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Alfred Dunhill of London v. Republic of Cuba, May 24, 1976 Supreme Court of the United States

Judicial Decisions

Supreme Court of the United States, No. 73-1888

Alfred Dunhill of London, Inc., Petitioner v.
The Republic of Cuba et al.
On Writ of Certiorari to the United States Court of Appeals for the Second Circuit. [May 24, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.*

The issue in this case is whether the failure of respondents to return to petitioner Alfred Dunhill of London, Inc. (Dunhill), funds mistakenly paid by Dunhill for cigars that had been sold to Dunhill by certain expropriated Cuban cigar businesses was an "act of state" by Cuba precluding an affirmative judgment against respondents. . . .

I

In 1960, the Cuban government confiscated the business and assets of the five leading manufacturers of Havana cigars. These companies, three corporations and two partnerships, were organized under Cuban law. Virtually all of their owners were Cuban nationals. None were American. These companies sold large quantities of cigars to customers in other countries, including the United States, where the three principal importers were petitioner, Alfred Dunhill of London, Inc. (Dunhill), Saks and Co. (Saks) and Faber, Coe & Gregg, Inc. (Faber). The Cuban government named "interventors" to take possession and operate the business of the seized Cuban concerns. Interventors continued to ship cigars to foreign purchasers, including the United States importers.

This litigation began when the former owners of the Cuban companies, most of whom had fled to the United States, brought various actions against the three American importers for trademark infringement and for the purchase price of any cigars that had been shipped to importers from the seized Cuban plants and that bore United States trademarks claimed by the former owners to be their property . . . Both the former owners and the interventors had asserted their

*Part III of this opinion is joined only by THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

right to some $700,000 due from the three importers for post-intervention shipments . . . It also developed that as of the date of intervention, the three importers owed sums totalling $477,600 for cigars shipped prior to intervention: Faber, $322,000; Dunhill, $148,600; and Saks, $6,600. These latter sums the importers had paid to interventors subsequent to intervention on the assumption that interventors were entitled to collect the accounts receivable of the intervened business. The former owners claimed title to and demanded payment of these accounts.

Based on the "act of state" doctrine which had been reaffirmed in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964), the District Court held in *Palicio v. Brush, supra,* and here, that it was required to give full legal effect to the 1960 confiscation of the five cigar companies insofar as it purported to take the property of Cuban nationals located within Cuba. Interventors were accordingly entitled to collect from the importers all amounts due and unpaid with respect to shipments made after the date of intervention. The contrary conclusion was reached as to the accounts owing at the time of intervention: because the United States courts will not give effect to foreign government confiscations without compensation of property located in the United States and because under *Republic of Iraq v. First National City Bank,* 353 F.2d 47 (CA2 1965), *cert. denied,* 382 U.S. 1027 (1966), the situs of the accounts receivable was with the importer-debtors, the 1960 seizures did not reach the preintervention accounts; and the former owners, rather than the interventors, were entitled to collect them from the importers—even though the latter had already paid them to interventors on the mistaken belief that they were fully discharging trade debts in the ordinary course of their business.

This conclusion brought to the fore the importers' claim that their payment of the preintervention accounts had been made in error and that they were entitled to recover these payments from the interventors by way of setoff and counterclaim. Although their position that the 1960 confiscation entitled them to the sums due for preintervention sales had been rejected and the District Court had ruled that they "had no right to receive or retain such payment," interventors claimed those payments on the additional ground that the obligation, if any, to repay was a quasi-contractual debt having a situs in Cuba and that their refusal to honor the obligation was an act of state not subject to question in our courts. The District Court rejected this position for two reasons. First, the repayment obligated was more properly deemed situated in the United States and hence remained unaffected by any purported confiscatory act of the Cuban government. Second, in the District Court's view, nothing had occurred which qualified for recognition as an act of state:

> [T]here was no formal repudiation of the obligations by Cuban Government decree of general application or otherwise. . . . Here all that occurred was a statement by counsel for the intervenors, during the trial, that the Cuban Government and the

> intervenors denied liability and had refused to make repayment. This statement was made after the intervenors had invoked the jurisdiction of this Court in order to pursue their claims against the importers for postintervention shipments. It is hard to conceive how, if such a statement can be elevated to the status of an act of state, *any* refusal of any state to honor *any* obligation at *any* time could be so considered anything else. 345 F. Supp., at 545.

