MISC. APP. NO.3/82

IN THE SUPREME COURT OF SIERRA LEONE

CORAM:

The Hon. Mr. Justice C.A. Harding, J.S.C. - Presiding

The Hon. Mr. Justice O.B.R. Tejan - J.S.C.

The Hon. Mr. Justice S. Beccles Davies - J.S.C.

BETWEEN:

The Bank of Credit & Commerce International - Applicants

And

The Charge D'Affaires of the Republic of the Ivory Coast Embassy in Sierra Leone Acting for and on behalf of the Republic of Ivory Coast, Freetown - Respondent

Garves J. Betts, Esq.,(with him Miss Patrice Wellesley-Cole) for the Applicants

T.M. Terry, Esq., for the Respondent

RULING DELIVERED THIS 21ST DAY OF SEPTEMBER, 1983

C.A. HARDING, J.S.C.:- The Applicants herein were the Respondents in Civil Appeal 60/81 before the Court of Appeal and the Respondent herein was the Appellant. The application before us is for special leave to appeal to this Honourable Court against the Judgment and Order of the Court of Appeal dated 15th April, 1982 made therein and for a stay of execution and or proceedings on the Judgment and Order aforesaid on terms pending the hearing of the proposed appeal.

The events leading up to this application may be catalogued as follows:-

On 29th June, 1981, the Respondent took out a specially indorsed Writ claiming, inter alia, repayment of the sum of

Le.18,000/00 plus interest from the Applicants. Service of the Writ was effected on that same day on the Applicants who entered appearance thereto on 6th July, 1981.

On 5th October, 1981, the Respondent obtained Judgment in default of Defence and caused a Writ of Fi-Fa to be issued against the Applicants. On the following day in response to the Writ of Fi-Fa the Applicants issued a cheque made payable to the Master and Registrar for the sum of Le.21,606.10.

On 7th October, 1981, before clearance for payment of the said cheque was effected, on an Ex-parte application made by the Applicatns inter alia (1) to set aside the Writ of Fi-Fa (2) alternatively for an interim stay of the Writ of Fi-Fa pending an application to set aside the Judgmsnt in Default and all subsequent proceedings (3) that the Judgmsnt in Default of Defence be set aside and (4) that leave be granted to file a defence to the Writ of Summons, Thompson-Davis, J. ordered (a) that the Default Judgment and all subsequent proceedings including the Writ of Fi-Fa be stayed for a period of five days and (b) that the application by Motion be served on the other side i.e. on the Respondent, and the matter adjourned to 13th October, 1981.

On 9th October 1981, before ever the motion was heard counsel for the Respondent sought leave of the learned Judge to appeal to the Court of Appeal against the interim order made on 7th October 1981; leave was granted on 21st October, 1981.

On 15th April, 1982, the Court of Appeal allowed the appeal, set aside the Orders of Thompson-Davis, J. and substituted therefor an interim order for a stay of proceedings, on the Applicants, on or before the 16th of

April, 1981, paying to the Respondent the sum of Le.21,606.10, the Respondent to give a written undertaking to repay the said amount to the Applicants or any amount that may be ordered to be paid by any competent Court in Sierra Leone to the Applicants after the final determination of the action. It further ordered that on payment of the said amount the Master and Registrar of the High Court was to place the original Motion brought by the Applicants to set aside the Default Judgment before Thompson-Davis J. or another Judge of the High Court for hearing inter partes.

On 16th April, 1982, the Applicants sought leave of the Court of Appeal to appeal against the Order of 15th April, 1982, to this Court, but the application was refused and counsel has now applied to this Court for special leave to appeal against the aforesaid Order.

As stated above, before ever the Applicants original Motion was heard by the High Court the Respondent on 9th October, 1981, appealed against the interim Order made on 7th October, 1981 to the Court of Appeal. The grounds of appeal may be summarised as follows:-

(1) Bias on the part of the learned trial Judge, he being the lessor of the Respondent.

(2) That the learned trial Judge ought not on an Ex-parte application to have made an interim Order staying the Default Judgment and all subsequent proceedings including the Writ of Fi-Fa for a period of five days.

(3) That there was no longer in existence a Writ of Fi-Fa as the said Writ had already been executed on 6th October, 1981 and in consequence the Order of 7th October, 1981 setting aside the Writ of Fi-Fa was one made in vain.

