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THIRD DIVISION

[G.R. No. 70547. January 22, 1993]

PHILIPPINE NATIONAL RAILWAYS and HONORIO CABARDO, *petitioners, vs.* **INTERMEDIATE APPELLATE COURT and BALIWAG TRANSIT, INC.,** *respondents.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC CORPORATIONS; PHILIPPINE NATIONAL RAILWAYS; POWER TO SUE AND BE SUED; IMPLICIT FROM THE FACILITY TO TRANSACT PRIVATE BUSINESS. — On the aspect of whether the Philippine National Railways enjoys immunity from suit, respondent court initially noted that an exculpation of this nature that was raised for the first time on appeal may no longer be entertained in view of the proscription under Section 2, Rule 9 of the Revised Rules of Court, apart from the fact that the lawyer of petitioner agreed to stipulate *inter alia* that the railroad company had capacity to sue and be sued. This being so, respondent court continued, PNR was perforce estopped from disavowing the prejudicial repercussion of an admission *in judicio*. Even as the laws governing the creation and rehabilitation of the PNR were entirely mute on its power to sue and be sued, respondent court nonetheless opined that such prerogative was implied from the general power to transact business pertinent or indispensable to the attainment of the goals of the railroad company under Section 4 of Republic Act No. 4156 as amended by Republic Act No. 6366. Thus, respondent court utilized the doctrine of implied powers announced in *National Airports Corporation vs. Teodoro, Sr. and Philippine Airlines, Inc.* (91 Phil. 203 [1952], to the effect that the power to sue and be sued is implicit from the faculty to transact private business. At any rate, respondent court characterized the railroad company as a private entity created not to discharge a governmental function but, among other things, to operate a transport service which is essentially a business concern, and thus barred from invoking immunity from suit.

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2. POLITICAL LAW; IMMUNITY FROM SUIT OF THE STATE; ACQUIESCENCE OF THE STATE TO BE SUED, WHEN MANIFESTED. — The bone of contention for exculpation is premised on the familiar maxim in political law that the State, by virtue of its sovereign nature and as reaffirmed by constitutional precept, is insulated from suits without its consent. However, equally conceded is the legal proposition that the acquiescence of the State to be sued can be manifested expressly through a general or special law, or indicated implicitly, as when the State commences litigation for the purpose of asserting an affirmative relief or when it enters into a contract. When the State participates in a covenant, it is deemed to have descended from its superior position to the level of an ordinary citizen and thus virtually opens itself to judicial process. Of course, We realize that this Court qualified this form of consent only to those contracts concluded in a proprietary capacity and therefore immunity will attach for those contracts entered into in a governmental capacity, following the ruling in the 1985 case of *United States of America vs. Ruiz* (136 SCRA 487 [1985]; cited by *Cruz, supra* at pages 36-37). But the restrictive interpretation laid down therein is of no practical worth nor can it give rise to herein petitioner PNR's exoneration since the case of *Malong vs. Philippine National Railways* (138 SCRA 63 [1985]; 3 *Padilla*, 1987 Constitution with Comments and Cases, 1991 edition, page 644), decided three months after *Ruiz* was promulgated, was categorical enough to specify that the Philippine National Railways "is not performing any governmental function."

3. ID.; ID.; BY ENGAGING IN A PARTICULAR BUSINESS THROUGH THE INSTRUMENTALITY OF A CORPORATION, THE GOVERNMENT DIVESTS ITSELF *PRO HAC VICE* OF ITS SOVEREIGN CHARACTER. — To the pivotal issue of whether the State acted in a sovereign capacity when it organized the PNR for the purpose of engaging in transportation, *Malong* continued to hold that: ". . . in the instant case the State divested itself of its sovereign capacity when it organized the PNR which is no different from its predecessor, the Manila Railroad Company. The PNR did not become immune from suit. It did not remove itself from the operation of Articles 1732 to 1766 of the Civil Code on common