The importers were accordingly held entitled to set off their mistaken payments to interventors for preintervention shipments against the amounts due from them for their post-intervention purchases . . . But Dunhill—and at last we arrive at the issue in this case—was entitled to more from interventors—$148,000—than they owed for post-intervention shipments—$93,000—and to be made whole, asked for and was granted judgment against interventors for the full amount of its claim, from which would be deducted the smaller judgment entered against it.

The Court of Appeals, 485 F.2d 1355 (CA2 1975), agreed that the former owners were entitled to recover from the importers the full amount of pre-intervention accounts receivable. It also held that the mistaken payments by importers to interventors gave rise to a quasi-contractual obligation to repay these sums. But contrary to the District Court, the Court of Appeals was of the view that the obligation to repay had a situs in Cuba and had been repudiated in the course of litigation by conduct that was sufficiently official to be deemed an act of state: "[i]n the absence of evidence that the interventors were not acting within the scope of their authority as agents of the Cuban government, their repudiation was an act of state even though not embodied in a formal decree." 485 F.2d, at 1371. Although the repudiation of the interventors' obligation was considered an act of state, the Court of Appeals went on to hold that *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 749 (1972), entitled importers to recover the sums due them from interventors by way of setoff against the amounts due from them for post-intervention shipments. The act of state doctrine was said to bar the affirmative judgment awarded Dunhill to the extent that its claim exceeded its debt. The judgment of the District Court was reversed in this respect, and it is this action which was the subject of the petition for certiorari filed by Dunhill . . . We have now concluded that nothing in the record reveals an act of state with respect to interventors' obligation to return monies mistakenly paid to them. Accordingly we reverse the judgment of the Court of Appeals.

II

The District Court and the Court of Appeals held that for purposes of this litigation, interventors were not entitled to the preintervention accounts receivable by virtue of the 1960 confiscation and that, despite other arguments to the contrary, nothing based on their claim to those accounts entitled interventors to retain monies mistakenly paid on those accounts by importers. We do

not disturb these conclusions. The Court of Appeals nevertheless observed that interventors had "ignored" demands for the return of the monies and had "fail[ed] to honor the importers' demand (which was confirmed by the Cuban government's counsel at trial)." This conduct was considered to be "the Cuban government's repudiation of its obligation to return the funds" and to constitute an act of state not subject to question in our courts. 485 F.2d, at 1369, 1371. We cannot agree.

If interventors, having had their liability adjudicated and various defenses rejected, including the claimed act of state with respect to preintervention accounts represented by the Cuban confiscation in 1960, were nevertheless to escape repayment by claiming a second and later act of state involving the funds mistakenly paid them, it was their burden to prove that act. Concededly, they declined to pay over the funds; but refusal to repay does not necessarily assert anything more than what interventors had claimed from the outset and what they have continued to claim in this Court—that the preintervention accounts receivable were theirs and that they had no obligation to return payments on those accounts.[1] Neither does it demonstrate that in addition to authority to operate commercial businesses, to pay their bills and to collect their accounts receivable, interventors had been invested with sovereign authority to repudiate all or any part of the debts incurred by those businesses. Indeed, it is difficult to believe that they had the power selectively to refuse payment of legitimate debts arising from the operation of those commercial enterprises.

In *"The Gul Djemal,"* 264 U.S. 90 (1924), a supplier libeled and caused the arrest of the *Gul Djemal,* a steamship owned and operated for commercial purposes by the Turkish government, in an effort to recover for supplies and services sold to and performed for the ship. The ship's master, "a duly commissioned officer of the Turkish Navy," appeared in court and asserted sovereign immunity, claiming that such an assertion defeated the court's jurisdiction. A direct appeal was taken to this Court, where it was held that the master's assertion of sovereign immunity was insufficient because his mere representation of his government as master of a commercial ship furnished no basis for assuming he was entitled to represent the sovereign in other capacities. Here there is no more reason to suppose that the interventors possess governmental, as opposed to commercial, authority than there was to suppose that the master of the *Gul Djemal* possessed such authority. The master of the *Gul Djemal* claimed the authority to assert sovereign immunity while the interventors claim that they had the authority to commit an act of state, but the difference is unimportant. In both cases, a party claimed to have had the authority to exercise sovereign power. In both, the only authority shown is commercial authority.

