CALCUTTA HIGH COURT

Mirza Akbar Kasini

Vs.

United Arab Republic

Suit No. 1143 of 1959

(A.N. Ray, J.)

16.05.1960

JUDGMENT

A.N. Ray, J.

1. The plaintiff instituted this suit with leave under Clause 12 of the Letters Patent for a decree for Rs. 6,07,346/-. The plaintiffs claim arises out of an agreement between the plaintiff and the defendants through defendant No. 2 in respect of supply of tea. There was an agreement in the month of December 1957. The quantity supplied under that agreement to the defendants had been paid for. In the month of March 1958 another agreement was entered into on behalf of the defendants through defendant No. 2. It was agreed that the defendants would accept and/or buy and/or purchase from the plaintiff 2,00 tons of tea. The goods were to be shipped from Calcutta during the months of May and June 1958. The plaintiff was to be paid by means of letter of credit at Calcutta. The other terms of the agreement contained, inter alia, a clause that no further order shall be placed in India by the defendant who would give to the plaintiff the first refusal of their future requirements a month before the expiry of the contract, subject to the fixation of prices prevailing at the time.

2. The plaintiffs case is that the said term was the basis of the agreement and was entered into for the purpose of enabling the plaintiff to buy tea in the local market in India without competition from others in order to supply to the defendants at the contracted rate. In pursuance of the agreement the plaintiff supplied 600 tons of tea. The defendants paid for the same.

3. In the month of June/July 1958 the time for shipment was extended up to August 31, 1958. The plaintiffs case is that in breach of the agreement on July 29, 1958 the defendants placed Order with Messrs. Standard Stores Agency (Private) Ltd. of Calcutta for the supply of 4.500 tons of tea. The said order according to the plaintiff was placed during the tenure of the contract between the plaintiff and the defendants without giving the plaintiff the first refusal for the future requirement of the defendants.

4. The breach of contract upset the local market of Egyptian quality of tea in India and thereby prevented the plaintiff from buying the tea for supplying the same to the defendants at contracted

price. The plaintiff states that the balance quantity of 1,400 tons of the tea could not be delivered to the defendants on account of wrongful conduct on the part of the defendants though the plaintiff was ready and willing to perform the plaintiffs part of the contract.

5. Under these circumstances the plaintiff claims damages under two heads. First, the loss of profit and/or the income that the plaintiff would have earned if the plaintiff was allowed to deliver the balance quantity that is 1,400 tons, secondly, the profit that the plaintiff would have earned if the order for 4,500 tons placed by the defendants with Messrs. Standard Stores Agency (Private) Ltd. was placed with the plaintiff and/or loss of profit suffered by the plaintiff for the same.

6. I am not called upon to express any opinion on the merits or demerits of the plaintiffs claim.

7. This application was made on behalf of the defendants, The United Arab Republic and the Ministry of Economy, Supplies Importation Department of the Republic of Egypt at Cairo for revocation of leave under Clause 12 of the Letters Patent, for rejection and/or taking off the plaint of the file and for stay of the proceedings till the final disposal of this application.

8. Counsel on behalf of the defendants contended first that the suit was incompetent in the absence of consent of the Central Government under Section 86 of the Code of Civil Procedure . Secondly, it was contended that the United Arab Republic is a foreign State and cannot be impleaded in a suit in this country on the principle of absolute immunity.

9. Sections 83 to 87A in the Civil Procedure Code appear under the heading "suits by aliens and by or against foreign rulers, ambassadors and envoys". Under Section 86 of the Code it is enacted that no ruler of a foreign state may be sued in any court otherwise competent to try the suit except with the consent of the Central Government certified in writing. Such consent may be given with respect to a specified suit or to several specified suits and may specify in the case of any suit, the court in which the ruler may be sued. Such consent shall not be given unless it appears to the Central Government (a) that the ruler has instituted a suit in the court against the person desiring to sue him or (b) by himself or another trades within the local limits of the jurisdiction of the court or (c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or money charged thereon or (d) has expressly or impliedly waived the privilege accorded to him by the section. "Foreign state" has been defined in Section 87A of the Code to mean any state outside India which has been recognized by the Central Government. "Ruler" in relation to a foreign state has been defined in the Code to mean the person who is for the time being recognized by the Central Government to be the head of that state. Section 87 states that the ruler of a foreign State may sue and shall be sued in the name of his state.