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carriers. The correct rule is that 'not all government entities, whether corporate or noncorporate, are immune from suits. Immunity from suit is determined by the character of the objects for which the entity was organized.' 'Suits against State agencies with relation to matters in which they have assumed to act in a private or nongovernmental capacity, and various suits against the State.' 'Suits against State agencies with relation to matters in which they have assumed to act in a private or nongovernmental capacity, and various suits against certain corporations created by the State for public purposes, but to engage in matters partaking more of the nature of ordinary business rather than functions of a governmental or political character. are not regarded as suits against the State. 'The latter is true, although the State may own the stock or property of such a corporation, for by engaging in business operations through a corporation the State divests itself so far of its sovereign character, and by implicating consents to suits against the corporation. The foregoing rule was applied to State Dock Commissions carrying on business relating to pilots, terminals and transportation and to State Highways Commissions created to build public roads and given appropriations in advance to discharge obligations incurred in their behalf. The point is that when the government enters into a commercial business it abandons its sovereign capacity and is to be treated like any other private corporation. The Manila Hotel case also relied on the following rulings: 'By engaging in a particular business through the instrumentality of a corporation, the government divests itself *pro hac vice* of its sovereign character, so as to render the corporation subject to the rules of law governing private corporations.' 'When the State acts in its proprietary capacity, it is amenable to all the rules of law which bind private individuals.' 'There is not one law for the sovereign and another for the subject, but when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the contract in any form comes before the courts, the rights and obligation of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor.'

4. CIVIL LAW; COMMON CARRIERS; MUST OBSERVE REASONABLE DILIGENCE. — It was demonstrated beyond

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cavil in the course of the pre-trial hearings held for the purpose of stipulating on critical facts that the bus was hit on the rear portion thereof after it crossed the railroad tracks. Then, too the train engineer was frank enough to say that he saw the jeep maneuvering into a parking area near the crossing which caused the obstruction in the flow of traffic such that the gravel and sand truck including the bus of herein private respondent were not able to move forward or to take the opposite lane due to other vehicles. The unmindful demeanor of the train engineer in surging forward despite the construction before him is definitely anathema to the conduct of a prudent person placed under the same set of perceived danger. Indeed: "When it is apparent, or when in the exercise of reasonable diligence commensurate with the surroundings it should be apparent, to the company that a person on its track or to get on its track is unaware of his danger or cannot get out of the way, it becomes the duty of the company to use such precautions, by warnings, applying brakes, or otherwise, as may be reasonably necessary to avoid injury to him." Likewise, it was established that the weather condition was characterized with intermittent rain which should have prompted the train engineer to exercise extra precaution. Also, the train reached Calumpit, Bulacan ahead of scheduled arrival thereat, indicating that the train was travelling more than the normal speed of 30 kilometers per hour. If the train were really running at 30 kilometers per hour when it was approaching the intersection, it would probably not have travelled 190 meters more from the place of the accident. All of these factors, taken collectively, engendered the concrete and yes, correct conclusion that the train engineer was negligent who, moreover, despite the last opportunity within his hands *vis-a-vis* the weather condition including the presence of people near the intersection, could have obviated the impending collision had he sickened his speed and applied the brakes.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Leopoldo Sta. Maria for private respondent.

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D E C I S I O N

MELO, *J.:*

The imputation of *culpa* on the part of herein petitioners as a result of the collision between its train, bound for Manila from La Union, with a Baliwag transit bus at the railroad crossing on the road going to Hagonoy, Bulacan on August 10, 1974, is the subject of the petition at bar directed against the judgment of affirmance rendered by respondent court, through the Fourth Civil Cases Division (Sison, Bidin (P), Veloso, *JJ*.), *vis-a-vis* the decretal portion handed down by the court of origin in:

"1. Ordering the defendants, jointly and severally to pay the plaintiff the amount of ₱179,511.52 as actual damages.

