United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 21-20034

Al-Waleed Khalid Abu Al-Waleed Al Hood Al-Qarqani; Ahmed Khalid Abu Al-Waleed Al Hood Al-Qarqani; Naoum Al-Doha Khalid Abu Al-Waleed Al Hood Al-Qarqani; Heirs of Khalid Abu Al-Waleed Al Hood Al-Qarqani; Shaha Khalid Abu Al-Waleed Al Hood Al Qarqani; Nisreen Mustafa Jawad Zikri,

Plaintiffs—Appellants,

versus

Saudi Arabian Oil Company,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-1807

Before Jolly, Haynes, and Oldham, *Circuit Judges*.

E. Grady Jolly, *Circuit Judge*:

The historical narrative behind the arbitral award at issue in this case is exotic and complicated. Plaintiffs claim rights under a 1933 agreement between Standard Oil of California and the Kingdom of Saudi Arabia and a 1949 agreement between the purported ancestors of the plaintiffs and the Arabian American Oil Company. In this proceeding, the plaintiffs seek to

enforce an arbitral award against defendant, Saudi Arabian Oil Company, which they were awarded by an Egyptian arbitration panel. Notwithstanding the complexity of the underlying historical facts, and notwithstanding the alleged shenanigans underlying the arbitration proceedings, we can resolve this appeal with clarity: there is no agreement for us to enforce, thus bringing this appeal to a quick end. Defendant Saudi Arabian Oil Company is an instrumentality of a foreign state and is therefore immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611, which generally provides that federal courts have no jurisdiction over sovereigns. Consequently, we VACATE the judgment of the district court and REMAND this case with instructions to the district court to dismiss for lack of jurisdiction.

I.

The background that sets up this case begins in 1949 in Saudi Arabia when the purported ancestors of the plaintiffs entered into an agreement with the Arabian American Oil Company concerning certain oil-rich land in their possession. The plaintiffs contend that this agreement was a lease, that their ancestors never surrendered ownership, and that they are the rightful owners of the land by inheritance. They further contend that the term of the lease expired a number of years ago and that they are owed rents for the use of the land from the date on which the lease expired.

The plaintiffs brought these claims before a Saudi tribunal in 2011, which rejected them. A Saudi Legal Committee ruled that the 1949 agreement was an outright sale, not a lease, and that therefore the plaintiffs had no legitimate claim to the land or any rents derived therefrom. The plaintiffs were apparently unfazed and, in 2014, took their claims to an organization calling itself the International Arbitration Centre, or IAC, in Cairo, Egypt. There they initiated arbitral proceedings, to which all of the respondents, including the Saudi Arabian Oil Company, promptly objected.

The arbitration that occurred was, to put it charitably, irregular. Multiple arbitrators resigned during the course of the proceedings. The tribunal finally issued a ruling that it lacked jurisdiction over the dispute. That was not the end of the matter, however, because the IAC then replaced one of the arbitrators and reopened proceedings. Eventually a second ruling was issued that awarded $18 billion to the plaintiffs and roughly $23 million in fees to the IAC itself. Following these proceedings, the Egyptian General Prosecutor brought criminal charges against the arbitrators on the panel that issued the second award and two other members of the IAC for attempting to defraud the respondents. The members of the panel were convicted and sentenced to three-year terms of imprisonment.

II.

Nevertheless, after the Egyptian arbitration concluded, the plaintiffs sought to enforce the award in the United States. They brought parallel actions against different respondents in the Northern District of California and in the Southern District of Texas.[1] This appeal is from the action that was brought in Texas against Saudi Arabian Oil Company, better known as Saudi Aramco.

The district court denied the petition for enforcement, finding that the arbitration clause invoked by the plaintiffs, which is contained in an agreement to which they are not signatories, did not encompass the dispute at issue. In doing so, the district court observed that "[t]he arbitration

[1] The plaintiffs have had no success in California either. *See Al-Qarqani v. Chevron Corp.*, 2019 WL 4729467 (N.D. Cal. Sept. 24, 2019), *aff'd Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018 (9th Cir. 2021). We briefly note, however, that that case is a completely different case brought against different parties and it has little legal relevance to the issues presented to this appeal. In the California case, plaintiffs sought to enforce an arbitral award against Chevron Corporation and Chevron U.S.A., Inc.; the Ninth Circuit affirmed the district court's holding that there was no binding agreement to arbitrate. *Al-Qarqani*, 8 F.4th at 1025-26.

proceeding was conducted in direct contravention of the agreement's explicit procedural terms and was so riddled with irregularities that it resulted in criminal convictions for several of the arbitrators involved."

Four weeks after the district court entered an order denying their petition, the plaintiffs filed a motion for reconsideration. Then on December 23, 2020, eight days after the motion for reconsideration was filed, the district court entered an order striking that motion for failure to comply with two of the court's procedural rules. Twenty-nine days later, on January 21, 2021, or sixty-five days after the court denied their petition, the plaintiffs filed a notice that they were appealing that denial order.

