible for any entity pursuing objects essentially different from those pursued by states to be invested with international personality (Kunz, The Status of the Holy See in International Law, 46 The American Journal of International Law 308 [1952]).

Inasmuch as the Pope prefers to conduct foreign relations and enter into transactions as the Holy See and not in the name of the Vatican City, one can conclude that in the Pope's own view, it is the Holy See that is the international person.

The Republic of the Philippines has accorded the Holy See the status of a foreign sovereign. The Holy See,

through its Ambassador, the Papal Nuncio, has had diplomatic representations with the Philippine government since 1957 (Rollo, p. 87). This appears to be the universal practice in international relations.

B. Sovereign Immunity

As expressed in Section 2 of Article II of the 1987 Constitution, we have adopted the generally accepted principles of International Law. Even without this affirmation, such principles of International Law are deemed incorporated as part of the law of the land as a condition and consequence of our admission in the society of nations (*United States of America v. Guinto*, 182 SCRA 644 [1990]).

There are two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory, a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory, the immunity of the sovereign is recognized only with regard to public acts or acts *jure imperii* of a state, but not with regard to private acts or acts *jure gestionis* (*United States of America v. Ruiz*, 136 SCRA 487 [1987]; *Coquia and Defensor-Santiago*, Public International Law 194 [1984]).

Some states passed legislation to serve as guidelines for the executive or judicial determination when an act may be considered as *jure gestionis*. The United States passed the Foreign Sovereign Immunities Act of 1976, which defines a commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." Furthermore, the law declared that the "commercial character of the activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." The Canadian Parliament enacted in 1982 an Act to Provide For State Immunity In Canadian Courts. The Act defines a "commercial activity" as any particular transaction, act or conduct or any regular course of conduct that by reason of its nature, is of a "commercial character."

The restrictive theory, which is intended to be a solution to the host of problems involving the issue of sovereign immunity, has created problems of its own. Legal treatises and the decisions in countries which follow the restrictive theory have difficulty in characterizing whether a contract of a sovereign state with a private party is an act *jure gestionis* or an act *jure imperii*.

The restrictive theory came about because of the entry of sovereign states into purely commercial activities remotely connected with the discharge of governmental functions. This is particularly true with respect to the Communist states which took control of nationalized business activities and international trading.

This Court has considered the following transactions by a foreign state with private parties as acts *jure imperii*: (1) the lease by a foreign government of apartment buildings for use of its military officers (*Syquia v. Lopez*, 84 Phil. 312 [1949]); (2) the conduct of public bidding for the repair of a wharf at a United States Naval Station (*United States of America v. Ruiz*, *supra.*); and (3) the change of employment status of base employees (*Sanders v. Veridiano*, 162 SCRA 88 [1988]).

On the other hand, this Court has considered the following transactions by a foreign state with private parties as acts *jure gestionis*: (1) the hiring of a cook in the recreation center, consisting of three restaurants, a cafeteria, a bakery, a store, and a coffee and pastry shop at the John Hay Air Station in Baguio City, to cater to American servicemen and the general public (*United States of America v. Rodrigo*, 182 SCRA 644 [1990]); and (2) the bidding for the operation of barber shops in Clark Air Base in Angeles City (*United States of America v. Guinto*, 182 SCRA 644 [1990]). The operation of the restaurants and other facilities open to the general public is undoubtedly for profit as a commercial and not a governmental activity. By entering into the employment contract with the cook in the discharge of its proprietary function, the United States government impliedly divested itself

of its sovereign immunity from suit.

In the absence of legislation defining what activities and transactions shall be considered "commercial" and as constituting acts *jure gestionis*, we have to come out with our own guidelines, tentative they may be.

Certainly, the mere entering into a contract by a foreign state with a private party cannot be the ultimate test. Such an act can only be the start of the inquiry. The logical question is whether the foreign state is engaged in the activity in the regular course of business. If the foreign state is not engaged regularly in a business or trade, the particular act or transaction must then be tested by its nature. If the act is in pursuit of a sovereign activity, or an incident thereof, then it is an act *jure imperii*, especially when it is not undertaken for gain or profit.

As held in *United States of America v. Guinto*, (*supra*):

"There is no question that the United States of America, like any other state, will be deemed to have impliedly waived its non-suability if it has entered into a contract in its proprietary or private capacity. It is only when the contract involves its sovereign or governmental capacity that no such waiver may be implied."