The Court of Appeal made no adjudication as regards (3) but as regards (1) and (2) held respectively that there was nothing to warrant their coming to the conclusion that there was a likelihood of bias if the learned trial Judge set as

he did at the hearing of the Ex-parte Motion and that the learned trial Judge had power to grant interim stay on terms. Nevertheless the Court proceeded to set aside the Orders of the learned trial Judge and to Order payment of the amount claimed to the Respondent by the Applicants, on the Respondent giving a written undertaking to repay if so ordered by any competent Court in Sierra Leone as a condition for listing the original Motion before the High Court for hearing.

Both in the affidavit in support of the original Motion and in that in support of the present one, the Solicitor for the Applicants had deposed that because of the Respondent's diplomatic status any money once paid may not be recoverable by legal process. Also, in the affidavit in support of the present application before us it was stated that the Applicants were prepared to pay into Court the amount claimed pending the hearing and determination of this application as well as the proposed appeal.

Counsel for the Applicants has urged that the matter is one of sufficient public importance to warrant this Court granting special leave to appeal against the Judgment of the Court of Appeal dated 15th April, 1982. He referred to Sec.3 of the Diplomatic Immunities and Privileges Act, No.35 of 1961 and to Halsburys Laws of England 3rd Edition, Volume 16 paragraph 19 and Volume 7 paragraphs 7, 571 and 576 and also to the case of DUFF DEVELOPMENT CO. vs KELANTAN GOVERNMENT (1924) A.C. 797. He submitted that the issuing of a Writ and a submission to the jurisdiction made by a foreign envoy does not amount to a waiver of execution. He submitted further that on analysis of the Judgment and the Court of Appeal Order they did not consider that the Motion before the High Court was ripe for hearing because by such an Order the High Court was precluded from making

any Order which it might have felt disposed to make and thereby the Court of Appeal was usurping the functions of the High Court because by so doing they were determining the Motion which was before the High Court.

Counsel for the Respondent submitted that before leave to appeal is granted to the Applicants it must be shown by them that there is an arguable appeal or that there is a prima facie case or that the Court from whose decision leave to appeal is sought must have committed an error on a point of law or has failed to exercise its discretion lawfully or on wrong grounds. He contended that the proposed grounds of appeal prima facie do not disclose good grounds nor can it be said that the Court of Appeal committed an error of law or failed to exercise its discretion judicially or that the decision was based on wrong principles. He submitted that if leave to appeal is granted this should not operate as a stay of execution, that the Applicants have not made out a case for depriving the Respondent of the fruits of his Judgment and that a stay will not accord with the justice of the case.

I have perused the proposed grounds of Appeal (six in all) and I am satisfied that they raise important issues which should warrant this Court to exercise the power conferred on it by Rule 6(2) of the Rules of this Court. I will accordingly grant the Applicants special leave to appeal to the Supreme Court and I so order. I also make the following Orders:-

(a) That the grounds of appeal be as follows:-

"1. That the Court of Appeal was wrong in law to have set aside the Order or Orders of the High Court dated 7th October, 1981 in the Judgment dated 15th April, 1982 when the Appellant's first ground of Appeal had been rejected by the Court of

Appeal and there had been no finding by the Court, that the learned trial judge in the High Court had exercised his discretion wrongly or non judicially, in granting the Defendants in that Court a stay of proceedings pending service of the ex-parte motion on the Plaintiff.

2. That by its decision in setting aside the order of Thompson-Davis, J. dated 15th April, 1981, the Court of Appeal impliedly held, and wrongly in law, that the High Court may not properly grant an ex-parte order, or must necessarily do so only on the Appellant's undertaking.

3. That the order of the Court of Appeal that "the Master and Registrar of the High Court do place the motion to set aside the Default Judgment brought by the Respondent" only after payment of the said amount of Le.21.606.10 cents was wrong in law in so far as the said order could not in law have properly been made by the said Court.

4. That in all the circumstances of the case, the Court of Appeal was wrong in law to grant a stay on condition which compelled the Appellants, the Respondents before the Court of Appeal to pay the entire amount of the judgment award to the Respondents herein on the Respondents undertaking to refund the same, on the eventual determination of the action, when to the knowledge of that Court, there was a motion ripe for hearing before the High Court, seeking to set aside the Respondents Writ of Fi-Fa in the action on the grounds irregularity.