III.

We review the existence of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") *de novo*. *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992).

IV.

A.

First, we must consider whether we have jurisdiction over this appeal, which, in part, turns on whether the plaintiffs timely filed their notice of appeal. Although it may seem like a small matter in the context of all that has occurred in this case, a failure to timely file would deprive this court of jurisdiction and end our part in this saga. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007).

Federal Rule of Appellate Procedure 4(a) provides that a private party, in a civil case, has thirty days from the entry of the judgment or order appealed from to file a notice of appeal. On the face of the record, this requirement was not satisfied. The plaintiffs filed their notice of appeal sixty-five days after the district court denied their petition. Ordinarily, however, a motion for reconsideration, which indeed was filed in this case, will toll the

period for filing a notice of appeal. *Moody Nat'l Bank of Galveston v. GE Life & Annuity Assurance Co.*, 383 F.3d 249, 250 (5th Cir. 2004). The respondents here contend, however, that because the district court struck the motion for reconsideration for failure to comply with local rules, it did not serve this tolling function.

This matter is a determinative point because the filing of the notice was timely if the motion for reconsideration tolled the thirty-day filing period. Federal Rule of Appellate Procedure 4(a)(4)(A) provides that "the time to file an appeal runs for all parties from the entry of the order disposing of the last [qualifying motion]."[2] The plaintiffs filed their notice of appeal twenty-nine days after the district court entered an order striking, for procedural reasons, their motion for reconsideration; so their filing would be within the thirty-day window if the instant motion for reconsideration did in fact toll the period for filing.

B.

Saudi Aramco's argument that this motion for reconsideration did not toll the filing period rests on two unpublished Fifth Circuit opinions—*Franklin v. Burlington N. & Santa Fe Ry.*, 522 F. App'x 220 (5th Cir. 2013) (per curiam) (unpublished) and *Hoffman v. Meckling*, 139 F.3d 899 (5th Cir. 1998) (per curiam) (unpublished)—and one out-of-circuit opinion—*Bunn v. Perdue*, 966 F.3d 1094, 1095–98 (10th Cir. 2020), which held that struck motions for reconsideration did not toll the period for filing a notice of appeal. These opinions, in turn, trace their reasoning back to *Air Line Pilots Ass'n v. Precision Valley Aviation, Inc.*, 26 F.3d 220 (1st Cir. 1994). Each of these cases, however, failed to note a critical revision of the law that occurred after

[2] A motion "to alter or amend the judgment under Rule 59," which was filed here, is one of the enumerated motions. FED. R. APP. P. 4(a)(4)(A)(iv).

Air Line Pilots was decided. Federal Rule of Civil Procedure 83(a) was revised to add a second paragraph which provides that "[a] local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply." FED. R. CIV. P. 83(a)(2).

We conclude that it would be contrary to Federal Rule of Civil Procedure 83(a)(2) to follow our practice reflected in the non-precedential cases of *Franklin* and *Hoffman*. The plaintiffs' motion for reconsideration was struck for non-compliance with Court Procedures 6(C)(2)–(3). Court Procedure 6(C)(2) requires that all motions contain a certificate of conference "stating that counsel and pro se parties have conferred regarding the substance of the relief requested, and stating whether the relief is opposed or denied." Court Procedure 6(C)(3) requires that almost all motions be accompanied by a proposed order, which was not submitted here. We think these requirements are, however, merely formal.

Not only do Court Procedures 6(C)(2)–(3) seem on their face to deal with matters of form, but, as Saudi Aramco itself points out, they largely reproduce Local Rules 7.1(C)-(D), which are labeled under the heading "Form." Moreover, it is undisputed that the plaintiffs' non-compliance was nonwillful. We therefore conclude that the plaintiffs' motion for reconsideration tolled the period for filing a notice of appeal, consistent with Federal Rule of Civil Procedure 83(a)(2). The filing period thus began to run upon entry of the order striking that motion, and the plaintiffs' notice of appeal was timely filed.

V.

A.

Our jurisdictional analysis does not end there, however. "The Foreign Sovereign Immunities Act provides the sole basis for obtaining

jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)). A "foreign state," within the meaning of the FSIA, "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or instrumentality of a foreign state" includes "any entity . . . which is a separate legal person, corporate or otherwise, and . . . a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and . . . is neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b).

We hold that Saudi Aramco is a "foreign state" for purposes of the FSIA. It is a distinct legal entity incorporated under Saudi law, a majority of whose shares are owned by the Kingdom of Saudi Arabia and whose principal place of business is in Saudi Arabia. That satisfies the definition of "foreign state" set forth in the FSIA. 28 U.S.C. § 1603. As a foreign state, Saudi Aramco is presumptively immune from suit in the courts of the United States. 28 U.S.C. § 1604.

B.

