Privy Council Appeal Nos. 45 *and* 46 *of* 1953

Juan Ysmael & Company Incorporated - - - - *Appellants*

v.

The Government of the Republic of Indonesia - - - *Respondents*

and between

Juan Ysmael and Company Incorporated - - - - *Appellants*

v.

The Government of the Republic of Indonesia and another *Respondents*

(Consolidated Appeals)

FROM

THE APPEAL COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH OCTOBER, 1954

Present at the Hearing:

EARL JOWITT
LORD PORTER
LORD OAKSEY
SIR JOHN BEAUMONT
MR. L. M. D. DE SILVA

[*Delivered by* EARL JOWITT]

These are consolidated appeals from a judgment dated the 13th December, 1952, of the Appeal Court of Hong Kong reversing a judgment of Mr. Justice Reece in the Supreme Court of Hong Kong (Admiralty Jurisdiction) dated the 15th September, 1952, and setting aside the writs and all subsequent proceedings in two actions, namely Action No. 6 and Action No. 8 in the Supreme Court of Hong Kong (Admiralty Jurisdiction). Action No. 6 was an action brought against the steamship "Tasikmalaja" by the respondent Anthony Loh for ship's necessaries. It was conceded in argument that that action can be ignored, and their Lordships have therefore confined their judgment to Action No. 8.

It will be convenient to summarise in the first place the relevant steps in the action leading up to the judgment under appeal. The appellants, who are a company incorporated under the laws of the Philippine Islands, issued the writ in the action on the 27th June, 1952. It was a writ *in rem* against the steamship "Tasikmalaja" addressed to all parties interested in the said steamship, and by the statement of claim endorsed thereon the plaintiffs as the owner of the said steamship claimed to have legal possession of the vessel decreed to them.

On the 27th June, 1952, the said vessel was arrested by process of the Court in the action and at all material times thereafter remained in the legal custody of the Head Bailiff of the Supreme Court. On the 30th June, 1952, an appearance under protest was entered by the Government of Indonesia without prejudice to an application to dismiss the action. On the 9th July, 1952, the Government of Indonesia gave notice of motion for an order that the writ and all subsequent proceedings be set aside on the grounds that the writ impleaded a Foreign Sovereign State and that the Government of Indonesia was the owner or was in possession or control or entitled to possession of the vessel. Affidavits were sworn

in support of the motion by various persons, including in particular Kwee Djie Hoo, described as Consul General for the Government of Indonesia at Hong Kong, and Pamoe Rahardjo, described as a Major in the Army of the Republic of Indonesia. On the 25th July, 1952, the appellants gave notice of their intention to cross-examine these deponents, and applied for leave to do so, and on the 25th August Mr. Justice Reece granted such leave. Thereupon the Government of Indonesia claimed diplomatic privilege for the deponents, but on the 27th August Mr. Justice Reece ruled that the deponents were not entitled to diplomatic privilege. Summonses were accordingly issued to the deponents to attend for cross-examination, which they failed to do, and on the 15th September, 1952, Mr. Justice Reece ordered the affidavits of the two deponents to be removed from the file. There is no appeal before their Lordships' Board against the Orders of the learned judge overruling the claim to diplomatic privilege, and directing the two affidavits to be removed from the file, and their Lordships express no opinion on the propriety of such Orders.

On the 15th September, 1952, Mr. Justice Reece gave judgment dismissing the motion of the Government of Indonesia claiming immunity from being sued, and on the same day the said Government gave notice of appeal from the said Order to the Appeal Court. On the 24th October, 1952, the action came to trial before Mr. Justice Reece who decreed possession of the vessel to the appellants subject to the claim of the Hong Kong & Whampoa Dock Company Ltd. for the cost of work done upon the said vessel. On the 8th December, the appeal of the Government of Indonesia against the Order of Mr. Justice Reece of the 15th September, 1952, refusing immunity, came before the Appeal Court. The three following submissions were made to the Appeal Court by counsel on behalf of the Indonesian Government:

(i) That the trial judge erred in making the orders for the cross-examination of Mr. Kwee Djie Hoo and Major Pamoe Rahardjo;

(ii) That the trial judge erred in refusing to grant to these persons the diplomatic immunity claimed for them;

(iii) That even if the trial judge was correct in his decisions on points (i) and (ii), there was left upon the record ample material upon which the impleading motions should have been allowed.

