JESUS GUERRERO ALIG as Administrator of the Estate of Jose AUg San Nicolas, also known as Jose San Nicolas AUg, deceased, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, its ALIEN PROPERTY CUSTODIAN, the ALIEN PROPERTY CUSTODIAN OF THE DISTRICT OF SAlPAN, and the LAND AND CLAIMS ADMINISTRATOR, Appellees

Civil Appeal No. 27

Appellate Division of the High Court

November 24, 1967

See, also, 3 *T.T.R. 64*

Appeal from judgment of the Trial Division of the High Court, Mariana Islands District, in which summons as to all defendants was quashed as unauthorized suit against the sovereign. Plaintiff prays for restitution of land in Saipan which was seized by the Japanese Government in 1931 and which is now in. possession·of defendants, and for damages, rents, and declaration that he is lawful owner of property in question. The Appellate Division of the High Court, Chief Justice E. P. Furber, held that action is barred by reason of sovereign immunity, that United Nations Trusteeship does not create trust capable of court enforcement, and that action against named individual defendants is in effect suit against Government.

Affirmed.

1. Courts—High Court

Under Trust Territory law, the Trial Division of the High Court is court of general jurisdiction. (T.T.C., Sec. 23)

2. T.rust Territory-Suits Against

Suit against Txust Territory and certain of its officers for return of land taken by Japanese Government and for damages and rents comes within doctrine of sovereign immunity, whereby government is immune from suit without its consent.

3. Trust Territory-Suits Against

Although Trust· Territory of the Pacific Islands is not a sovereign in international sense, it may still be granted sovereign immunity.

4. International Law-Sovereignty-Sovereign Immunity

A government may be entitled to and enjoy some attributes. of sovereignty without necessarily having all of them, and court will consider fundamental purpose of sovereign immunity in order to determine which governments principle applies to.

5. United States-Suits Against

Doctrine of sovereign immunity may be applied to certain territories of United States even though legislative determinations of government involved are subject to possible change at discretion of Congress of United States.

6. International Law-Sovereignty-Sovereign Immunity

Actual sovereignty in traditional sense is not essential to right of a government to sovereign immunity from suit without its consent.

7. International Law-Sovereignty-Sovereign Immunity

Sovereign immunity attaches to a government having wide legislative power, as an incident of that power, even though government may not be truly sovereign.

8. Trusteeship-Generally

Although Trust Territory of the Pacific Islands is means by which United States carries out certain responsibilities as administering authority under Trusteeship Agreement, it also has some separate standing administratively, and therefore cannot be considered merely agency of the United States in all cases.

9. Legislative Power-Delegation

Delegations of legislative power in Trust Territory indicate intent to work towards a government along lines followed in organizing territories of the United States.

10. Trust Territory-Suits Against

Delegation of legislative power to Trust Territory of the Pacific Islands, even though subject to some limitations, gives Trust Territory quasi-sovereignty or qualified sovereignty, carrying with it attribute of immunity from suit without its own consent.

11. Former Administrations-Taking of Private Property by Japanese Government-Limitations

The Trust Territory of the Pacific Islands has not consented to be sued for return of property taken by Japanese Government in 1931, nor for damages and profits accruing to it as result of possession of such property.

12. Trusteeship-Trusteeship Agreement

United Nations Charter, in setting up international trusteeship system, makes definite provision for enforcement of this system through Trusteeship Council, General Assembly and, in case of strategic trusteeships, the Security Council. (United Nations Charter, Chapters XII, XIII)

13. Trusteeship-Trusteeship Agreement

Type of trusteeship system created by United Nations Charter does not create trust capable of enforcement through the courts.

14. Trust Territory-Suits Against

Even if legal trust, as distinguished from political trust, were involved in setting up of Trust Territory, principle of government's immunity from suit without its consent would still prevent maintenance of action against Trust Territory for return of property taken by Japanese Government in 1931.