There are, however, a number of exceptions to this general rule of immunity. 28 U.S.C. § 1605. Once a party invoking immunity makes a prima facie case that it is a "foreign state," the burden shifts to the opponent to show that an FSIA exception applies. *See Moats*, 961 F.2d at 1205. In the district court, the plaintiffs argued that four different FSIA exceptions applied, namely those set forth at 28 U.S.C. § 1605(a)(1)–(3); (6). We examine each in turn. Although the district court did not expressly address this FSIA issue, and it was not extensively briefed on appeal, we must determine whether we have jurisdiction before reaching the merits of the case.

Section 1605(a)(1) provides that "[a] foreign state shall not be immune . . . in any case . . . in which the foreign state has waived its immunity. . . ." 28 U.S.C. § 1605(a)(1). The plaintiffs contend that Saudi Aramco waived immunity by entering into a 1933 agreement that gave Standard Oil of California exclusive rights to exploit mineral resources in Saudi Arabia. This assertion does not convince for a number of reasons, a few of which are that Saudi Aramco did not exist in 1933 and that the plaintiffs are not parties to that agreement. This agreement is discussed more fully below, but it suffices to say that the Kingdom of Saudi Arabia thereby waived immunity only to the extent a dispute is governed by the arbitration provision in that agreement, and the dispute underlying the arbitral award at issue in this case is clearly outside its scope.

Next, we turn to the exception found at 28 U.S.C. § 1605(a)(2):

> A foreign state shall not be immune . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

This exception does not apply. The plaintiffs' argument in the district court appears to have been that Saudi Aramco conducts business in the United States and that therefore its immunity is waived under this provision of the FSIA. But this case arises out of an arbitration that took place in Egypt. This arbitration did not cause a "direct effect" in the United States. The plaintiffs merely seek to enforce the resulting award in this country.

We next consider the exception at 28 U.S.C. § 1605(a)(3):

> A foreign state shall not be immune . . . in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

This exception does not apply because, even assuming that Saudi Aramco unlawfully expropriated the plaintiffs' land, what is at issue in this case is the enforcement of an arbitral award and not litigation of a property dispute involving international law. Moreover, because the property at issue is not located in the United States, the plaintiffs would have to establish that Saudi Aramco "is engaged in commercial activity in the United States," which they have not done. Finally, to the extent the plaintiffs are Saudi nationals, as they appear to be,[3] the expropriation of their land by the Saudi government or its instrumentalities would not violate international law. *See de Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985) ("With a few limited exceptions, international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens.").

[3] "The Appellants are the children and heirs of Sheikh Khalid Abu Al-Waleed Al Hood Al-Qarqani, an advisor to His Majesties King Abdulaziz, King Saud and King Faisal of the Kingdom of Saudi Arabia." Saudi Aramco describes the individuals who brought the action before the Saudi Legal Committee as "Saudi nationals," but it seems that some Egyptian nationals may have joined the IAC proceedings.

Now we turn to the exception at 28 U.S.C. § 1605(a)(6):

> A foreign state shall not be immune . . . in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if . . . (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards. . . .

This exception is really the essential jurisdictional point in this case. The plaintiffs contend that the second IAC award was issued pursuant to a valid arbitration agreement and that the recognition and enforcement of the award is governed by the New York Convention, an international treaty to which both the United States and Saudi Arabia are parties. We hold that no such arbitration agreement exists.

It is undisputed that there is no agreement to arbitrate signed by both the plaintiffs and Saudi Aramco. Instead, the plaintiffs rely on an arbitration clause contained in a 1933 agreement between Standard Oil of California and the Kingdom of Saudi Arabia. The plaintiffs argue that somehow that clause binds Saudi Aramco to arbitrate this dispute, but their arguments are totally unpersuasive.

The 1949 agreement between the purported ancestors of the plaintiffs and the Arabian American Oil Company does not so much as mention arbitration. It does mention the 1933 agreement, but not the article

containing the arbitration clause, Article 31. It references only Article 25 of that agreement, which deals with the acquisition and transfer of surface rights and that says nothing whatsoever about arbitration. Because there exists no agreement among the parties to arbitrate, this FSIA exception does not apply.

Having found that Saudi Aramco is a "foreign state" for purposes of the FSIA and that no exception to the general rule of immunity for foreign states is applicable, we conclude that we lack jurisdiction to hear this appeal.

VI.

The district court's analysis of this case was quite accurate. The arbitral proceedings give every appearance of having been a sham, and there exists no agreement among these parties to arbitrate this dispute, or anything else for that matter. We think, however, that instead of denying the petition for enforcement, the case is more properly dismissed for lack of jurisdiction, given that Saudi Aramco qualifies as a foreign state for purposes of the Foreign Sovereign Immunities Act. Therefore, we vacate the judgment of the district court and remand this case with instructions to the district court to dismiss for lack of jurisdiction.

VACATED AND REMANDED.