10. Counsel for the defendants contended that since the ruler of a foreign state is to be sued in the name of a state, a suit against a foreign state would be a suit against the ruler in relation to a foreign state and therefore consent would be imperative under Section 86 of the Code to maintain any such suit.

11. The definition of foreign state requires that such a state has been recognized by the Central Government. Counsel for the defendants relied on the decisions of *Duff Development Co. v. Kelantan Gov*[1]*., Engelke v. Musmann*[2]*,* and *Spain v. Arant Zazu Mendi*[3]*,* in support of the

proposition that if any question arose as to whether a foreign slate was recognized by the Government the court would direct a letter to be addressed by the Registrar to the Secretary to the Government and the evidence furnished by the Government as to recognition of a foreign state would thus be obtained. Lord Sumner once expressed a view in one of the cases that obtaining information in that manner would be one of the ways of finding out whether the state was recognized or not. Lord Atkin in the Arantzazu Mendi case 1939 A. C. 256 said that the only manner of obtaining information as to the recognition of a foreign state was by causing enquiries to be made of the Government and that there should not be two voices in the matter of recognition of a foreign state. In other words, it was not desirable that the Judiciary should say one thing and the Executive another. Speaking for myself I was inclined to adopt the procedure laid down in the cases referred to above inasmuch as solicitor for the defendants in spite of Endeavour failed to get any information on the point. Counsel for the plaintiff eventually did not raise any dispute as to the question of recognition of the United Arab Republic as a foreign state by the Government of this country. I, therefore, proceed on the footing that the United Arab Republic is a foreign state recognized by the Government of India.

12. It is true that Section 87 of the Code states that the ruler of a foreign state may sue and shall be sued in the name of a state but Section 87A defines foreign state and ruler separately. In the present case there is no evidence before me as to who has been recognized by the Central Government to be the head of the state to be within the definition of ruler of foreign state impleaded here. Be that as it may, it cannot, in my opinion, be said that a suit against a foreign state becomes necessarily a suit against the ruler of that state. Under the Constitution of our country there may be a suit against a State or against the Union but such suit does not lie against either the Governor or the President. Under the American Constitution a suit does not lie against the President. Can it under these circumstances be stated that if a suit be instituted against the United States of America such a suit would become a suit against the President of the United States of America? I am unable to accept the contention of the defendants that a suit against a foreign state is a suit against the ruler. To my mind, Sections 83 to 87A of the Code deal only with suits by or against rulers of foreign states and these sections do not contemplate any consent being required as a condition precedent to the institution of any suit against a foreign state.

13. I am unable to hold that under Sections 83 to 87A of the Code any suit against a foreign state requires consent of the Central Government. I am equally unable to hold that the words "foreign state" and "Ruler" in these sections are synonymous. Apart from the definition of "Foreign state" and "Ruler" these sections indicate that it is only where the Ruler intends to sue or the Ruler has to be sued that the Central Government takes certain steps. To illustrate, the Central Government appoints a person to prosecute or defend a suit on behalf of the Ruler. The Central Government gives consent to the institution of certain classes of suits against the Ruler. Such consent is not liable to be questioned by the court. The certificate is conclusive. See *Govindram Gordhandas Seksaria v. State of*

[1]1924 AC 797 [3]1939 AC 256

[2]1928 AC 433

Gondal[4]*,* In the case of a foreign state it would, in my opinion, be an information of international law that such a fiat would be conclusive in the sense that the foreign state would not be able to claim the "protective umbrella" of immunity.