15. Eminent Domain-Generally

Where taking of property by Japanese Government occurred in 1931, Trust Territory Bill of Rights provision regarding payment' of compensation where property is taken for public use is not applicable, since Bill of Rights provision is' prospective only. (T.T.C., Sec. 4)

16. Former Administrations-Redress of Prior Wrongs-Exception to Applicable Doctrine

Government of Tru'st Territory is not required as matter of right to correct w:rongs which former government may have permitted, except in those cases where wrong occurred so near time of change of administration that there was no opportunity for it to be corrected through courts or other administration of the former administration.

17. Trust Territory-Suits Against

Suit is one against Trust Territory Government· where individuals named as defendants are sued purely by title, there are no allegations as to what specific part any of them has taken in wrongs alleged, there is no allegation any of them was exceeding his delegated powers in occupying land in question, or that any was in possession of land in anything other than his official capacity..

Counsel for Appellant: ARRIOLA, BOHN & GAYLE, Joaquin C. Arriola, Esq., on the brief and John C. Dierking, Esq. orally

Counsel for Appellees: D. KELLY TURNER, ESQ.

Before FURBER, *Chief Justice,* GOSS, *Associate Justice,* SHIVER, *Temporary Judge*

FURBER, *Chief Justice*

This is an appeal from a judgment of the Trial Divisionofthe High Court in its Mariana Islands District Civil Action No. 119, 3 T.T.R. 64, by which judgment the summons as to all named defendants was quashed, set aside, held for naught, and the action dismissed.

The complaint filed in the Trial Division by the plaintiff-appellant Jesus Guerrero Alig as administrator of the Estate of Jose Alig San Nicolas, also known as Jose San Nicolas Alig, deceased, alleged in substance that on or about 1931 the Government of Japan, unlawfully and against the will of the deceased made an unlawful and forcible entry into and upon two substantial pieces of land on Saipan, Mariana Islands, owned by the deceased, and unlawfully and forcibly ejected and expelled the deceased from the premises, and that the United States and the defendants in this action are trustees and legal successors of the Japanese Government and have wrongfully continued in the possession of the property. Wherefore the plaintiff prayed, among other things, for judgment against the defendants for the restitution of the premises in question, damages for forcible and unlawful entry and forcible and unlawful detention, for monthly rents and profits, for treble damages and loss of rents, for a determination that the Trusteeship Agreement for the former Japanese Mandated Islands is a valid and existing trust, and that the plaintiff be declared rightfully entitled to the cause or causes of the action set out in the complaint, that the plaintiff be declared the true and lawful owner of the lands described, that the defendants be ordered to account to the plaintiff for all of the trust property and the rents, issues, and profits therefrom and be ordered and directed to deliver over to the plaintiff all such property.

The Attorney General of the Trust Territory, appearing specially, moved to quash, set aside, and hold for naught the summonses and service thereof as to all defendants because this was an attempted action against the Government of the Trust Territory of the Pacific Islands, its officers and agents and it had not given its consent for itself or its officers or agents to be made defendants.

The opinion of the Trial Division held in substance as follows:-

1. The Trust Territory of the Pacific Islands, aside from designating a geographical area, is merely a name under which the United States carries out its obligations as administering authority under the Trusteeship Agreement with the United Nations for the former Japanese Mandated Islands and therefore is not a real legal entity, but speaks, operates, and acts as part of the executive department of the United States.

2. That the Trusteeship Agreement did not create such a trust as courts of equity can enforce.

3. The plaintiff's contention that the individuals named as defendants are sued in their individual, rather than their official, capacities is without merit and the suit is actually against the Government.

4. It rests with the Congress of the United States to determine not only what the United States may be sued for, but in what courts suits may be brought against it. This being a suit against the United States and no Congressional authority having been given for the bringing of such an action in the Trial Division of the High Court, that court had no jurisdiction to entertain it.