2. Ordering the defendants jointly and severally to pay the plaintiff ₱436,642.03 as reimbursement for the damages paid by the plaintiff to death, injury and damage claimants.

3. Ordering the defendants jointly and severally to pay exemplary damages in the amount of ₱50,000.00 to the plaintiff.

4. Ordering the defendants jointly and severally to pay the plaintiff attorney's fees in the amount of ₱5,000.00.

5. Ordering the defendants, jointly and severally to pay the plaintiff interest at the legal rate on the above amounts due the plaintiff from August 10, 1974 until fully paid.

6. Ordering the defendants to pay the cost of this suit.

7. Ordering the dismissal of the defendants counterclaim for lack of factual and legal basis." (p. 101, Record on Appeal; p. 103, *Rollo*.)

Culled from the text of the assailed disposition are the facts of the case at bar which are hereunder adopted *verbatim*:

"The case arose from a collision of a passenger express train of defendant Philippine National Railways, (PNR) coming from San Fernando. La Union and bound for Manila and a passenger bus of Baliwag Transit, Inc. which was on its way to Hagonoy, Bulacan,

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from Manila, but upon reaching the railroad crossing at Barrio Balungao, Calumpit, Bulacan at about 1:30 in the afternoon of August 10, 1974, got stalled and was hit by defendant's express train causing damages to plaintiff's bus and its passengers, eighteen (18) of whom died and fifty-three (53) others suffered physical injuries. Plaintiff alleging that the proximate cause of the collision was the negligence and imprudence of defendant PNR and its locomotive engineer, Honorio Cirbado, in operating its passenger train in a busy intersection without any bars, semaphores, signal lights, flagman or switchman to warn the public of approaching train that would pass through the crossing, filed the instant action for Damages against defendants. The defendants, in their Answer traversed the material allegation of the Complaint and as affirmative defense alleged that the collision was caused by the negligence, imprudence and lack of foresight of plaintiff's bus driver, Romeo Hughes.

"At the pre-trial conference held on June 23, 1976, the parties agreed on a partial stipulation of facts and issues which as amplified at the continuation of the pre-trial conference, on July 12, 1976, are as follows:

> '1. That plaintiff is a duly constituted corporation registered with the Securities and Exchange Commission engaged in the business of transportation and operating public utility buses for the public with lines covering Manila, Caloocan City, Quezon City, Malabon, Rizal, Bulacan, Pampanga and Nueva Ecija, and particularly from Manila to Hagonoy, Bulacan and return in the month of August, 1974 passing thru the town of Calumpit, Bulacan, temporarily while the bridge at Hagonoy, Bulacan was under construction;
>
> 2. That defendant Philippine National Railways is a purely government owned and controlled corporation duly registered and existing by virtue of Presidential Decree No. 741, with capacity to sue and be sued, and is likewise engaged in transporting passengers and cargoes by trains and buses and that, it operates a train line between San Fernando, La Union and Manila particularly Passenger Express Train with Body No. 73, passing along the intersection of Barrio Balungao, Calumpit, Bulacan, in going to San Fernando, La Union from Manila and return;
>
> 3. That on August 10, 1974 at about 1:20 o'clock in the afternoon, a Baliuag Transit Bus with Body No. 1066 and Plate

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No. XS-929 PUB-Bulacan '74 was driven by its authorized driver Romeo Hughes and PNR Train No. 73 was operated by Train Engineer Honorio Cabardo *alias* Honorio Cirbado and at the railroad intersection at Barrio Balungao, Calumpit, Bulacan, said passenger train no. 73 hit and bumped the right mid portion of the plaintiff's passenger bus No. 1066, while the rear portion of said bus was at the railroad track and its direction was towards Hagonoy, Bulacan at about 1:30 o'clock in the afternoon;