5. That the Court of Appeal was wrong in law to have made any order compelling payment of the judgment award to the Respondent, when the High Court had not adjudicated on the motion before it to set aside the Writ of Fi-Fa in case as irregular as well as the judgment in default of defence.

6. That the Court of Appeal was wrong in law to order payment of the judgment monies to the Respondent because of the comity of nations when the Court of Appeal knew that there is in law no process to compel a foreign envoy to restore monies once paid and especially in view of the fact that the judgment relied on was a default judgment."

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(b) That the Applicants lodge the Notice of Appeal within 10 days from date hereof.

(c) That the Applicants deposit the sum of Le.5,000/00 or enter into recognisance for the payment of the said amount in one surety, as security for costs.

(d) That the Applicants deposit the sum of Le.1,000/00 for the costs of the Record.

(e) That the amount of Le.21,606.10 already lodged by the Applicants do remain in Court pending the determination of the proposed appeal.

(f) That a stay of execution and/or proceedings on the Judgment and Order of the Court of Appeal made and dated the 15th day of April, 1981 is hereby granted pending the hearing and determination of the proposed appeal.

(g) Costs of this Application to the Respondent assessed at Le.350.

(Sgd) C. Augustine Harding
(Hon. Mr. Justice C.A. Harding, J.S.C., Presiding)

TEJAN, J.S.C.:- In order to appreciate the application before this Court, I think it is necessary to deal briefly with history of the events which necessitated the application, and these can be stated thus: On the 29th day of June 1981 the respondent issued a writ of summons against the applicants claiming:

(a) Damages against the applicants for loss and damage caused by the applicants by reason of the fact that the applicants negligently and/or in breach of contract paid a cheque of Eighteen Thousand Leones (Le.18,000.00) purporting to be drawn by the respondent payable to bearer and negligently debited the said account of the respondent with the sum of Le.18,000.00

(b) A declaration that the applicants are not entitled to debit the respondent's account with the amount of Le.18,000.00

(c) A declaration that the respondent is entitled to the repayment to him of the sum of Le.18,000/00 plus interest at the rate of 16%.

(d) Such further or other relief as may be just.

(e) Costs.

On the 6th day of July 1981, the applicants entered an unconditional appearance. The applicants, having failed to file a defence, the respondent obtained a judgment in default of defence on the 5th day of October, 1981. On the 6th day of October 1981, the respondent levied execution by a writ ffrfieri facias against the applicants. The applicants issued a cheque for the sum of Le.21,606.10 in the name of the Master and Registrar on the same day. The respondent presented the cheque for special clearance but the cheque was cancelled by the applicants on the ground of superfluous indorsement. On the 7th day of October 1981, an exparte motion was filed by the applicants in the High Court praying for the following orders:-

"(1) That the writ of Fieri Facias be set aside on the grounds of (a) non-compliance with the Form of Writ of Fieri Facias as prescribed in the Schedule A of Chapter 22 of the Laws of Sierra Leone, or alternatively Form No.1 in Appendix H of the Rules of the Supreme Court; (b) In so far as the writ is directed to the wrong legal person, that is to say, Bank of Credit and Commerce International rather than the Bank of Credit and Commerce (Overseas) International Limited, the proper Defendants in this action.

(2) In the alternative, an interim stay of the writ of Fieri Facias herein pending an application in this motion contained to set aside the judgment in default and subsequent proceedings, and that the defendants be allowed to defend this action.

(3) That the defendants be at liberty to move the court exparte, on such terms as to ats as the Court may think just.

(4) That the judgment in default of defence herein be set aside.

(5) That the defendants be at liberty to file a defence to the writ of summons in this action.

(6) Such further or other orders as to the Court may seem just."

To this motion, an affidavit was attached in support. This affidavit was sworn to by Miss Wellesley-Cole. The motion came before Thompson-Davie, J. who made the following orders:-

"(1) That the default Judgment and all subsequent proceedings including the writ of Fi-Fa stayed for a period of five days.

(2) It is further ordered that this application by motion is ordered to be served on the other side and matter is adjourned to 13th October 1981."