14. Counsel for the defendants realised difficulties in maintaining that consent was necessary to

the institution of the suit against the foreign state and ultimately relied on the broad principle of absolute immunity of a foreign state. The doctrine of immunity of a foreign state is stated in Diceys Conflict of Laws 7th edition at page 129 under Rule 17 that the court has no jurisdiction to entertain an action or other proceeding against any foreign state or the head or government or any department of Government of any foreign state. The immunity of a foreign state is derived under International Law and is embodied in the maxim par in parem non habet imperium. Immunity is accorded to foreign states irrespective of their size or power. The doctrine of absolute immunity of foreign states is illustrated in the two classic propositions of Lord Atkin in the Cristina Case, *Compania Naviera Vascongado v. Cristina S. S*[5]. The first is that

> "the courts of a country will not implead a foreign sovereign, that is they will not by their process make him against his will a party to legal proceedings, where the proceedings involved process against his person or seek to recover from him specific property or damages".

The second is that

> "they will not by their, process, whether the sovereign is a party to the proceeding or not, seize or detain property which is his or of which he is in possession or control".

Lord Atkin said that the second proposition would extend to property used for commercial purposes as well. The immunity of property of a foreign state is also illustrated in the case of *Parlement Belge, In re*[6] A steamer belonging to the Belgian Government which carried not only the public mails but also goods and passengers for hire came into collision with an English steam-tug. An action was brought against the steamer. The court of appeal held that the immunity enjoyed by the Belgian Government was not lost by reason of the ship having been used for commercial purposes. The immunity which was accorded to property of a foreign state was on the ratio that ownership or possession of the ship vested in the sovereign. Again in the case of Porto Alaxandra, 1920 P. 30 a German ship that had been requisitioned by the Portuguese Government got a ground while she was carrying cargo for a private trading company. Proceedings were brought by the salvors for the services that they had rendered. The proceedings were set aside on the ground that the vessel was public national property.

15. Professor Lauterpacht in an Article The problem of jurisdictional immunities of foreign states published in the British Year Book of International Law, 1951 dealt with the principles of absolute immunity, qualified immunity and denial of immunity and reached certain conclusions. First, he stated that the doctrine of absolute immunity has no foundation in the principle of international law and that the doctrine has been largely

[4]77 Ind App 156 [6](1880) 5 P. D. 197
[5]1938 A. C. 485

abandoned by judicial practice. Secondly, the doctrine of limited immunity is not always capable of satisfactory definition and application. Thirdly, he suggests the solution to be assimilation of the position of foreign states to that of states under a rule of law which have substantially renounced their own immunity before their own courts. He further suggests that there should be certain safeguards in the application of this principle.

16. In support of the principle of absolute immunity first it is argued that the assumption of jurisdiction over foreign states is an exercise of imperium and such jurisdiction is contrary to the custom of the international law. It is secondly advocated that absolute immunity should be given effect to irrespective of the activities of the state in the economic sphere because such activities are a passing phase. Thirdly, it is suggested that absolute immunity should exist inasmuch as even if any jurisdiction is exercised over a foreign state, a judgment against a foreign state will be incapable of execution. Finally, the adherents of absolute immunity state that a distinction between acts jure gestionis and acts jure imperii is perhaps impossible to be defined and applied. Suppose, a foreign state enters into a contract for the purchase of shoes for its army. Would such a purchase be an act jure imperii or an act jure gestionis. A standard conclusive answer is not always possible.

17. Such questions have been solved by Professor Lauterpacht by propounding that the law on the subject should and can be placed on a footing different from the doctrine of absolute immunity or concession of immunity by reference to distinction in matters jure imperii and jure gestionis. At page 226 in the British Year Book of International Law, 1951 he states that the alternative consists in making a foreign state accountable before otherwise competent courts in respect of claims put forward against at in the matter both of contract and tort in the same way in which the domestic state is subject to the law administered by the courts. At page 229 he states that no legitimate claim of sovereignty is violated it the court of a state assumes jurisdiction over a foreign state with regard to contracts concluded or torts committed in the territory of state assuming jurisdiction. The sovereignty, the independence and the equality of a foreign state is observed as long as the state exercising jurisdiction applies ordinary law and rules of Private International Law and there is no disregard of the legislative and administrative sovereignty of a foreign state or one state does not reach out into the domain of a foreign state Professor Lauterpacht states at page 231 that the dignity of foreign states is no more impaired by their being subject to the law, impartially applied, of a foreign country than it is by submission to their own law.