4. That at the time of the collision there was a slight rainfall in the vicinity of the scene of the accident and that there was at said intersection no bars, semaphores, and signal lights that would warn the public of the approaching train that was about to pass through the intersection and likewise there was no warning devices to passing trains showing that they were about to pass an intersection in going to Manila from San Fernando, La Union and back;

5. That on account of said collision, the Baliuag Transit Bus with Body No. 1066 driven by Romeo Hughes was damaged and eighteen (18) of its passengers died and the rest who were more than fifty three (53) passengers suffered physical injuries;

6. That after the investigation the Chief of Police of Calumpit, Bulacan, filed a criminal case of Reckless Imprudence Causing Multiple Homicide with Multiple Physical Injuries and Damage to Property against Romeo Hughes *y* Parfan, driver of the Baliuag Transit bus docketed under Crim. Case No. 2392; while the train Engineer Honorio Cabardo alias Honorio Cirbado was not included as an accused in said case, although his train No. 73 was the one that hit and bumped the right rear portion of the said bus;

7. That immediately after the said accident Major Manuel A. Macam, Chief of the Municipal Police of Calumpit, Bulacan, together with some of his policemen conducted an investigation of the accident;

8. That at the railroad crossing in Calumpit, Bulacan where the accident took place there is no railroad crossing bar, however, during the pre-war days there was a railroad crossing bar at said intersection; that, however, there was only one sign of

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railroad crossing "Stop, Look and Listen" placed on a concrete slab and attached to a concrete post existing at the approach of the railroad track from the Highway going towards Hagonoy, Bulacan and that after the said railroad track there was a designated jeep parking area at right side in the direction from the Highway to Hagonoy, Bulacan;

9. That the train No. 73 driven by Train Engineer Honorio Cabardo *alias* Honorio Cirbado stopped after passing the railroad crossing at a distance of about 50 meters from the said intersection after the collision on August, 1974;

10. That the expected time of arrival of said Train No. 73 in Manila was 2:41 P.M. and its departure time from San Fernando, La Union was 9:00 A.M. and its expected arrival at Calumpit, Bulacan was 1:41 P.M. with no stop at Calumpit, Bulacan was 1:41 P.M. with no stop at Calumpit, Bulacan.

SIMPLIFICATION OF ISSUES

11. That the principal issue in the instant case is who between the driver Romeo Hughes Baliuag Transit, Incorporated and the train engineer Honorio Cabardo *alias* Honorio Cirbado of the Philippine National Railways was negligent or whether or not both are negligent; that likewise which of said companies was negligent at said railroad intersection;

12. That another additional issue is whether the Baliuag Transit Incorporated has exercised the diligence of a good father of the family in the selection and supervision of its employees." (pp. 85-87, Record on Appeal).'" (Annex A, Petition; pp. 79-82, *Rollo*)

In addition, respondent court deemed it necessary to reflect the salient findings of the case for damages as formulated by the trial court:

"Posed for resolution are the following issues: Who between the driver Romeo Hughes of the Baliuag Transit Incorporated and Honorio Cabardo, train Engineer of the Philippine National Railways was negligent in the operation of their respective vehicles, or whether or both were negligent? Could either of the companies Baliuag Transit Incorporated and the Philippine National Railways be held accountable for the collision because of negligence?

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"The defendants presented several statements or affidavits of alleged witnesses to the collision specifically Exhibits 2, 3, 4, 5, 6, 11, 13, 14, 15, 16, 17, 18 and 19; the Court is at a loss as to why the persons who gave the said statements were not presented as witnesses during the trial of the case, as aptly said, the statements are hearsay evidence (*Azcueta v. Cabangbang*, - 45 O.G. 144); at most they be taken as proof only of the fact that statements of said persons were taken and that investigation was conducted of the incident; the Court cannot consider the averments in said statements as testimonies or evidence of truth.