It is to be noted that the ex-parte application was heard on the same day the notice of motion was filed. The respondent, being aggrieved by the orders made, appealed against the orders without delay to the Court of Appeal. The appeal was heard by During, Navo and Turay JJ. of Appeal, and on the 15th day of April 1982, the Court of Appeal

delivered judgment.

In a passage of the judgment, the Court of Appeal said:-

> "In the Court below, apparent in the affidavit of Miss Wellesley-Cole in support of the Ex-parte application and before us was argued it is clear to my mind that the Respondent only wants stay because they are of the opinion that they might not be able to recover any amount paid over the applicent should in case an order for repayment is made by our Courts. I must state that it seems to me to be very odd that a reputable bank would make out a cheque due for payment on demand and not in future and then attempt to stop execution of a Writ of Fi-Fa on the ground that it might not recover any money paid to a Judgment Creditor on a regular Judgment if Diplomatic privilege or immunity is claimed by the Judgment Creditor who has submitted to the Jurisdiction of our Courts. It appears to me that the Respondent when they made out the cheque to the Sheriff had no intention to honour the same on demand for payment. I think I am absolutely right in saying that our Courts must take judicial notice of the fact that the Ivory Coast is a friendly country. As far as Sierra Leone is concerned it is not a hostile country or an enemy of State in so far as the relationship between our country and the Ivory Coast is concerned and diplomatic relationship still exists between the two States. I see no reasons why we should start with a presumption that the appellant would not behave in accordance with the comity as exists between the two States in a simple matter like this before us. I am of the opinion that the Respondent the applicant in the Court below should have been put on terms."

During J.A. further said:

> "I would set aside the orders of the learned Judge and make an order granting interim stay of proceedings on the Respondent on or before Friday the 16th of April 1982 paying to the Appellant to give an undertaking in writing to repay the said amount of Le.21,606.10 to the Respondent or any amount that may be ordered to be paid by any competent Court in Sierra Leone to the respondent after the final determination of the said action. On the payment of the said sum of Le.21,606.10 on terms as stated above I would direct the Master and Registrar of the High Court to put the motion to set aside the Default Judgment brought by the Respondent before the same Judge or another Judge of the High Court for hearing inter partes. Liberty to apply to this Court."

It is against that decision of the Court of Appeal that the applicant having been refused leave to appeal to the Supreme Court that they now have applied for Special Leave to appeal to this Court. In addition to the application for Special Leave to appeal, the applicants prayed for an order granting an interim stay of execution and on the proceedings on the consequential orders of the Court of Appeal pending the hearing of the application. The Applicants also prayed for an order granting "a stay of execution and on the proceedings on the judgment and order of the Court of Appeal as aforesaid on terms that the applicants pay into Court the entire amount of Le.21,606.10 as ordered by the Court of Appeal to be paid by said Applicants to the Respondent, or on such other terms and to the Court may seem just pending the hearing and determination of the proposed appeal".

I propose to deal firstly with the application for a stay of execution. The general rule with regard to stay of proceedings is that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court of Appeal, may order, and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from or the Court of Appeal may direct. But a Court will not make it a practice at the instance of a successful litigant of depriving a succeseful one of the fruits of his litigation until a further appeal is determined except in special circumstances. See MONK v BARTRAM (1891) 1 Q.B. 346; and BARKER v LAVERY (1885) 18 Q.B.D. 769. But when it is the exercise of a Judge's discretion, the appellate tribunal will only in extreme case interfere with the discretion of the Judge. See HANSORD v LETHBRIDGE (1891) 8 T.L.R. 179.

As a general rule an order staying proceedings is granted upon payment by the appellant of the money in question, the plaintiff giving security for repayment, and on the undertaking of the Solicitor to abide by any order which the Court may make as to refunding if the appeal proves successful; and the costs of the application have to be paid by the applicant: See MORGAN v ELFORD (1876) 4 Ch. D. 388; COOPER v COOPER (1876) 2 Ch. D. 492.

In MONK v BARTRAM (supra) it was held that where a stay of execution has been refused by the Judge at the trial, an application made to the Court of Appeal for a stay pending an appeal must be supported by special circumstances, and the allegations that there has been misdirection, that the verdict was against the weight of evidence or that there was no evidence to support the verdict or judgment are not special circumstances on which the Court will grant the application.