The appellant in his Notice of Appeal alleges five grounds as follows :–

1. That the court erred in finding that the Trust Territory of the Pacific Islands is not a legal entity.

2. That the court erred in finding that the suit was a suit against the United States which the Trial Division of the High Court could not entertain.

3. That the court erred in holding that United States Congressional action was necessary before the court would have jurisdiction of the appellant's causes of action.

4. That the court erred in denying that Section 4 of the Bill of Rights of the Trust Territory of the Pacific Islands (Chapter 1, Laws and Regulations, Government of the Trust Territory of the Pacific Islands) constitutes a specific waiver of immunity from suit when real property is seized for public use without compensation.

5. Generally, that the court erred in denying jurisdiction and in dismissing the action.

The appellant in his brief argued in support of each of the five grounds in the appeal enumerated above. In the oral argument his counsel stressed particularly the weight which he believed the court should give to the United Nations Charter and the Trusteeship Agreement, and argued that, in view of these, the question of sovereignty was not really controlling because of the trust which he believed had been created. He claimed that, if the people of the Trust Territory had no recourse to the courts for enforcement of the trust, they would be without any remedy.

In their brief the appellees argued in support of the position indicated in the opinion of the Trial Division, but in the oral argument they took a very different view. Their counsel claimed orally that the Trial Division had taken the wrong track to reach the right result. He argued that the Trust Territory is a government in its own right, created by the United States for the government of the area comprising the Trust Territory of the Pacific Islands, pointing out that the Manual of the Department of the Interior states that territories are not organizational entities of the Department of the Interior. He asserted that sovereignty was not a judicial question, but one which should be decided by the executive and legislative branches of the government. He argued, however, that the court had no jurisdiction over the

Trust Territory since the government was not mentioned in Section 117 of the Trust Territory Code, outlining the jurisdiction of Trust Territory courts over persons, and that the Trust Territory was neither a person nor a corporation. He further pointed out that neither the Trust Territory Government nor any of the defendants had taken anything from the plaintiff which was enforcible at the time the Trust Territory came into existence.

We feel that both sides here are too much concerned with the technical definitions of words and that much greater reliance must be placed upon the principles involved and the context in which those words were used. The Trust Territory of the Pacific Islands has appeared as a party repeatedly in the Trial Division of the High Court as shown by its opinions distributed in mimeographed form in situations in which it had consented to be a party-particularly in appeals under Section 14 of the Trust Territory's Office of Land Management Regulation No. 1 from determinations of ownership by District Land Title Officers and in eminent domain proceedings under Chapter 20 of the Trust Territory Code.

[1-3] We believe it is very clear that the provisions of the Trust Territory Code, particularly Section 123, make the Trial Division of the High Court a court of general jurisdiction and that it must be considered to have jurisdiction over this action unless it comes within some recognized exception to the general jurisdiction of courts. We believe that the action does come within the exception that is normally described as "sovereign immunity" of a government from suit without its consent, although it might be more accurate to refer to it as "governmental immunity". We freely recognize that the Trust Territory of the Pacific Islands is not a sovereign in the international

sense, but neither are the states of the United States, nor were the incorporated territories of the United States; yet these have been regularly granted this type of immunity. 49 Am. Jur., States, Territories and Dependencies, §§ 91, 143. Bouvier's Law Dictionary, 3rd Rev., Vol. 2, Sovereignty, p. 3096, 3097.

[4, 5] It appears quite clear that, according to usual American concepts, there are degrees or attributes of sovereignty and that a government may be entitled to and enjoy some of these attributes without necessarily having all of them. To determine, therefore, what governments this principle of "sovereign immunity" applies to, we must consider the fundamental purpose of the immunity. This has been very succinctly stated by Mr. Justice Holmes, speaking on behalf of the Supreme Court of the United States, in part as follows:-

"A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. . . . .

"As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as, in the case of a state, the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power." *Kawananakoa v. Polyblank*, 205 U.S. 349 at p. 353,354,27 S.Ct. 526 at p. 527 (1907).