18. It must be conceded that immunity of foreign state must remain with respect to legislative acts of the foreign state and the measures taken in pursuance thereof or in respect of an executive or administrative act of a foreign state within its territory. Foreign states furthermore should not be placed in a position less advantageous then that of a private individual. In other words, where under private International Law the Court has no jurisdiction in private action it should have no jurisdiction against a foreign state in respect of contracts beyond the jurisdiction of foreign courts. Finally, no action should lie or execution be levied against a foreign state in the matter of diplomatic immunities. It these safeguards are observed, Professor Lauterpacht states, that no rule of International Law will be violated if jurisdictional immunity is declined to foreign states in acts jure gestionis.

19. I now propose to examine the decisions cited at the Bar to find out to what extent the theory of absolute immunity has been applied by the courts in England. It does not appear that the principle of absolute immunity has attained any rigidity. Sir Robert Phillimore in the Parlement Belge held that a state-owned vessel engaged in commercial venture did not enjoy immunity. In the Cristina Case, 1938 AC 485 Lord Thankerton said,

> "I have some doubt whether the proposition that the foreign sovereign state cannot be impleaded is an absolute one; the real criterion being the nature of the remedy sought."

It is held that if the reedy sought by an action in rem is against public property it will be an indirect mode of exercising authority against the owner of the property and will be an infraction of the principles of independence and equality of the state owning such property. The Christina was found to be dedicated to public use and therefore Lord Thankerton found it unnecessary to decide the full extent of the principle of absolute immunity. Lord Macmillan said in the Christina case that the courts before they gave the force of law, within the realm, of the doctrine of international Law should be satisfied that it had the hallmarks of general assent and reciprocity. Lord Thankerton further observed that he hesitated to lay down as a part of the law of England that an ordinary trading vessel would be immune from civil process by reason of the mere fact that it was owned by a foreign state. In that context he further said, It is only in modern times that sovereign state that so far condescended to lay aside their dignity as to enter competitive markets of commerce and it is easy to see that a different view may be taken as to whether an immunity conceded in one state of circumstances should, to the same extent, be enjoyed in totally different circumstances." Lord Maugham hesitated to take the view that the requisitioning of a ship by foreign state was by itself a sufficient evidence of intention of the state to devote the vessel to public uses and said that steps should be taken to put an end to a state of things which were not merely anomalous, but unjust to nationals in the state where the suit would be instituted.

20. Viscount Simon in "*Sultan of Johore v. Abu Bakar Tunku Aris Bendahara*[7]*,* said at page 343 of the report that it had not been finally established in England as an absolute rule that a foreign independent sovereign cannot be impleaded in any circumstances.

21. The principle of absolute immunity has been applied in the circumstances where possession or control of property of a foreign state has been sought to be interfered with. The principle is equally applicable where property of a foreign sovereign has been sought to be recovered. This principle of absolute immunity has sometimes been applied regardless of the distinction between acts jure gestionis and acts jure imperii. There has been certain amount of hesitation expressed from time to time by Judges as to whether in the first place the principle of absolute immunity should be affirmed with any rigidity and in the second place whether the adoption of this principle should be based on any distinction between activities jure gestionis and activities jure imperii of a foreign state. Lord Radcliffe in the Dollfus Case, (*U.S.A. and Republic of France v. Dollfus Meig et*

[7]1952 AC 318

cie. S. A[2]*.),* stated that it was going too far to say that a suit where the sovereign was named as a party must necessarily be arrested and it would depend on the purpose for which the sovereign were made a party. Lord Radcliffe further said that the decisions in England did not establish as to how the principle was to be applied.