The question of stay of execution arose in the cases of MORGAN v ELFORD (1876) 4 Ch. D. 388 and in COOPER v COOPER (1875) - 1876) Ch. D. 492. It was held that as a general rule an order staying proceedings is granted upon payment by the appellant of the money in question, the plaintiff giving security for repayment, and on the undertaking of the Solicitor to abide by any order which the Court may make as to refunding if the appeal proves successful if directed and cost of the application have to be paid by the appellant.

In the case of BARKER v LAVERY (1885) 14 Q.B.D. 769, it was held that execution for costs pending appeal from the Court of Appeal to the House of Lords will not be stayed, unless evidence be adduced to show that the respondent to the appeal will be unable to repay the amount levied by execution,

if the appellant be successful before the House of Lords.

There are numerous cases dealing with stay of execution; but there is a different approach when the matter relates to foreign nations, ambassadors and those who have diplomatic immunity. But in TENDREX CORPORATION v CENTRAL BANK (1977) 1 A.E.R. 889, Lord Denning M.R. said that -

> "I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our Courts could ever recognise a change in the rules of International Law. It is certain that international law does change andthe Courts have applied the chenges without the aid of Act of Parliament.... The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the Courts in our country and theirs - having given effect to them without any legislation for the purpose, notably in the decision of the Privy Council in Phillipine Admiral (owners) v Wallen Shipping (Hong Kong) Ltd. (1976) 1 All E.R. at page 78; (1976) 2 W.L.R. 214. Seeing that the rules of international law have changed - and do change - and the Courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English Law. It follows too that a decision of this Court, as to what was the ruling of International Law 50 or 60 years ago is not binding on this Court today. International law knows no rule of stare decisis. If this Court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change, and apply the change in our English Law, without waiting for the House of Lords to do it."

A century ago, no sovereight state engaged in commercial activities. It kept to the traditional functions of a sovereign; to maintain law and order, to conduct foreign affairs, and to see to the defence of the country. It was in those days that England, with most other countries adopted the rule of absolute immunity. It was adopted because it was considered to be the rule of international law of the time. In re Parliament Belge (1880) 5 P.D.197 at 205, (1874 - 80) A.E.R. Rep. 104 at 109, Brett C.J. said:

> "The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations (so also his property), The universal agreement which has made these propositions part of the law of nations has been an implied agreement."

This rule was stated by Dicey in hiswork on conflict of laws (5th Ed.) 1932 at page 194; and 9th Edition (1973) at page 138 and repeated religiously by the Judges thereafter. The classic restatement of it was made by Lord Atkin in COMPANIA NIVIERA VASCONGADA v CHRISTIANA (1938) 1 All E.R. 719 at 720, 721 (1938) A.C. 485 at 490 in these terms:-

> "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, whether the proceedings involve process against his person or seek to recover from him specific property or damages."

Viscount Simons repeated this doctrine in the case of RAHIMTOOLA v NAZIM OF HYDERABAD (1957) 3 All E.R. 441 at 446; (1938) A.C. 370 at page 394.

Mr. Betts' contention was that if the proposed appeal is successful, it would not be possible to get a refund from the respondent. Mr. Terry on the other hand, argued that since the respondent had submitted to the jurisdiction by institution an action coupled with the affidavit sworn to by the Charge D'Affaires of the Ivory Coast Embassy, on a successful appeal, the respondent would refund the money.

It is to be noted that the transaction between the applicant and the respondent, in my view, is a commercial transaction, and in the case of PHILIPPINE ADMIRAL (owners) v WELLAN SHIPPING (HONG KONG) LTD. (1976) 1 All E.R. at 95, 96 (1976) 2 W.L.R. 214 at 233 the Privy Counsil said:

> "... the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transaction

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> ... their Lordships themselves think that it is wrong that it should be so applied. ..... Thinking as they do that the restrictive theory is more consonant with justice, they do not think that they should be deterred from applying it ...."

Lord Denning M.R, in the TENDREX TRADING CORP (supra) said at page 981:

> "Such reason is of general application. It covers action in personam. In those actions, too, the restrictive theory is more consonant with justice. So it should be applied to them. It should not be retained as an indefensible anomaly."