"Defendants endeavored to show that the proximate and immediate cause of the collision was the negligence of the bus driver because the driver did not make a stop before ascending the railtrack; he did not heed the warning or shoutings of bystanders and passengers and proceeded in traversing the railtrack at a fast speed; that the bus driver was in fact violating Section 42 (d) of R.A. 4136, otherwise known as the Land Transportation and Traffic Code for failure to 'stop, look, and listen' at the intersection, before crossing the railtrack; that it is incumbent upon him to take the necessary precautions at the intersection because the railroad track is in itself a warning; and the bus driver ignored such a warning and must assume the responsibility for the result of the motion taken by him (*U.S. v. Mananquil*, 42 Phil. 90)

"Except the testimony of the train engineer Cabardo, there is no admissible evidence to show that indeed, the bus driver did not take the necessary precaution in traversing the track. Note that he first noticed the bus when it was only 15 meters away from him; he could not have possibly noticed the position of the bus before negotiating the track.

"On the other hand, it was shown by plaintiff that the bus driver Romeo Hughes took the necessary precautions in traversing the track.

"The bus driver had stopped before traversing the track and in fact asked the conductor to alight and made a 'Look and Listen' before proceeding; the conductor had done just that and made a signal to proceed when he did not see any oncoming train. (TSN, October 21, 1976, p. 4); plaintiff's bus drivers and conductors are enjoined to observe such a precautionary measure in seminars conducted by the company. (TSN, September 23, 1976, pp. 26-27).

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"The evidence disclosed that the train was running fast because by his own testimony, the train engineer had testified that before reaching the station of Calumpit the terrain was downgrade and levelled only after passing the Calumpit bridge (TSN, July 26, 1976, p. 14); the tendency of the train, coming from a high point is to accelerate as the gravity will necessarily make it so, especially when it is pulling seven coaches loaded with goods and passengers.

"Moreover, upon impact, the bus loaded with passengers was dragged and thrown into a ditch several meters away; the train had stopped only after the engine portion was about 190 meters away from the fallen bus; several passengers were injured and at least 20 died; such facts conclusively indicate that the train was speeding, because if it wore moving at moderate speed, it would not run some 190 meters after impact and throw the bus at quite a distance especially so when it is claimed that the train's emergency brakes were applied.

"Further, the train was an express train; its departure was 9:00 A.M. at San Fernando, La Union and expected in Manila at 2:41 P.M.; the collision occurred at 130 P.M. or 4 1/2 hours after it left La Union; surely, the train could have not negotiated such a distance in so short a time if it were not running at fast speed.

"It may be argued that a railroad is not subject to the same restrictions to the speed of its train as a motorists (*Mckelvey v. Delaware L. and W.R. Co*. 253 App., D.V. 109, 300 NYS 1263); but it does not follow that a train will be permitted to run fast under all conditions at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property (*Johnson v. Southern Pacific Company* (Cal. App. 288 p. 81), considering the surrounding circumstances particularly the nature of the locality (*Atchinson, T. and SFR Co. v. Nicks* (Arts) 165 p. 2d 167).

"Cabardo's route included the passage over the said intersection; he could have noticed that it is a very busy intersection because the crossroad leads to the Calumpit Poblacion as well as to the neighboring town of Hagonoy; there was a parking lot by the side of the track whereat passengers board jeepneys for the neighboring barrios and towns; stalls abound in the vicinity and bystanders congregate nearby. A prudent train operator must, under the circumstances, slacken his speed almost for the protection of motorists and pedestrians,

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not only when a collision is inevitable but even if no hindrance is apparent on the way;

"Moreover, there was an intermittent rain at the time of the collision (see stipulation of facts and photographs); the condition of the weather was such that even if for this reason alone, the train engineer should have foreseen that danger of collision lurked because of poor visibility of slippery road; he should have taken extra precaution by considerably slackening its speed. This he failed to do even if the nature of his job required him to observe care exercised by a prudent man.