22. In England in two classes of cases this principle of immunity has been attracted. The Admiralty cases are those where the Foreign sovereign has a valid interest in the ship. Once it was settled that the ship was the public property of the foreign State it has been held the use put upon the property would not disqualify the owner from taking advantage of the general rule. In other words the Courts order for the arrest of the ship it made would be in substance an order

against the sovereign. A question sometimes arose as to whether a mere claim in property was enough or the same had to be proved. The principle has sometime been applied where the sovereign not even claimed, but merely stated that he was tile owner of the property forming subject of the action. As I have understood the ratio is de facto possession of the property or rights of direction and control without possession or that the proceedings would result in an order affecting either possession or those other rights. The other group of cases where this principle of absolute immunity has been invoked is Chancery case. The Chancery cases proceed on the existence of trust fund or other item of trust property within the area or jurisdiction of the Chancery Courts. There is a trust to be administered by the Court. Judges in equity believe that they have responsibility for administering and determining the rights to such property even though a foreign sovereign might be known to be a possible or certain claimant to an interest in it. The Court of Chancery treated trust property within the jurisdiction as domestic responsibility. The Court of Admiralty on the other hand would not deal with a ship on such principle though the ship were within the jurisdiction because proceedings against a ship would affect possession or other rights.

23. In the Dollfus case, 1952 AC 582 the Bank of England held as Bailee for the Government of United States, France and the United Kingdom 64 numbered gold bars claimed to be the property of a French company. The bars had been wrongfully seized by German authorities during the Second World War and taken to Germany. After their recovery by Allied Forces they were lodged with the Bank by the Government for safe custody pending their ultimate disposal. The bank sold 13 bars by mistake retaining the balance of 51. The French company brought an action against the Bank claiming delivery of the 64 bars and injunction restraining the bank from parting with possession of them and alternatively damages. The bank applied to have the writ set aside on the ground that the bars were in possession or control of the three governments and that the action impleaded two foreign States, which declined to submit to the jurisdiction in the Court. The company on the other hand moved the Court for an interlocutory order restraining the bank from parting with the bars. All the proceedings were stayed on the application of the bank. On appeal the banks motion was ordered to be discharged and the company was given leave to apply for injunction. Subsequently the bank applied to the Court of Appeal for postponement of the drawing up of the order. The Court declined. These Governments then presented a petition to the House of Lords for leave to appeal although they were not parties to the suit and alternatively for an order adding them as defendants. The petition was ordered to stand over with liberty of any party to apply to restore it on the footing that the Governments should apply to the Court for leave to be joined as defendants. On

[2]1952 AC 582

an application in the trial Court it was ordered that they should be joined. The Governments then moved for a stay of further proceedings. That application was dismissed. The Court of Appeal affirmed the decision. The Governments then appealed to the House of Lords. It was held in the House of Lords mat the action must be allowed to proceed as regards 13 bars since the bank by its own act terminated the bailment but the action was stayed as regards the remaining bars since the doctrine of immunity or foreign sovereign applied to the case of a claim to recover property in the hands of bailee for a foreign sovereign. It was further held that there was no jurisdiction to order the bailee to pay damages for conversion since the bailee would thereby acquire the title to the property so as to be able to set it up against the bailor, the foreign sovereign.