In the case at bench, if petitioner has bought and sold lands in the ordinary course of a real estate business, surely the said transaction can be categorized as an act *jure gestionis*. However, petitioner has denied that the acquisition and subsequent disposal of Lot 5-A were made for profit but claimed that it acquired said property for the site of its mission or the Apostolic Nunciature in the Philippines. Private respondent failed to dispute said claim.

Lot 5-A was acquired by petitioner as a donation from the Archdiocese of Manila. The donation was made not for commercial purpose, but for the use of petitioner to construct thereon the official place of residence of the Papal Nuncio. The right of a foreign sovereign to acquire property, real or personal, in a receiving state, necessary for the creation and maintenance of its diplomatic mission, is recognized in the 1961 Vienna Convention on Diplomatic Relations (Arts. 20-22). This treaty was concurred in by the Philippine Senate and entered into force in the Philippines on November 15, 1965.

In Article 31(a) of the Convention, a diplomatic envoy is granted immunity from the civil and administrative jurisdiction of the receiving state over any real action relating to private immovable property situated in the territory of the receiving state which the envoy holds on behalf of the sending state for the purposes of the mission. If this immunity is provided for a diplomatic envoy, with all the more reason should immunity be recognized as regards the sovereign itself, which in this case is the Holy See.

The decision to transfer the property and the subsequent disposal thereof are likewise clothed with a governmental character. Petitioner did not sell Lot 5-A for profit or gain. It merely wanted to dispose off the same because the squatters living thereon made it almost impossible for petitioner to use it for the purpose of the donation. The fact that squatters have occupied and are still occupying the lot, and that they stubbornly refuse to leave the premises, has been admitted by private respondent in its complaint (Rollo, pp. 26, 27).

The issue of petitioner's non-suability can be determined by the trial court without going to trial in the light of the pleadings, particularly the admission of private respondent. Besides, the privilege of sovereign immunity in this case was sufficiently established by the Memorandum and Certification of the Department of Foreign Affairs. As the department tasked with the conduct of the Philippines' foreign relations (Administrative Code of 1987, Book IV, Title I, Sec. 3), the Department of Foreign Affairs has formally intervened in this case and officially certified that the Embassy of the Holy See is a duly accredited diplomatic mission to the Republic of the Philippines exempt from local jurisdiction and entitled to all the rights, privileges and immunities of a diplomatic mission or embassy in this country (Rollo, pp. 156-157). The determination of the executive arm of government that a state or instrumentality is entitled to sovereign or diplomatic immunity is a political question that is conclusive upon

the courts (*International Catholic Migration Commission v. Calleja*, 190 SCRA 130 [1990]). Where the plea of immunity is recognized and affirmed by the executive branch, it is the duty of the courts to accept this claim so as not to embarrass the executive arm of the government in conducting the country's foreign relations (*World Health Organization v. Aquino*, 48 SCRA 242 [1972]). As in *International Catholic Migration Commission* and in *World Health Organization*, we abide by the certification of the Department of Foreign Affairs.

Ordinarily, the procedure would be to remand the case and order the trial court to conduct a hearing to establish the facts alleged by petitioner in its motion. In view of said certification, such procedure would however be pointless and unduly circuitous (*Ortigas & Co. Ltd. Partnership v. Judge Tirso Velasco*, G.R. No. 109645, July 25, 1994).

IV

Private respondent is not left without any legal remedy for the redress of its grievances. Under both Public International Law and Transnational Law, a person who feels aggrieved by the acts of a foreign sovereign can ask his own government to espouse his cause through diplomatic channels.

Private respondent can ask the Philippine government, through the Foreign Office, to espouse its claims against the Holy See. Its first task is to persuade the Philippine government to take up with the Holy See the validity of its claims. Of course, the Foreign Office shall first make a determination of the impact of its espousal on the relations between the Philippine government and the Holy See (*Young, Remedies of Private Claimants Against Foreign States, Selected Readings on Protection by Law of Private Foreign Investments* 905, 919 [1964]). Once the Philippine government decides to espouse the claim, the latter ceases to be a private cause.

According to the Permanent Court of International Justice, the forerunner of the International Court of Justice:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law" (*The Mavrommatis Palestine Concessions*, 1 Hudson, World Court Reports 293, 302 [1924]).

WHEREFORE, the petition for certiorari is GRANTED and the complaint in Civil Case No. 90-183 against petitioner is DISMISSED.

SO ORDERED.

Narvasa, C.J., (Chairman), Bidin, Regalado, Davide, Jr., Romero, Bellosillo, Melo, Puno, Vitug, Kapunan, and Mendoza, JJ., concur.

Feliciano, J., on official leave.

Padilla, J., no part.

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