The Appeal Court decided to hear the third point first, as a decision on that point would render it unnecessary to determine points (i) and (ii). The Court came to the conclusion that on the material before them the impleading motions should have been allowed. They pronounced no decision on points (i) and (ii). Accordingly the judgment of the Court rescinded the judgment of Mr. Justice Reece of the 15th September, 1952, ordered that the writ and all subsequent proceedings and orders in the said action be set aside on the ground that the said action impleaded the Government of Indonesia, a Foreign Sovereign State, declared that the judgment of Mr. Justice Reece dated the 24th October, 1952, was null and void for want of jurisdiction and ordered the appellants to pay the costs of the Government of Indonesia of the said appeal and the said notice of motion. The question before the Board is whether that judgment is right.

The rule according to a Foreign Sovereign Government immunity against being sued has been considered and applied in many cases. The basis of the rule is that it is beneath the dignity of a Foreign Sovereign Government to submit to the jurisdiction of an alien court, and that no Government should be faced with the alternative of either submitting to such indignity or losing its property. The rule was stated by Lord Atkin in the case of *The Cristina* [1938] A.C. 485 as involving two propositions. The first that the courts of a country cannot implead a Foreign Sovereign; and the second that they would not by their process, whether the Sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. Dicey, 6th Edition 131.

in a passage in his "Conflict of Laws" approved by Lord Radcliffe in the case of *Dollfus Mieg* [1952] A.C. 616, stated the rule in these terms:—

> "The court has no jurisdiction to entertain an action or proceeding against any foreign sovereign. . . . An action or proceeding against the property of a foreign sovereign is an action or proceeding against such person."

In whichever way the rule is stated it is apparent that difficulty may arise in the application of the second branch of it. Where the Foreign Sovereign State is directly impleaded the writ will be set aside, but where the Foreign Sovereign State is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is therefore indirectly impleaded, a difficult question arises as to how far the Foreign Sovereign Government must go in establishing its right to the interest claimed. Plainly if the Foreign Government is required as a condition of obtaining immunity to prove its title to the property in question the immunity ceases to be of any practical effect. The difficulty was cogently expressed by Lord Radcliffe in the case of the *Dollfus Mieg* (*ubi supra*) where he said at page 616:—

> "A stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and indeed to require him (i.e. the Foreign Sovereign) to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do."

In the case of *The Jupiter* [1924] P. 236 where the writ was *in rem* against the ship, Lord Justice Scrutton based his judgment on the view that an assertion by a Foreign Sovereign that he claimed a right in property must be accepted by the court as conclusive without investigating whether the claim be good or bad. The learned Lord Justice concluded his judgment by saying:—

> "I am content to rest my decision in this case on the fact that this writ requires a foreign sovereign to appear in these Courts to defend what he alleges to be his property and by the principles of international comity the Courts of this kingdom do not allow such steps to be taken against foreign sovereigns."

The view that a bare assertion by a Foreign Government of its claim is sufficient has the advantage of being logical, and simple in application, but it may lead to a very grave injustice if the claim asserted by the Foreign Government is in fact not maintainable, and the view of Lord Justice Scrutton has not found favour in subsequent cases.

In the case of *The Cristina* (*ubi supra*) the action was commenced by a writ *in rem* against the ship and the Foreign Government which sought to have the writ set aside claimed to be in possession of the ship. Lord Wright, in his speech at page 506, noted that the fact of possession was proved, and he added:—

> "It is unnecessary here to consider whether the Court would act conclusively on a bare assertion by the Government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondent here has established the necessary facts by evidence."

Lord Maugham in his speech dealt with the matter at more length and expressed the view that "there is neither principle nor any authority binding this House to support the view that the mere claim by a Government or an ambassador or by one of his servants would be sufficient to bar the jurisdiction of the Court, except in such cases as ships of war or other notoriously public vessels or other public property belonging to the State".