We thus disagree with the Court of Appeals that the mere refusal of the interventors to repay funds followed by a failure to prove that interventors "were not

acting within the scope of their authority as agents of the Cuban government" satisfied respondents' burden of establishing their act of state defense. Nor do we consider *Underhill v. Hernandez,* 168 U.S. 250 (1897), heavily relied upon by the Court of Appeals, to require a contrary conclusion. In that case and in *Oetjen v. Central Leather Co.,* 246 U.S. 297 (1978), and *Ricaud v. American Metal Co.,* 246 U.S. 304 (1918), it was apparently concluded that the facts were sufficient to demonstrate that the conduct in question was the public act of those with authority to exercise sovereign powers and was entitled to respect in our courts. We draw no such conclusion from the facts of the case before us now. As the District Court found, the only evidence of an act of state other than the act of nonpayment by interventors was "a statement by counsel for the interventors, during the trial, that the Cuban Government and the interventors denied liability and had refused to make repayment." 345 F. Supp., at 545. But this merely restated respondents' original legal position and adds little, if anything, to the proof of an act of state. No statute, decree, order or resolution of the Cuban government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers.

III

If we assume with the Court of Appeals that the Cuban government itself had purported to exercise sovereign power to confiscate the mistaken payments belonging to three foreign creditors and to repudiate interventors adjudicated obligation to return those funds, we are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities. Our cases have not yet gone so far, and we decline to expand their reach to the extent necessary to affirm the Court of Appeals.

Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach. . . .

It is the position of the United States, stated in a brief filed by the Solicitor General, that such a line should be drawn in defining the outer limits of the act of state concept and that repudiations by a foreign sovereign of its commercial debts should not be considered to be acts of state beyond legal question in our courts . . .

The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations. *Banco Nacional de Cuba v. Sabbatino,* 376

U.S., *supra,* at 427-428, 431-433. But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary, for the reasons to which we now turn, we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts . . . Repudiation of a commercial debt cannot, consistent with this restrictive approach to sovereign immunity, be treated as an act of state; for if it were, foreign governments, by merely repudiating the debt before or after its adjudication, would enjoy an immunity which our government would not extend them under prevailing sovereign immunity principles in this country. This would undermine the policy supporting the restrictive view of immunity, which is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible.

Although at one time this Court ordered sovereign immunity extended to a commercial vessel of a foreign country absent a suggestion of immunity from the Executive Branch and although the policy of the United States with respect to its own merchant ships was then otherwise, *Berizzi Bros. Co. v. The Pesaro,* 271 U.S. 562 (1926), the authority of that case has been severely diminished by later cases such as *Ex parte Republic of Peru,* 318 U.S. 578 (1943), and *Mexico v. Hoffman,* 324 U.S. 30 (1945) . . .

In the last 20 years, lower courts have concluded in light of this Court's decisions in *Ex parte Republic of Peru, supra,* and *Mexico v. Hoffman, supra,* and from the Tate letter and the changed international environment that *Berizzi Bros. Co. v. Steamship Pesaro* no longer correctly states the law; and they have declined to extend sovereign immunity to foreign sovereigns in cases arising out of purely commercial transactions. *Victory Transport, Inc. v. Comisaria General,* 336 F.2d 354 (CA2 1964), *cert. denied,* 381 U.S. 934 (1965); *Petrol Shipping Corp. v. Kingdom of Greece,* 360 F.2d 103 (CA2), *cert. denied,* 385 U.S. 931 (1966) . . . Indeed, it is fair to say that the "restrictive theory" of sovereign immunity appears to be generally accepted as the prevailing law in this country. ALI, Restatement (Second), Foreign Relations Law of the United States, § 69 (1965) . . . In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves" . . . There may be little codification or consensus as to the rules of international law concerning exer-

cises of *governmental* powers, including military powers and expropriations, within a sovereign state's borders affecting the property or persons of aliens. However, more discernible rules of international law have emerged with regard to the commercial dealings of private parties in the international market. The restrictive approach to sovereign immunity suggests that these established rules should be applied to the commercial transactions of sovereign states.

Of course, sovereign immunity has not been pleaded in this case; but it is beyond cavil that part of the foreign relations law recognized by the United States is that the commercial obligations of a foreign government may be adjudicated in those courts otherwise having jurisdiction to enter such judgments. Nothing in our national policy calls on us to recognize as an act of state a repudiation by Cuba of an obligation adjudicated in our courts and arising out of the operation of a commercial business by one of its instrumentalities. For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "Act of State" than if it is given the label "sovereign immunity."[2] In describing the act of state doctrine in the past we have said that it "precludes the courts of this country from inquiring into the validity of *public* acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1964) (emphasis added), and that it applies to "acts done within their own states, in the exercise of *governmental* authority." *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897) (emphasis added). We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations. Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba's agents in the operation of cigar businesses for profit, the act was not an act of state.

Reversed.