"Contributory negligence may not be ascribed to the bus driver; it was evident that he had taken the necessary precautions before passing over the railway track; if the bus was hit, it was for reasons beyond the control of the bus driver because he had no place to go; there were vehicles to his left which prevented him in swerving towards that direction; his bus stalled in view of the obstructions in his front where a sand and gravel truck stopped because of a jeep maneuvering into a garage up front. All the wheels at the bus have already passed the rail portion of the track and only the rear portion of the bus' body occupied or covered the railtrack. This was evident because the part of the bus hit by the train was the rear since the bus fell on a nearby ditch. Otherwise, if the bus was really hit in mid-body, the bus could have been halved into two because of the force of the impact.

"The stipulation of facts between the parties show that there was no crossing bar at the railroad intersection at Calumpit, Bulacan at the time of collision (par. 8, Stipulation of Facts); the plaintiff contended and the defendants did not deny, that there were no signal lights, semaphores, flagman or switchman thereat; the absence of such devices, the plaintiff argues constitute negligence on the part of the Philippine National Railways.

"A railroad is not required to have a gate (crossing bar) or a flagman, or to maintain signals at every intersection; only at such places reasonably necessary; what is considered reasonably necessary will depend on the amount of travel upon the road, the frequency with which trains pass over it and the view which could be obtained of trains as they approach the crossing, and other conditions (*Pari v. Los Angeles Ry. Corporation* (Cal A2d) 128 p2d 563; *Swdyk v. Indiana Harbor Belt R. Co.*, 148 F. 2d 795, and others).

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"As has been amply discussed, the crossroad at the intersection at Calumpit is one which is a busy thoroughfare; it leads to the Poblacion at Calumpit and other barrios as well as the town of Hagonoy; the vicinity is utilized as a parking and waiting area for passengers of jeepneys that ply between the barrios, clearly, the flow of vehicular traffic thereat is huge. It can be said also that, since there is no other railtrack going North except that one passing at Calumpit, trains pass over it frequently;

"A portion of the intersection is being used as a parking area with stalls and other obstructions present making it difficult, if not impossible, to see approaching trains (see photographs).

"The failure of the Philippine National Railways to put a cross bar, or signal light, flagman or switchman, or semaphores is evidence of negligence and disregard of the safety of the public, even if there is no law or ordinance requiring it, because public safety demands that said devices are equipments be installed, in the light of aforesaid jurisprudence. In the opinion of this Court the X sign or the presence of 'STOP, LOOK, LISTEN' warnings would not be sufficient protection of the motoring public as well as the pedestrians, in the said intersection;

"The parties likewise have stipulated that during the pre-war days, there was a railroad crossing bar at the said intersection (Par-8, Stipulation of Facts). It appears that it was a self imposed requirement which has been abandoned. In a case it was held that where the use of a flagman was self imposed, the abandonment thereof may constitute negligence. (*Fleming v. Missouri and A. Ry. Co.,* 198 ARDC 290, 128 S.W. 2d 286 and others; cited in Sec. 1082 SCRWARTZ, Vol. 2). Similarly, the abandonment by the PNR of the use of the crossing bar at the intersection at Calumpit constitutes negligence, as its installation has become imperative, because of the prevailing circumstances in the place.

"A railroad company has been adjudged guilty of negligence and civilly liable for damages when it failed to install semaphores, or where it does not see to it that its flagman or switchman comply with their duties faithfully, to motorist injured by a crossing train as long as he had crossed without negligence on his part (*Lilius vs. MRR,* 39 Phil. 758)." (Decision, pages 94-100, R.A.; pp. 83-89, *Rollo*)

On the aspect of whether the Philippine National Railways enjoys immunity from suit, respondent court initially noted that