24. Lords Radcliffe and Tucker dealt with the question of companys claim to damages. Lord

Radcliffe considered whether the principle of immunity was offended merely by mulcting the bailee in damages. An action for damages for conversion can ordinarily be stayed if the defendant offers to hand over the property in dispute. In that sense a suit, for damages for conversion is an attempt to use the Courts process to interfere with the existing possession of the chattel the title to which is in dispute. In that sense Lord Radcliffe said that if the defendant were allowed to keep the chattel and pay for damages the defendant would become entitled to set up the plaintiffs title to the goods against the defendant bailor, by paying for the goods. Lord Radcliffe further observed that the result of a judgment in damages in the case of bailment would have analogy to a sale by the Court of a chattel which was in possession or under the requisition of foreign sovereign. Lord Tucker considered whether the relief as to damage could be afforded to the plaintiff without affecting the rights of the three Governments to possession of the gold bars and whether the doctrine of immunity was designed for the benefit of a foreign sovereign and not for the protection of persons resident within the jurisdiction who chose to enter into contractual relations with foreign governments. Lord Tucker said that the defendant satisfying a judgment in damages representing the value of the goods detained or damages for their conversion acquires thereby such title to the goods as was vested in the plaintiff when judgment had been satisfied. Such a judgment would require the bank to do that which would materially alter the rights of the three governments vis-a-vis the bank to the gold bars and enable the bank in its own right to do that which it otherwise could not have done i.e., to contest its bailors title. In effect it may be an infringement of the foreign sovereigns right to immediate possession of the bailed chattels.

25. In the Hyderabad Case, (*Rahimtoola v. Nizam of Hyderabad*[3]*),* Viscount Simonds said that the property in dispute in that case was situate in the country and a suit by a third party attempted to interfere with the title of a foreign government or with their possession or control of their property. Viscount Simonds further observed that to make one law with regard to valuable or bars of gold and another with regard to simple contract debts was not a policy that would recommend itself to the House. The foreign government, the owner of the property, was entitled to refuse to have its title investigated whether the property is gold bar or debt. Lord Denning in the Hyderabad case looked at the question from two points of view. First whether there was any universal or absolute rule against impleading a foreign government. Secondly, to what property or interest therein the doctrine of immunity was applicable. Lord Denning said that if the very question to be decided by the Court was "To whom does this debt belong? Whose property is it?" it

[3]1958 AC 379

ought to be decided at the trial - or at any rate at a trial. The Judicial Committee of the Privy Council in the case of *Juan Ysmael and Co., Incorporated v. Govt. of the Republic of Indonesia*[4]*,* held that the foreign government was not bound to prove its title but it must produce evidence to satisfy the Court that the claim is not illusory nor founded on a title manifestly defective. Lord Denning considered at length the Dollfus case and the principle on which the suit was allowed to continue with regard to 13 bars and held that it was a direct decision of the House of Lords about a chose in action. The action was allowed to proceed with 13 bars which had been sold by the bank. The claim as formulated was not for delivery of 64 bars but for damages. The plaintiff there was allowed to proceed against the bank in damages for 13 bars. The reason for refusing immunity in respect of 13 bars was because the bank put an end to the bailment. Lord Denning put the consequences as follows : The Sovereign government could bring an action against the bank for conversion of the 13 bars and in that action the bank could not dispute the bailors title.

The bank could not be liable twice for the same conversion - once to the company and again to the sovereign governments. The bank could interplead the sovereign governments to come in and either to maintain or relinquish their claim. Even if the bank had not sought to interplead and the company obtained judgment against the bank, it could on satisfaction of the judgment set up title of the company against the sovereign governments. It is precisely on this principle that the company was not allowed to proceed against the bank in damages for 51 bars and yet the action was allowed to continue for 13 bars. Lord Denning regarded this as a direct decision about a chose in action. He further held that the decision was in line with the Chancery decisions about a trust fund or a debt. Just as a trust has to be administered, a debt should not remain unpaid forever. The creditors action should continue. Ultimately Lord Denning rested his decision on the principle that if the dispute concerned commercial transactions there was no ground for granting immunity.

