[Syllabus]

FIRST DIVISION

[G.R. No. 113191. September 18, 1996]

DEPARTMENT OF FOREIGN AFFAIRS, *petitioner, vs.* NATIONAL LABOR RELATIONS COMMISSION, HON. LABOR ARBITER NIEVES V. DE CASTRO and JOSE C. MAGNAYI, *respondents.*

D E C I S I O N

VITUG, *J.*:

The questions raised in the petition for *certiorari* are a few coincidental matters relative to the diplomatic immunity extended to the Asian Development Bank ("ADB").

On 27 January 1993, private respondent initiated NLRC-NCR Case No. 00-01-0690-93 for his alleged illegal dismissal by ADB and the latter's violation of the "labor-only" contracting law. Two summonses were served, one sent directly to the ADB and the other through the Department of Foreign Affairs ("DFA"), both with a copy of the complaint. Forthwith, the ADB and the DFA notified respondent Labor Arbiter that the ADB, as well as its President and Officers, were covered by an immunity from legal process except for borrowings, guaranties or the sale of securities pursuant to Article 50(1) and Article 55 of the Agreement Establishing the Asian Development Bank (the "Charter") in relation to Section 5 and Section 44 of the Agreement Between The Bank And The Government Of The Philippines Regarding The Bank's Headquarters (the "Headquarters Agreement").

The Labor Arbiter took cognizance of the complaint on the impression that the ADB had waived its diplomatic immunity from suit. In time, the Labor Arbiter rendered his decision, dated 31 August 1993, that concluded:

"WHEREFORE, above premises considered, judgment is hereby rendered declaring the complainant as a regular employee of respondent ADB, and the termination of his services as illegal. Accordingly, respondent Bank is hereby ordered:

"1. To immediately reinstate the complainant to his former position effective September 16, 1993;

"2. To pay complainant full backwages from December 1, 1992 to September 15, 1993 in the amount of ₱42,750.00 (₱4,500.00 x 9 months);

"3. And to pay complainants other benefits and without loss of seniority rights and other privileges and benefits due a regular employee of Asian Development Bank from the time he was terminated on December 31, 1992;

"4. To pay 10% attorney's fees of the total entitlements."[1]

The ADB did not appeal the decision. Instead, on 03 November 1993, the DFA referred the matter to the National Labor Relations Commission ("NLRC"); in its referral, the DFA sought a "formal vacation of the void judgment." Replying to the letter, the NLRC Chairman, wrote:

"The undersigned submits that the request for the 'investigation' of Labor Arbiter Nieves de Castro, by the

National Labor Relations Commission, has been erroneously premised on Art. 218(c) of the Labor Code, as cited in the letter of Secretary Padilla, considering that the provision deals with 'a question, matter or controversy within its (the Commission) jurisdiction' obviously referring to a labor dispute within the ambit of Art. 217 (on jurisdiction of Labor Arbiters and the Commission over labor cases).

"The procedure, in the adjudication of labor cases, including raising of defenses, is prescribed by law. The defense of immunity could have been raised before the Labor Arbiter by a special appearance which, naturally, may not be considered as a waiver of the very defense being raised. Any decision thereafter is subject to legal remedies, including appeals to the appropriate division of the Commission and/or a petition for certiorari with the Supreme Court, under Rule 65 of the Rules of Court. Except where an appeal is seasonably and properly made, neither the Commission nor the undersigned may review, or even question, the propriety of any decision by a Labor Arbiter. Incidentally, the Commission sits en banc (all fifteen Commissioners) only to promulgate rules of procedure or to formulate policies (Art. 213, Labor Code).

"On the other hand, while the undersigned exercises 'administrative supervision over the Commission and its regional branches and all its personnel, including the Executive Labor Arbiters and Labor Arbiters' (penultimate paragraph, Art. 213, Labor Code), he does not have the competence to investigate or review any decision of a Labor Arbiter. However, on the purely administrative aspect of the decision-making process, he may cause that an investigation be made of any misconduct, malfeasance or misfeasance, upon complaint properly made.

"If the Department of Foreign Affairs feels that the action of Labor Arbiter Nieves de Castro constitutes misconduct, malfeasance or misfeasance, it is suggested that an appropriate complaint be lodged with the Office of the Ombudsman.

"Thank you for your kind attention."[2]

Dissatisfied, the DFA lodged the instant petition for *certiorari*. In this Court's resolution of 31 January 1994, respondents were required to comment. Petitioner was later constrained to make an application for a restraining order and/or writ of preliminary injunction following the issuance, on 16 March 1994, by the Labor Arbiter of a writ of execution. In a resolution, dated 07 April 1994, the Court issued the temporary restraining order prayed for.

The Office of the Solicitor General (OSG), in its comment of 26 May 1994, initially assailed the claim of immunity by the ADB. Subsequently, however, it submitted a Manifestation (dated 20 June 1994) stating, among other things, that "after a thorough review of the case and the records," it became convinced that ADB, indeed, was correct in invoking its immunity from suit under the Charter and the Headquarters Agreement.