Accordingly it has been held that the principle of "sovereign immunity" applied to the Government of Porto

Rico as organized under the Organic Act of April 12, 1900, (31 Stat. at L. 77, Chapter 191), to the unincorporated territory of Guam, and to the Virgin Islands as organized under the Organic Act of 1936 (49 Stat. 1807), although in each case the legislative determinations of the government involved were subject to possible change at the discretion of the Congress of the United States. *Porto Rico v. Rosaly y Castillo,* 227 U.S. 270, 33 S.Ct. 352 (1913). *People of Puerto Rico v. Shell Co.,* 302 U.S. 253, 58 S.Ct. 167 (1937). *Crain v. Government of Guam,* 195 F.2d 414 (1952). *Harris v. Municipality of St. Thomas and St. John,* 212 F.2d 323 (1954). (Note: In consideration of this case and that of *Harris v. Burnham,* cited later, it should be noted that the two "municipalities" in which the Virgin Islands were organized under the Organic Act of 1936, were based on Danish colonial precedent and were expressly constituted "bodies politic and juridic" with local legislative powers. They are, therefore, quite different from usual American municipal corporations so far as the issue discussed here is concerned.)

[6,7] The following statements from the opinions in the *Shell Company* case and the case of *Harris v. Municipality of St. Thomas and St. John,* cited above, are particularly in point as indicating that actual sovereignty in the traditional sense is not essential to the right of a government to so-called "sovereign immunity" from suit without its own consent. In the *Shell* case the Supreme Court of the United States stated at p. 261, 262 of 302 U.S., p. 171 of 58 S.Ct. as follows:-

"The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. *Romer v. Standard Dredging Co.,* 224 U.S. 362, 370, 32 S.Ct. 499, 56 L.Ed. 801; *People of Porto Rico v. Rosaly y Castillo,* supra, 227 U.S. 270, at page 274, 33 S.Ct. 352, 57 L.Ed. 507. The effect was to

confer upon the territory many of the attributes of *quasi Sovereignty* possessed by the states-as, *for example, immunity from suit without their consent."* (Emphasis added)

In the opinion in the *Harris* case the U.S. Court of Appeals for the Third Circuit said at p. 325:-

"Thus in Section 7 of the Foraker Act, 31 Stat. 79, the original Organic Act for the near-by island of Puerto Rico, it was provided that the inhabitants of the island 'shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.' In the *People of Porto Rico v. Rosaly*, 1913, 227 U.S. 270, 33 S.Ct. 352, 57 L.Ed. 507, it was held that the effect of the Organic Act was to endow this body politic with a *qualified sovereignty, having the sovereign characteristic of immunity from suit without its consent;* that the provision of Section 7 aforesaid was merely an express recognition of the power to sue which would be implied from the nature of the charter grant as a whole, 'and a recognition of a liability to be sued consistently with the nature and character of the government; that is, only in case of consent duly given.' 227 U.S. at page 277, 33 S.Ct. at page 354." (Emphasis added)

This type of immunity is, therefore, one which attaches to a government having wide legislative power, as an incident of that power, even though the government may not be truly sovereign.

[8] The Trust Territory of the Pacific Islands appears to be quite definitely of a dual nature. It is certainly the means by which the United States carries out the major part of its responsibilities as administering authority under the Trusteeship Agreement and its activities are included in the annual reports of the United States' administration of the territory made by the United States to the Trusteeship Council. Furthermore the Trust Territory Government seems clearly intended to come within the meaning of the words "such agency or agencies as the President of the United States may direct or authorize"