26. The question which often engages international lawyers is whether there should be any gap between the law governing the immunity of the home state and the law relating to the immunities of foreign states. The doctrine of immunity of a foreign state is based first on considerations of the dignity of the sovereign state and secondly, on the absolute independence of the sovereign state of every superior authority. This was the view in (1880) 5 PD 197. Esher L.J. said that the principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with its real dignity. In the same case Brett, L.J. spoke of the independence and dignity as well as equality and independence as the basis of immunity. Sir Robert Phillimore observed in the Charkieh, (1873) 4 A. and E. 59 at p. 99 that no principle of international law has gone so far as to authorise a sovereign prince to assume the character of a trader, when it is for his benefit and when he incurs an obligation to a private subject to throw off his disguise and appear as a sovereign, claiming for his own benefit and to the injury of a private person, for the first time, all the attributes of his character. These observations of Sir Robert Phillimore were not fully accepted in the decision of the Parlement Belge. In the case of *Compania Mercantil Argentina v. United States Shipping Board*[5], Bankes L.J. said that a sovereign state does not by entering into a trading contract with a foreigner lose its immunity. This view has received challenge in the Christina, the Sultan of Juhore, the Dollfus and the Hyderabad

[4]1955 AC 72

[5](1924) 93 LJ K.B. 816

cases. It is the view of Professor Lauterpacht that a state does not derogate from the dignity of another state by subjecting it to the normal operation of the law under proper municipal and international safeguards and on a footing of equality with the state within which it concludes a contract or commits a tort. The dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it.

27. The decisions establish the following principles. First, the principle of immunity should be applied with respect to the legislative acts of a foreign state, the executive and administrative acts of a foreign state and in the matter of diplomatic immunities. Secondly, the courts of a state should not require other states to enforce foreign public or fiscal law. Thirdly, the courts will not assume jurisdiction when a foreign government is made a party either directly or indirectly as the result of an action in rem against property in its possession. Fourthly, the circumstance that the foreign sovereign is or may be interested in a trust or similar fund is not a sufficient reason for

declining jurisdiction. Fifthly, the foreign state should not be placed in a position less advantageous than that of private individuals where according to rules of private international law courts would have no jurisdiction. Sixthly, unless ownership or possession is vested in the sovereign, the action does not seek either to bring him before the court or to impugn his title. Seventhly, the principle of immunity is not an absolute one. Finally, the circumstances and the purpose of the suit and the remedy sought are to be looked into.

28. It cannot be deduced from the decisions that there is any absolute principle of immunity. Nor can it be suggested that the principle of immunity is applicable whenever a foreign state is sued. The principles of equality, of independence and of dignity of states are to be observed. Lord Denning says in the Hyderabad case that beyond that principle there is no common ground. Professor Lauterpacht in the 8th Edition of Oppenheims International Law Vol. 1 states that there is no obvious impairment of the rights of equality or independence or dignity of a state if it is subjected to ordinary judicial processes within the territory of a foreign state, in particular, if that state submits to the jurisdiction of its own courts in respect of claims brought against it. Should a foreign state which is in its modern economic sphere expending activities have a privileged position as compared with private traders?

29. The question in the present case is if a contract is concluded in India between a foreign state and an ordinary person will the foreign state be entitled to claim immunity. Ordinarily, any contract between a foreigner and a person in India would attract the jurisdiction of an otherwise competent court in this country if the contract is to be performed in this country or if it refers to Indian law as proper law of contract or if for any other reason according to rules of private international law an Indian court would hold it to be subject to Indian Law. Does the position change when a foreign state is a contracting party? Professor Lauterpacht states in his 8th Edition of Oppenheims International Law Vol. 1, that most states including the United States have now abandoned or are in the process of abandoning the absolute immunity of foreign states with regard to what is usually described acts of a private law nature. The position in Great Britain is still fluid. He further says that the question should be governed in particular cases by the Municipal Law of the country concerned. The ordinary presumption is that foreign law is the same as in India unless it is proved to the contrary. Counsel for the defendant has not made any submission that the Municipal law of the foreign state is different to the law in India with regard to right of a subject to sue the state in respect of contracts. In India the Union or the State can be sued in respect of contracts. The only safeguard is that a contract has to be made for or on behalf of the President or for or on behalf of the State. No point was taken that the contract in the present case was incapable of being sued upon. In the absence of any such plea a contract can be sued upon.