The Court is of the same view.

Article 50(1) of the Charter provides:

The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities.[3]

Under Article 55 thereof -

All Governors, Directors, alternates, officers and employees of the Bank, including experts performing missions for the Bank:

(1) shall be immune from legal process with respect of acts performed by them in their official capacity,

except when the Bank waives the immunity.[4]

Like provisions are found in the Headquarters Agreement. Thus, its Section 5 reads:

"The Bank shall enjoy immunity from every form of legal process, except in cases arising out of, or in connection with, the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities.[5]

And, with respect to certain officials of the bank, Section 44 of the agreement states:

Governors, other representatives of Members, Directors, the President, Vice-President and executive officers as may be agreed upon between the Government and the Bank shall enjoy, during their stay in the Republic of the Philippines in connection with their official duties with the Bank:

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(b) Immunity from legal process of every kind in respect of words spoken or written and all acts done by them in their official capacity.[6]

The above stipulations of both the Charter and Headquarters Agreement should be able, nay well enough, to establish that, except in the specified cases of borrowing and guarantee operations, as well as the purchase, sale and underwriting of securities, the ADB enjoys immunity from legal process of every form. The Banks officers, on their part, enjoy immunity in respect of all acts performed by them in their official capacity. The Charter and the Headquarters Agreement granting these immunities and privileges are treaty covenants and commitments voluntarily assumed by the Philippine government which must be respected.

In World Health Organization vs. Aquino,[7] we have declared:

It is a recognized principle of international law and under our system of separation of powers that diplomatic immunity is essentially a political question and courts should refuse to look beyond a determination by the executive branch of the government, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government x x x it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the principal law officer of the government, x x x or other officer acting under his direction. Hence, in adherence to the settled principle that courts may not so exercise their jurisdiction x x x as to embarrass the executive arm of the government in conducting foreign relations, it is accepted doctrine that `in such cases the judicial department of government follows the action of the political branch and will not embarrass the latter by assuming an antagonistic jurisdiction.'"[8]

To the same effect is the decision in International Catholic Migration Commission vs. Calleja,[9] which has similarly deemed the Memoranda of the Legal Adviser of the Department of Foreign Affairs to be "a categorical recognition by the Executive Branch of Government that ICMC x x x enjoy(s) immunities accorded to international organizations" and which determination must be held "conclusive upon the Courts in order not to embarrass a political department of Government. In the instant case, the filing of the petition by the DFA, in behalf of ADB, is itself an affirmance of the government's own recognition of ADB's immunity.

Being an international organization that has been extended a diplomatic status, the ADB is independent of the municipal law.[10] In Southeast Asian Fisheries Development Center vs. Acosta,[11] the Court has cited with approval the opinion[12] of the then Minister of Justice; thus -

"One of the basic immunities of an international organization is immunity from local jurisdiction, i.e., that

it is immune from the legal writs and processes issued by the tribunals of the country where it is found. (See Jenks, Id., pp. 37-44). The obvious reason for this is that the subjection of such an organization to the authority of the local courts would afford a convenient medium thru which the host government may interfere in their operations or even influence or control its policies and decisions of the organization; besides, such subjection to local jurisdiction would impair the capacity of such body to discharge its responsibilities impartially on behalf of its member-states."[13]

Contrary to private respondent's assertion, the claim of immunity is not here being raised for the first time; it has been invoked before the forum of origin through communications sent by petitioner and the ADB to the Labor Arbiter, as well as before the NLRC following the rendition of the questioned judgment by the Labor Arbiter, but evidently to no avail.

In its communication of 27 May 1993, the DFA, through the Office of Legal Affairs, has advised the NLRC:

"Respectfully returned to the Honorable Domingo B. Mabazza, Labor Arbitration Associate, National Labor Relations Commission, National Capital Judicial Region, Arbitration Branch, Associated bank Bldg., T.M. Kalaw St., Ermita, Manila, the attached Notice of Hearing addressed to the Asian Development Bank, in connection with the aforestated case, for the reason stated in the Department's 1st Indorsement dated 23 March 1993, copy attached, which is self-explanatory.

"In view of the fact that the Asian Development Bank (ADB) invokes its immunity which is sustained by the Department of Foreign Affairs, a continuous hearing of this case erodes the credibility of the Philippine government before the international community, let alone the negative implication of such a suit on the official relationship of the Philippine government with the ADB.

"For the Secretary of Foreign Affairs

(Sgd.)
"SIME D. HIDALGO
Assistant Secretary"[14]

The Office of the President, likewise, has issued on 18 May 1993 a letter to the Secretary of Labor, *viz*:

"Dear Secretary Confesor,

"I am writing to draw your attention to a case filed by a certain Jose C. Magnayi against the Asian Development Bank and its President, Kimimasa Tarumizu, before the National Labor Relations Commission, National Capital Region Arbitration Board (NLRC NCR Case No. 00-01690-93).