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an exculpation of this nature that was raised for the first time on appeal may no longer be entertained in view of the proscription under Section 2, Rule 9 of the Revised Rules of Court, apart from the fact that the lawyer of petitioner agreed to stipulate *inter alia* that the railroad company had capacity to sue and be sued. This being so, respondent court continued, PNR was perforce estopped from disavowing the prejudicial repercussion of an admission *in judicio.* Even as the laws governing the creation and rehabilitation of the PNR were entirely mute on its power to sue and be sued, respondent court nonetheless opined that such prerogative was implied from the general power to transact business pertinent or indispensable to the attainment of the goals of the railroad company under Section 4 of Republic Act No. 4156 as amended by Republic Act No. 6366:

"SECTION 4. General Powers. — The Philippine National Railways shall have the following general powers:

(a) To do all such other things and to transact all such business directly or indirectly necessary, incidental or conducive to the attainment of the purpose of the corporation; and

(b) Generally, to exercise all powers of a railroad corporation under the Corporation law."

in conjunction with Section 2(b) of Presidential Decree No. 741:

"(b) To own or operate railroad transways, bus lines, trucklines, subways, and other kinds of land transportation, vessels, and pipelines, for the purpose of transporting for consideration, passengers, mail and property between any points in the Philippines;"

Thus, respondent court utilized the doctrine of implied powers announced in *National Airports Corporation vs. Teodoro, Sr. and Philippine Airlines, Inc.* (91 Phil. 203 [1952], to the effect that the power to sue and be sued is implicit from the faculty to transact private business. At any rate, respondent court characterized the railroad company as a private entity created not to discharge a governmental function but, among other things, to operate a transport service which is essentially a business concern, and thus barred from invoking immunity from suit.

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In brushing aside petitioners' asseveration that the bus driver outraced the train at the crossing, respondent court observed that the bus was hit by the train at its rear portion then protruding over the tracks as the bus could not move because another truck at its front was equally immobile due to a jeep maneuvering into a nearby parking area. Under these tight conditions, respondent court blamed the train engineer who admitted to have seen the maneuvering jeep at a distance (TSN, July 28, 1976, page 18) and had the last clear chance to apply the brakes, knowing fully well that the vehicles following the jeep could not move away from the path of the train. Apart from these considerations, it was perceived below that the train was running fast during the entire trip since the train stopped 190 meters from the point of impact and arrived at Calumpit, Bulacan earlier than its expected time of arrival thereat.

Moreover, respondent court agreed with the conclusion reached by the trial court that the absence of a crossing bar, signal light, flagman or switchman to warn the public of an approaching train constitutes negligence per the pronouncement of this Court in *Lilius vs. Manila Railroad Company* (59 Phil. 758 [1934]).

Concerning the exercise of diligence normally expected of an employer in the selection and supervision of its employees, respondent court expressed the view that PNR was remiss on this score since it allowed Honorio Cabardo, who finished only primary education and became an engineer only through sheer experience, to operate the locomotive, not to mention the fact that such plea in avoidance was not asserted in the answer and was thus belatedly raised on appeal.

Petitioner moved to reconsider, but respondent court was far from persuaded. Hence, the petition before Us which, in essence, incorporates similar disputations anent PNR's immunity from suit and the attempt to toss the burden of negligence from the train engineer to the bus driver of herein private respondent.

The bone of contention for exculpation is premised on the familiar maxim in political law that the State, by virtue of its sovereign nature and as reaffirmed by constitutional precept, is insulated from suits without its consent (*Article 16, Section*