In his speech at page 821 in the case of DUFF CO. v GOVERNMENT OF KELANTAN (1924) A.C. 797 Lord Dunedine said that -

> "the present action does not embrace the Chancery costs. It seeks to enforce the award as a judgment. The Sultan does not in this action waive the privilege of sovereignty. He can therefore only be subjected to the jurisdiction if either he has done so by appearing as plaintiff in the Chancery suit or by his subscription of the contract ... An arbitrator is not a Court, and therefore by appearing before the arbitrator he did not submit himself to the jurisdiction of the Court."

Lord Sumner in his speech said at page 822:

> "The principle is well settled that a foreign sovereign is not liable to be impleaded in the municipal courts of this country, but is subject to their jurisdiction only when he submits to it, whether involving it as a plaintiff or by appearing as a defendant without objection."

The rule is, there is nothing to prevent a foreign sovereign from appearing as plaintiff in the English Courts; and if he does so appear, he is treated just like any other litigant in such matters as discovery of documents and security for costs; see Dicey and Morris on Conflict of Laws (9th Ed.) at page 144.

Referring to the DUFF DEVELOPMENT case (supra) Lord Carson said at page 832:

> "The main contention, however, of the appellant in the present case is that wherever a Sovereign State has submitted to the jurisidction of our Courts, it waives his privileges, and must for the purpose of doing justice be treated in exactly the same way. The general proposition upon this subject is, I think, accurately stated in Westlake's Private International Law, 6th Ed. 259 S.192. But a foreign state or person entitled to the privilege of exterritoriality, bringing an action in England, will be bound as a private corporation or person would bound to do complete justice to the defendant with regard to the matters comprised in the action, and will be subject to all cross-actions, counterclaims, defences and steps of procedure which as between private parties would be competent to the defendant for the purpose either of obtaining such complete justice or of defending himself against the plaintiff's claim.

The Learned Lord further said:

> "It is to be observed that the main principle underlying the cases referring to the exercise of jurisdiction by our Municipal Courts is that it was necessary that a Sovereign Power should be considered to have waived its privileges and be treated as other litigants for the purpose of enabling complete justice to be done between the parties: See King of Spain v Hullet 1 Dow & Clark 333, 335, and also in the judgment of James L.T. in Strousberg v Republic of Costa Rica 44 L.T. 199.....
> It is in applying this principle of equal treatment that the sovereign submitting to the jurisdiction has been ordered to give security for costs and also security for damages; See The Newbattle 10 P.D.33."

It was recognised at common law that a diplomatic agent or other member of the diplomatic staff might waive immunity from civil and criminal jurisdiction of the local courts, either by expressly consenting through his solicitor to the proceedings, or by entering an appearance to the writ or by commencing proceedings as plaintiff. Since, however, the privilege is the privilege of the sending State, not of the individual diplomat, it was essential that consent to its waiver should have been given by the sending State in the

case of proceedings against the head of the mission, and by the head of the mission where the proceedings were against a subordinate member of the staff.

But these rules have been interpreted in this way. In the first place, the authority of the sending State to waive the privilege is retained, and it is enacted that a waiver by by the mission shall be deemed to be a waiver by that State. The words of this last provision are wide enough to embrace the case where the head of the mission waives his own privileges, not merely that of a subordinate member of the staff. It is enacted that a waiver must always bee express: See Cheshire's Private International Law (9th Ed. at Page 114).

It is now settled that -

> "the initiation of proceedings by person enjoying immunity from jurisdiction ... shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim."

I think it is necessary to mention the case of the Newbattle (1885) P.D.33 at page 34 when Butt J, in a brief judgment said -

> "On the assumption which I have already mentioned the Louise Marie cannot be arrested, so that the case falls within S.34 of the Admiralty Act, 1861. Mr. Aspirall contended that though this case was within the words of that section it was not within the intention of it, but I think it is within both the wording and the intention. It has however, been contended that even so, a foreign government being plaintiff, and the matter being in the discretion of the Court, it could not order security to be given. But there is authority from the other Divisions of the High Court to show that the practice has been to oblige foreign government to give security for costs. By parity of reasoning I see no reason why a foreign government sould not be ordered to give security for damages. The motion must therefore be dismissed with costs."