30. I have already indicated that sometimes a distinction is made between acts jure imperii or acts jure gestionis. Two tests have been formulated. The first is not the object of the transaction but its nature. Secondly, is the transaction of such a nature that can be entered into by an individual. If contracts are made by the state for the purchase of shoes for the army or for warship or of foodstuff necessary for the maintenance of national economy can it be said that such acts by these tests are jure gestionis. Professor Lauterpacht states that such distinction is not easy to be applied or defined and if on that basis the principle of absolute immunity in such instances is treated as the alternative it will produce inconvenience and injustice. His theory is that a foreign state should be made accountable before otherwise competent courts in respect of claims put

forward against it in matters of both contract and tort in the same way in which the domestic state is subject to the law administered by the courts.

31. I have, under these circumstances, come to the conclusion first, that there is no principle of absolute immunity. Secondly, the nature of the transaction in the present case is one where the suit does not disregard the legislative or administrative sovereignty of the foreign state. Thirdly, the suit does not seek to enforce foreign, public or fiscal law. Fourthly, the claim in respect of the contract forming the subject matter of the suit is of a commercial nature and such a transaction is not entitled to immunity. Fifthly, where the rule of law prevails the foreign state ought to be entitled to such immunity but no more as enjoyed by the domestic state before its own tribunal. I hold therefore that the defendants are not entitled to immunity in this suit.

32. Counsel for the plaintiff further contended first that there was no invocation of the doctrine of immunity and secondly, that the defendants made an application and asked for relief and thereby submitted to the jurisdiction of the court. The procedure in England in such cases is for setting aside the writ. No comparable procedure exists in our Code. It has been held in the Duff Development Co. Case, 1924 AC 797 that the submission can be made only at the time when the court is asked to exercise jurisdiction and not at any previous time. In that case a lease of mining right was given by the government of Kelantan. The lease contained an arbitration clause. An award was made in favour of the lessee. It was held that the contract by which the Kelantan Government had agreed to arbitrate was not a submission to the jurisdiction of the High Court. In the present case it is not contended that there has been any such submission. Counsel for the defendants relied on the decision reported in In re, Republic of Bolovia Exploration Syndicate Ltd., 1914-1 Ch. 139 at pp. 154-155 in support of the proposition that it was open to the defendant to contend that the foreign state was entitled to immunity and that it had not submitted to the jurisdiction by making this application. Lord Esher M. R. In *Mighell v. Sultan of Johore*[6], stated that if at the time the court is asked to exercise jurisdiction over a foreign sovereign it is shown that he is an independent sovereign and he does not submit

[6]1894-1 QB 149

to the jurisdiction, the court has no jurisdiction over him. In the same case Lopes L.J. said that the only mode in which a sovereign can submit to the jurisdiction is by submission in the face of the court as for example by appearance to a writ. Kay L.J. in the same case said that the foreign sovereign is entitled to immunity from civil proceedings in the courts of any other country unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction. Counsel for the plaintiff contended that defendants had entered appearance and had given a warrant of attorney to defend the suit and thereby elected to waive the privilege and appeared pursuant to the writ and submitted to the jurisdiction. To my mind it appears that the petition is based entirely on invoking Section 86 of the Code and not on invoking the doctrine of immunity. It is true that counsel for the defendants argued the applicability of the doctrine of immunity and I have dealt with his arguments and come to the conclusion that the principle of immunity is not applicable here. Irrespective of that conclusion I am also of opinion that there is appearance to writ in the sense of initiation of proceedings and asking for relief on the basis of an application. Thereby the foreign state has submitted to the jurisdiction. This submission is however not a submission to execution of any judgment.

33. In my view the application should be dismissed. This is a matter where in my view each party should pay and bear its own costs. Certified for two counsel as against their respective

clients. The suit is stayed for a month, but this is without prejudice to the plaintiffs right to make the necessary application, if required, for extension of time with regard to the service of the writ. Time taken in having this application disposed of should be considered and the plaintiff should be entitled to ask for an extension of time with regard to issue of fresh writ of summons, if necessary.

Application dismissed.