In the case of *Haile Selassie* v. *Cable and Wireless Limited* [1938] 1 Ch. 839 the plaintiff sued for a debt and a Foreign Government claimed that it was entitled to the debt, and claimed to have the action stayed, but the Foreign Government took no part in the proceedings and the

Court of Appeal in those circumstances refused to stay the action, accepting the view expressed by Lord Maugham in *The Cristina* case that a mere claim by the Foreign Government is not enough. In the case of *The Arantzazu Mendi* [1939] P. 37 and [1939] A.C. 256 the writ was *in rem* claiming possession of the vessel. A Foreign Government entered appearance under protest and claimed to set aside the writ on the ground that the action impleaded a Foreign Sovereign State. In the Court of Appeal it was held that the Foreign Government was entitled neither to the ownership nor possession of the ship, but that it had proved that it had requisitioned the ship, and that the master and owners had recognised such requisition. The Court held that this showed a sufficient interest in the Foreign Government to involve that it was impleaded by the writ, and accordingly the writ was set aside. Lord Justice Goddard, as he then was, expressed the view on the authority of *The Cristina* and *Haile Selassie* cases that where a claim for immunity is made by a Foreign Sovereign it is not enough that his claim should be a bare assertion of right or a mere claim and the Lord Justice continued:—

> " But if the Court can see that the question that arises is a question of competing rights, as in this case here, where we have got the fact that the owners of the ship admittedly have purported to give to the foreign sovereign who is claiming immunity rights over the ship it may be that those rights are good or it may be they are bad, that is just what we cannot try, but if they purport to give rights over their ship and therefore there is more than a mere claim, and there is evidence before the Court on which it can be shown that the question which is to be decided in the case is competing rights, then it appears to me the principle of immunity applies."

In the House of Lords the view was taken that the Foreign Government had proved that it was in possession of the vessel and the case therefore was similar to that of *The Cristina.*

In the *Dollfus Mieg* case (*ubi supra*) the plaintiffs claimed from the Bank of England 64 gold bars which the Bank held as bailee. Certain Foreign Governments sought to stay the action on the ground that they were the owners of the bars. The action was stayed as to 51 bars it having been discovered after the hearing in the Court of First Instance that the Bank had inadvertently parted with 13 of the bars. Their Lordships think it clear that the House of Lords considered the evidence relating to the claim of the Foreign Governments since most of the learned Lords expressed the view that there should have been more adequate discovery which would only have been important to enable the Court to ascertain all the relevant facts.

In their Lordships' opinion the view of Lord Justice Scrutton that a mere assertion of a claim by a Foreign Government to property the subject of an action compels the Court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion a Foreign Government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed but it must produce evidence to satisfy the Court that its claim is not merely illusory, nor founded on a title manifestly defective. The Court must be satisfied that conflicting rights have to be decided in relation to the Foreign Government's claim. When the Court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. It remains to apply this principle to the facts of the present case.

The steamship " Tasikmalaja " was registered on the Panamanian registry. It was acquired by the appellants in the year 1950 and from 1951 onwards was chartered by the appellants to the Government of Indonesia under successive charter parties, the last of which was due to expire on the 30th June, 1952, three days after the issue of the writ.

The vessel was used by the Government of Indonesia for carrying troops, so that the question raised in some of the cases whether a right of immunity can be claimed for a ship used by the Foreign Government solely for commercial purposes does not arise. The only charter party produced in evidence is that of the 1st January, 1951, which was made by Frank Starr as lawful attorney for the appellants and under it, possession of the vessel did not pass to the Government. The last charter party due to expire on the 30th June, 1952, has not been produced, and there is no evidence that under it the Government of Indonesia acquired possession of the vessel, nor indeed has it been so claimed in argument. The power of attorney in favour of Starr which is in evidence is exhibit AR-1. It is dated the 8th November, 1950, and constitutes Starr the attorney of the appellants to sell the steamship " Tasikmalaja " for any sum of money or other consideration as to him may seem most advantageous and beneficial to the appellants. The power of attorney was signed on behalf of the appellant by K. H. Hemady as President and General Manager. There is some evidence that the power was void under the law of the Philippine Islands, but this matter has not been fully investigated and their Lordships will assume that the power was valid. On the 10th January, 1952, Hemady wrote to Major Pamoe saying that if the Government bought the " Tasikmalaja " there should be no deduction from $450,000 in respect of money paid to Starr on account. In his reply of the 17th January, 1952, Major Pamoe agreed to act as requested. At the end of January, 1952, Major Pamoe wrote to Hemady a letter in which he said:

> " We have chartered the Tasik for 6 months more until June this year with option to buy the vessel. The purchase price of the vessel will be applied to the charter price of the 6 months of last year. This contract is settled down already and we agreed. We can and dared to do this because Mr. Starr has the full power of attorney from your Company to charter or to purchase the vessel."