The plaintiff appealed against the decision of Butt J. In the appeal, Brett M.R. said:

> "The present case is clearly within the words of the 34th section of the Admiralty Court Act, 1861. It was argued by counsel for the plaintiffs that this order should not be made upon a soverign prince. There are some cases indeed in which orders ought not to be made against a sovereign prince. In the Parliament Belge (5 P.D.197), where the King of the Belgians appeared under protest, and where the question was whether the ship could be arrested, it was decided that being a ship of a foreign prince it could not.

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> It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign government to this extent."

Cotton L.J. agreed with Brett M.R. and said at page 35 -

> " ....."But when a government comes in as a suitor, it submits to the jurisdiction of the Court and to all orders which may properly be made. Regard must be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order is nevertheless a proper one."

In the same case at page 36, Lindley L.J. said:

> "I agree that the order appealed against is right; a counter-claim seems to me to be equivalent to the cross action mentioned in the Admiralty Act, 1861, and this case falls within both the letter and the spirit of that Act.:"

In HULLET v KING OF SPAIN 1 Dow & Clark, Lord Lynhurst (Chancellor) said at page 490:

> "Suppose the King of Spain had sent jewels here to be set, and the jeweller refused to restore them, would the King of Spain have no remedy at law to recover them or their value? Why should he not have his remedy here as well as any other foreigner? When he sues here as a plaintiff the Court has complete control over him, and may hold him to all proper terms."

Most of the earlier cases have been based on the Diplomatic Privileges Act 1708, which has always been interpreted as a declaratory Act. In HEMELEERS-SHENLEY v THE AMAZONE, RE THE AMAZONE (140) 1 All E.R. at page 269, it was held that the immunity was not affected by the Diplomatic Privileges Act, 17 08, which is confirmatory of, and does not supersede, the common law. The Editorial note in this case reads:

> "The question here discussed is of importance, since if the attached obtained his privilege only under the Act of 1708, it might be that he could prove his claim to it only after the fact that the goods were his had been established. The difficulty, however, does not arise, since it is held that that Act does not exhaustively define the nature of diplomatic common law."

Slesser, L.J. in his judgment in that case said at page 271:

> "The question of substance has already been considered, and, I think, decided in Parkenson v Potter (1885) 16 Q.B.D. 152; 11 Digest 538, 409, 53 L.T. 818 in which it is assumed and earlier cases have said the same thing - that the Diplomatic Privileges Act, 1708, is by no means exhaustive of the common law dealing with diplomatic immunity ..."

I shall now turn to the Laws of Sierra Leone relating to diplomatic immunity. The Diplomatic Immunities And Privileges Act, No.35 of 1961 came into force on the 27th day of April, 1961. With regard to immunities of Foreign Envoys and Consular Officers, Section 3 of the Act enacts that

> "Subject to the provisions of this Act every foreign envoy and every foreign consular officer, the members of the families of those persons, the members of their official or domestic staff, and the members of the families and of the domestic staff of the members of their official staff shall be accorded immunity from suit and legal process and inviolability of residence, official premises, and the official archivas to the extent to which they were respectively so entitled in force in Sierra Leone immediately before the passing of this Act."

Subsection 2 provides that:

> "Any writ in process sued forth or prosecuted before or after the coming into operation of this Act, whereby any foreign envoy authorised and received as such foreign envoy is liable to arrest or imprisonment, or his or their goods or chattels are liable to distress, seizure or attachment, shall be void."

The provisions of this section of Act No.35 of 1961 are similar to Section 3 of the Diplomatic Privileges Act, 1708. Section 3 of Act No.35 of 1965 does not stipulate any regulation with regard to a foreign envoy who voluntarily submits to the jurisdiction of our Courts. However, Section 74 of the Courts Act No.31 of 1965 enacts that -

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> "subject to the provisions of the Constitution and any other enactment, the common law, the doctrine of equity, and the statutes of general application in England on the 1st day of January 1880, shall be in force in Sierra Leone."

It seems to me from the authorities already referred to that a foreign envoy can be ordered to give security for costs, security for damages, and when he sues in this country as a plaintiff, the court has complete control over him, and may hold him to all proper terms. A government who comes in as a suitor, submits to the jurisdiction of the Court and to all orders which may properly be made.