as used in 48 U.S.C. 1681(a) in providing for the government of the area. The Trust Territory appears to act sometimes as a part of the Department of the Interior and sometimes as a separate, though subordinate, body having a will of its own. It is widely known within the Trust Territory that some of its officials and employees purport to be hired under United States Federal Civil Service Regulations, while others are considered to be contract employees. Many of its motor vehicles bear conspicuous number plates with the notation "U.S. Government". It is clear, however, that the United States has endeavored administratively to give it some separate standing. Such dual functions, although in that instance set up by Act of Congress, were not considered to make the Government of the Virgin Islands, including the two "municipalities" into which it was divided, an agency of the United States within the meaning of the Federal Tort Claims Act, nor to make the Superintendent of Public Works of one of these divisions an officer or employee of a federal agency while he was supervising the maintenance of streets, even though his salary was paid from federal funds appropriated by the United States Congress and he was appointed by the Secretary of the Interior and it was claimed he also had supervisory duties in respect to federal buildings' and federal projects. *Harris v. Borehan,* 233 F.2d 110 (1956).

The appellant has relied heavily upon the case of *Huskopj v. Corning Hospital District*, 359 P.2d 457 (1961) as having abrogated the doctrine of sovereign immunity in California. That case does not appear to us to be directly in point at all since the "sovereign immunity" abrogated there was immunity from tort liability and the court did not have to deal with the question of government immunity from suit without its own consent, because it found at page 461 that Article XX, Section 6, of the California Constitution provided for a legislative consent to sue.

[9] In view of the foregoing we do not find it necessary to pass on the question of whether the Trust Territory of the Pacific Islands is a legal entity or whether action of the United States Congress would be necessary to enable the Trial Division to entertain the action involved in this appeal. Article 2 of the Trusteeship Agreement for the former Japanese Mandated Islands designates the United States of America as administering authority, and Article 3 gives the administering authority "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of that agreement, ..." By what is sometimes called the Temporary Organic Act for the Trust Territory, 48 U.S.C. Sections 1681-1685, the Congress of the United States vested all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory in such person or persons and to be exercised in such manner or through such agency or agencies as the President of the United States may direct or authorize. By Executive Order No. 11021, dated May 7, 1962, the President of the United States vested responsibility for the administration of civil government in all the Trust Territory, and all executive, legislative and judicial authority necessary for that administration, in the Secretary of the Interior. The Secretary of the Interior, by Order No. 2876 of January 30, 1964, in effect vested legislative authority of the government of the Trust Territory in the High Commissioner and the Secretary of the Interior and provided for independent judicial authority. That Department of the Interior Order was still in effect at the time of the filing of the action now in question so far as legislative authority is concerned, although by Order No. 2882 of September 28, 1964, the Secretary had already provided for the creation of the Congress of Micronesia and the grant to it of leg-

islative authority effective by July 12, 1965, leaving the executive and judicial authorities as separate branches of the government. These delegations of legislative power are distinctly in accord with American law and precedents and we believe are fully effective, and taken together we believe indicate an intent to work towards a government along the lines followed in organizing the territories of the United States. 54 Am. Jur., United States, § 37. 49 Am. Jur., States, Territories and Dependencies, § 115, especially note 6.

[10,11] Leaving aside any technical question as to what word or small group of words most accurately describes the relation of the Trust Territory of the Pacific Islands to the United States of America, we hold that the delegation of legislative power outlined above to the Trust Territory of the Pacific Islands, even though subject to some limitations, gave the Trust Territory what United States courts have referred to, as noted above, as "quasi-sovereignty" or "qualified sovereignty", carrying with it the attribute of immunity from suit without its own consent. Nothing which we feel can fairly be considered as consent by the Trust Territory to be sued in this instance has been indicated.

[12,13] In response to the appellant's argument that the United Nations Charter and the Trusteeship Agreement create a trust which Trust Territory courts should enforce and that, if the people of the Trust Territory have no recourse to the courts for enforcement of the trust, they would be without any remedy, we would call attention to the fact that the provisions of Chapters XII and XIII of the United Nations Charter, in setting up the international trusteeship system, make very definite provision for enforcement of this system through the Trusteeship Council, the General Assembly, and, in the case of

strategic trusteeships such as this one, the Security Council. The court takes notice that these operate on a distinctly diplomatic basis. In view of this, the broad principles laid down for trusteeships, and the wide discretion left to the administering authorities, this court fully concurs with the Trial Division's holding that this type of trusteeship does not create a trust capable of enforcement through the courts.