After receipt of this letter, on the 6th February, 1952, Hemady cabled to Major Pamoe:

> " We do not agree to deduct any charter money from purchase price Tasikmalaja. Starr inquired and we answered negatively."

This cable was confirmed by letter to Major Pamoe the next day, and on the same day, the 7th February, Hemady wrote to Starr setting out a copy of the cable sent to Major Pamoe. In spite of these instructions and in complete disregard of them, Major Pamoe and Starr entered into an agreement to sell the ship, and it has not been denied that moneys due under the charter party were deducted from the purchase money. It appears from the Printed Case of the Government of Indonesia that the contract for sale was entered into on the 13th February, 1952, the contract price being U.S. $70,000 and that the sale was completed by Bill of Sale dated the 17th March, 1952. The Bill of Sale is not in evidence, but presumably further particulars of the transaction were contained in the evidence of the respondents which has been struck out. As from the date of the alleged sale the Government of Indonesia have claimed to be owners of the vessel, and have taken various steps to implement their title, including registering the vessel on the Indonesian register, and changing the flag from Panamanian to Indonesian. On the 13th March, 1952, the vessel was brought by the Government of Indonesia to Hong Kong and was delivered for repair to the Hong Kong & Whampoa Dock Company Ltd. in whose dock the ship was at the time of the issue of the writ. The said Government claims to have paid large sums to the Dock Company for work done on the vessel. The ship, however, has always remained in the legal possession of the appellants through the acting Captain, Jose Silos. On the 30th June, 1952, the Consul General for the Government of Indonesia at Hong Kong by letter purported to dismiss Silos, but Silos in his answer of the same day refused to accept such dismissal. Their Lordships are satisfied that Silos, as acting Captain of the " Tasikmalaja ", has always remained, as he claims in his Affidavit, the servant of the

appellants, and that legal possession of the vessel never passed to the Government of Indonesia. This indeed was not disputed in the argument before their Lordships' Board.

The result appears to be this. The charter party under which the Government of Indonesia had control of the vessel, expired on the 30th June, 1952, at the latest, even if it had not been previously repudiated. At the date when immunity was claimed by the Government of Indonesia, namely the 9th July, 1952, which is the date on which the validity of the claim first fell to be considered, the Government of Indonesia had no interest whatever in the vessel except such as arose under the alleged purchase of the 13th February, 1952. The negotiations for the sale and purchase of the ship were conducted between Starr and Major Pamoe. Starr was purporting to act as agent of the appellants as sellers and Major Pamoe as agent for the Government of Indonesia as purchasers. In fact, Starr had no authority to sell the ship on the terms specified in the agreement of sale, and Major Pamoe was fully aware that he had no such authority. However wide the powers originally given to Starr may have been, it is clear that they could be withdrawn or modified by the appellants. The cable and letters of the 6th and 7th February, 1952, from Hemady to Starr and Major Pamoe make it clear that the vessel could only be sold on certain conditions and Starr and Major Pamoe subsequently purported to agree to a sale of the ship in complete disregard of these conditions. The evidence in the record of their title to the ship set up by the Government of Indonesia appears therefore to their Lordships to be manifestly defective, since even if Major Pamoe did not disclose the position to his employers, the Government of Indonesia, yet he was the agent of that Government in carrying out the purchase, and his knowledge must be attributed to the Government. For these reasons their Lordships think that the Government of Indonesia have not established that they possess such an interest in the steamship "Tasikmalaja" as would show that they were impleaded. Accordingly there is no ground for setting the writ aside.

Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed, that the judgment of the Appeal Court in Hong Kong dated the 13th December, 1952, be set aside including the declaration that the judgment of Mr. Justice Reece dated the 24th October, 1952, was null and void for want of jurisdiction, and that the matter be remitted to the Appeal Court to consider the other questions raised in the appeal. All costs incurred in the courts in Hong Kong shall be dealt with by the Appeal Court. The respondents must pay the costs of the appeal to their Lordships' Board.

(39111) Wt. 8082—47 150 10/54 D.L.

In the Privy Council

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DELIVERED BY EARL JOWITT

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