"Last March 8, the Labor Arbiter charged with the case, Ms. Nieves V. de Castro, addressed a Notice of Resolution/Order to the Bank which brought it to the attention of the Department of Foreign Affairs on the ground that the service of such notice was in violation of the RP-ADB Headquarters Agreement which provided, inter-alia, for the immunity of the Bank, its President and officers from every form of legal process, except only, in cases of borrowings, guarantees or the sale of securities.

"The Department of Foreign Affairs, in turn, informed Labor Arbiter Nieves V. de Castro of this fact by letter dated March 22, copied to you.

"Despite this, the labor arbiter in question persisted to send summons, the latest dated May 4, herewith attached, regarding the Magnayi case.

"The Supreme Court has long settled the matter of diplomatic immunities. In WHO vs. Aquino, SCRA 48,

it ruled that courts should respect diplomatic immunities of foreign officials recognized by the Philippine government. Such decision by the Supreme Court forms part of the law of the land.

"Perhaps you should point out to Labor Arbiter Nieves V. de Castro that ignorance of the law is a ground for dismissal.

"Very truly yours,

(Sgd.)
JOSE B. ALEJANDRINO
Chairman, PCC-ADB"[15]

Private respondent argues that, by entering into service contracts with different private companies, ADB has descended to the level of an ordinary party to a commercial transaction giving rise to a waiver of its immunity from suit. In the case of Holy See vs. Hon. Rosario, Jr.,[16] the Court has held:

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 act or acts *jure gestionis*.

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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.[17]

The service contracts referred to by private respondent have not been intended by the ADB for profit or gain but are official acts over which a waiver of immunity would not attach.

With regard to the issue of whether or not the DFA has the legal standing to file the present petition, and whether or not petitioner has regarded the basic rule that *certiorari* can be availed of only when there is no appeal nor plain, speedy and adequate remedy in the ordinary course of law, we hold both in the affirmative.

The DFA's function includes, among its other mandates, the determination of persons and institutions covered by diplomatic immunities, a determination which, when challenged, entitles it to seek relief from the court so as not to seriously impair the conduct of the country's foreign relations. The DFA must be allowed to plead its case whenever necessary or advisable to enable it to help keep the credibility of the Philippine government before the international community. When international agreements are concluded, the parties thereto are deemed to have likewise accepted the responsibility of seeing to it that their agreements are duly regarded. In our country, this task falls principally on the DFA as being the highest executive department with the competence and authority to so act in this aspect of the international arena.[18] In Holy See vs. Hon. Rosario, Jr.,[19] this Court has explained the matter in good detail; *viz*:

"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, I 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 vs. 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 vs. Aquino, 48 SCRA 242 (1972), the Secretary of Foreign Affairs sent the trial court a telegram to that effect. In Baer vs. 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 vs. Bradford, 75 Phil. 50 [1945]; Miquiabas vs. Philippine-Ryukyus Command, 80 Phil. 262 [1948]; United States of America vs. 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."[20]

Relative to the propriety of the extraordinary remedy of *certiorari*, the Court has, under special circumstances, so allowed and entertained such a petition when (a) the questioned order or decision is issued in excess of or without jurisdiction,[21] or (b) where the order or decision is a patent nullity,[22] which, verily, are the circumstances that can be said to obtain in the present case. When an adjudicator is devoid of jurisdiction on a matter before him, his action that assumes otherwise would be a clear nullity.

WHEREFORE, the petition for *certiorari* is GRANTED, and the decision of the Labor Arbiter, dated 31 August 1993 is VACATED for being NULL AND VOID. The temporary restraining order issued by this Court on 07 April 1994 is hereby made permanent. No costs.

SO ORDERED.

Bellosillo, Kapunan, and *Hermosisima, Jr., JJ.,* concur.
Padilla, (Chairman), J., no part.

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[1] *Rollo*, pp. 34-35.

[2] *Rollo*, pp. 36-37.

[3] *Rollo*, p. 170.

[4] *Rollo*, p. 171.

[5] *Rollo*, p. 45.

[6] *Rollo*, pp. 51-52.

[7] 48 SCRA 242.

[8] At pp. 248-249.

[9] 190 SCRA 130.

[10] SEAFDEC *vs*. NLRC, 206 SCRA 283; See International Catholic Migration Commission *vs*. Calleja, *supra*.

[11] 226 SCRA 49.

[12] No. 139, Series of 1984.

[13] At page 53.

[14] *Rollo*, p. 272.

[15] *Rollo*, p. 273.

[16] 238 SCRA 524.

[17] At pp. 535-536.

[18] See ICMC *vs*. Calleja, *supra*.

[19] *Supra*.

[20] At pp. 531-533.

[21] Aguilar *vs*. Tan, 31 SCRA 205; Bautista, *et al. vs*. Sarmiento, 138 SCRA 587.

[22] Marcelo *vs*. De Guzman, 114 SCRA 657.