[14] Even if some sort of legal, as distinguished from a political, trust were considered to be involved, we believe the principle of a government's immunity from suit without its consent would still prevent the maintaining of this action against the Trust Territory of the Pacific Islands. *State of Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292 (1939).

[15] The appellant has also argued that the provisions of Section 4 of the Bill of Rights, incorporated in Chapter 1 of the Trust Territory Code, to the effect that private property shall not be taken for public use without just compensation, authorizes the present action without the need of any further consent and cites a number of authorities to the effect that action for what is sometimes called "inverse condemnation" can be brought for recovery of damages for property taken in violation of such a provision without further governmental consent. It should be noted, however, that the taking involved in this action is alleged to have been done by the Japanese Government on or about 1931 and that the provision in the Bill of Rights referred to by the appellant was first promulgated in the Trust Territory of the Pacific Islands by the Deputy High Commissioner's memorandum of 8 May 1948 forwarding copies of Interim Regulation No. 4-48 and later carried over into the Trust Territory Code. Whatever taking was involved here was, therefore, long prior to the

enactment of the provision of the Bill of Rights in question, and we believe, in accordance with usual principles of statutory construction that this provision should be given only prospective, and not retrospective, effect. 16 Am. Jur. 2d, Constitutional Law, § 148. 50 Am. Jur., Statutes, § 478.

[16] It seems to us it is particularly clear that such a provision cannot properly be applied retroactively to the actions of a former government. This court and the Trial Division of the High Court have repeatedly held, in accordance with well-accepted general principles of international law, that the present Government of the Trust Territory is not required as a matter of right to correct wrongs which the former government may have permitted, except in those cases where the wrong occurred so near the time of the change of administration that there was no opportunity for it to be corrected through the courts or other administration of the former administration. The alleged wrong in this case was more than ten years before the change of administration. 30 Am. Jur., International Law, § 47. *Cessna v. United States,* 169 U.S. 165, 18 S.Ct. 314 *(1898). Wasisang v. Trust Territory,* 1 T.T.R. 14. *Jatiosv. Levi,* 1 T.T.R. 578. *Aneten v. Olaf,* 1 T.T.R. 606. *Ngirudelsang v. Trust Territory,* 1 T.T.R. 512.

[17] We cannot agree with the appellant's claim that the action against the individual defendants named is against them in their official capacities and is not against the Trust Territory of the Pacific Islands. They are sued purely by title and there are no allegations as to what specific part anyone of them has taken in the wrongs alleged. It is not alleged that anyone of them was exceeding his delegated powers as an officer of the Trust Territory in occupying the land in question, or that he was in possession of the land in anything other than his official capacity. The court takes judicial notice that there were no officials bearing

those titles until after the creation of the Trust Territory of the Pacific Islands in 1947 and that, therefore, they could not have had any part in the original taking alleged in or about 1931.

The Supreme Court of the United States has obviously had difficulty in stating the exact test by which it should be determined whether a suit against a government official is really one against the government, or against him individually. The principles originally set forth in the case of *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240 (1882), cited by the appellant, might give some support to the appellant's claim on this point. The effect of that decision, however, has been drastically limited by later decisions, notably *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682,69 S.Ct.1457 (1949).

The present case appears to us clearly to come within the principles set forth in the more recent cases of *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999 (1963), cited in the opinion of the Trial Division, and *Malone v. Bowdin*, *369* U.S. 643, 82 S.Ct. 980 (1962). We therefore hold that, even as to the claims asserted against the individual defendants, this is actually a suit against the Trust Territory of the Pacific Islands and is barred by the latter's immunity from suit without its consent.

Judgment affirmed.