In the application before us, the respondent sued in the name of "The Charge D'Affairs of the Republic of the Ivory Coast Embassy in Sierra Leone acting for and on behalf of the Republic of Ivory Coast. The respondent, by suing as a plaintiff, has submitted to the jurisdiction of our municipal Courts. A number of affidavits has been sworn to and filed by both parties in this matter. One of the affidavits was sworn to on the 11th day of May 1982 at 11 a.m. by Mamadou Toure, the Charge D'Affairs of the Republic of Ivory Coast. In paragraphs 2 and 3 of the affidavit, he said:

> "That I have submitted myself to the jurisdiction of the Court of Sierra Leone by instituting proceedings in the matter C.C.481/81 (1981 C. No.6 and that in the light of paragraph two (2) supra of my affidavit and the undertaking signed by me on the 16th April 1982 pursuant to the Court of Appeal Judgment dated 15th April 1982, I consider myself bound by any decision of any competent Court in Sierra Leone in respect of the above mentioned matter.
>
> The said undertaking is exhibited by me and marked MT2".

In Exhibit MT2 the respondent undertook by himself, his heirs and executors administrators and assigns to repay the amount of Le.21,606.10 in the event of the applicants being successful in an action intituled Civ. Appeal 60/81.

Mr. Betts argued forcefully that if the amount is paid directly to the appellant, and that if the applicants are granted the orders sought in the motion before the High Court, and that the applicants subsequently become successful, it would be impossible to get a refund of money by the process of execution.

On the other hand Mr. Terry contended that the respondent having given an undertaking to refund the amount coupled with his submission to the jurisdiction of our Courts, no difficulty would be encountered in recovering the money.

The application before us is a matter of discretion, and in the area of judicial discretion, there are no binding precedents properly so-called, as each case must be dealt with its own merits. The money in this matter, as I understand, has been deposited into the account of the Master and Registrar, and Mr. Betts has told this Court that the applicants would be willing to pay any interest if the respondent is successful upon the determination of the case. An order for a stay of execution was granted by the High Court after execution had been levied. This is a question with which I am deeply concerned, because there was no writ of Fi-Fa in existence the execution of which can be stayed. There is also an application before this Court seeking an order for special leave to appeal to this Court, leave to appeal having been refused by the Court of Appeal.

A survey of the matters referred to in the affidavits coupled with the arguments on both sides forces me to the conclusion that the reasons given by applicants for an order of stay of execution are untenable.

It must be noted that there is no pending process of execution.

Execution has been levied and the money had been deposited in the account of the Master and Registrar. The main point is, is there any pending of process of execution to be stayed? To my mind since there has been execution of the fieri facias, there is nothing before this Court to make an order for a stay of execution. A Court cannot make an order in vain. In the circumstances, the application for Stay of execution is belated.

The case with regard to the application for special leave to appeal, in my opinion, presents the necessary features which would make it fit for the granting of special leave to appeal.

I agree with During, J.A. when he said -

> "I think I am absolutely right in saying that our Courts must take judicial notice of the fact that the Ivory Coast is a friendly country. As far as Sierra Leone is concerned, it is not a hostile country or an enemy of State in so far as the relationship between our country and the Ivory Coast is concerned and diplomatic relationship still exists between the two States. I see no reason why we should start with a presumption that the appellant would not behave in accordance with the comity as exists between the two States in a simple matter like this before us."

The argument of the applicants is mainly, that the respondent would refuse to make a refund if the money is paid to him, and that they could not levy execution on his person or property. The question is why must we start with the assumption that the respondent, having submitted to the jurisdiction of our Courts and having given an undertaking to abide by any order or decision of the Court? In my opinion, the argument of the applicants has failed to satisfy me that the reasons given

for the application for stay of execution of the fieri facias (which has already been executed) are not tenable grounds for granting the application. In the circumstances, the application for stay of execution is refused. In refusing the application for stay, I have also taken into consideration Section 102 sub-section 3 of the Constitution Act No.12 of 1978.

Costs of the application to be paid to the Respondents.

(Sgd.) O.B.A. Tejan

(Hon. Mr. Justice O.B.A. Tejan, J.S.

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BECCLES DAVIES J.S.C.:- I have had the opportunity of reading in draft the rulings of my learned brethren Harding and Tejan JJ.S.C. I agree with the ruling of Harding J.S.C. and the orders proposed by him. I have nothing more to add.

(Sgd.) S. Beccles Davies

(Hon. Mr. Justice S. Beccles Davies, J.S.C.)