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3, 1987 Constitution). However, equally conceded is the legal proposition that the acquiescence of the State to be sued can be manifested expressly through a general or special law, or indicated implicitly, as when the State commences litigation for the purpose of asserting an affirmative relief or when it enters into a contract (*Cruz*, Philippine Political Law, 1991 edition, page 33; *Sinco*, Philippine Political Law, Eleventh Edition, 1962, page 34). When the State participates in a covenant, it is deemed to have descended from its superior position to the level of an ordinary citizen and thus virtually opens itself to judicial process. Of course, We realize that this Court qualified this form of consent only to those contracts concluded in a proprietary capacity and therefore immunity will attach for those contracts entered into in a governmental capacity, following the ruling in the 1985 case of *United States of America vs. Ruiz* (136 SCRA 487 [1985]; cited by *Cruz, supra* at pages 36-37). But the restrictive interpretation laid down therein is of no practical worth nor can it give rise to herein petitioner PNR's exoneration since the case of *Malong vs. Philippine National Railways* (138 SCRA 63 [1985]; 3 *Padilla*, 1987 Constitution with Comments and Cases, 1991 edition, page 644), decided three months after *Ruiz* was promulgated, was categorical enough to specify that the Philippine National Railways "is not performing any governmental function" (*supra*, at page 68).

In *Malong*, Justice Aquino, speaking for the Court *en banc*, declared:

"The Manila Railroad Company, the PNR's predecessor, as a common carrier, was not immune from suit under Act No. 1510, its charter.

The PNR Charter, Republic Act No. 4156, as amended by Republic Act No. 6366 and Presidential Decree No. 741, provides that the PNR is a government instrumentality under government ownership during its 50-year term, 1964 to 2014. It is under the Office of the President of the Philippines. Republic Act No. 6366 provides:

'SECTION 1-a. Statement of policy. — The Philippine National Railways, being a factor for socio-economic development and growth, shall be a part of the infrastructure program of the government and as such shall remain in and

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> under government ownership during its corporate existence. The Philippine National railways must be administered with the view of serving the interests of the public by providing them the maximum of service and, while aiming at its greatest utility by the public, the economy of operation must be ensured so that service can be rendered at the minimum passenger and freight prices possible.'
>
> The charter also provides:
>
> 'SEC. 4. General powers. — The Philippine National Railways shall have the following general powers:
>
> (a) To do all such other things and to transact all such business directly or indirectly necessary, incidental or conducive to the attainment of the purpose of the corporation; and
>
> (b) Generally, to exercise all powers of a railroad corporation under the Corporation Law." (This refers to Sections 81 to 102 of the Corporation Law on railroad corporations, not reproduced in the Corporation Code.)'

Section 36 of the Corporation Code provides that every corporation has the power to sue and be sued in its corporate name. Section 13(2) of the Corporation Law provides that every corporation has the power to sue and be sued in any court.

'A sovereign is exempt from suit, not because of any formal conception or 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' (*Justice Holmes in Kawananakoa vs. Polyblank*, 205 U.S. 353, 51 L. 3d 834).

'The public service would be hindered, and public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen and, consequently, controlled in the use and disposition of the means required for the proper administration of the Government' (*The Siren vs. U.S.*, 7 Wall. 152, 19 L. ed. 129)." (at pp. 65-66)"

To the pivotal issue of whether the State acted in a sovereign capacity when it organized the PNR for the purpose of engaging in transportation, *Malong* continued to hold that:

"x x x in the instant case the State divested itself of its sovereign capacity when it organized the PNR which is no different from its

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predecessor, the Manila Railroad Company. The PNR did not become immune from suit. It did not remove itself from the operation of Articles 1732 to 1766 of the Civil Code on common carriers.

The correct rule is that 'not all government entities, whether corporate or noncorporate, are immune from suits. Immunity from suit is determined by the character of the objects for which the entity was organized.' (*Nat. Airports Corp. vs. Teodoro and Phil. Airlines, Inc.*, 91 Phil. 203, 206; *Santos vs. Santos*, 92 Phil. 281, 285; *Harry Lyons, Inc. vs. USA*, 104 Phil. 593).

'Suits against State agencies with relation to matters in which they have assumed to act in a private or nongovernmental capacity, and various suits against the State' (81 C.J.S. 1319).

> 'Suits against State agencies with relation to matters in which they have assumed to act in a private or nongovernmental capacity, and various suits against certain corporations created by the State for public purposes, but to engage in matters partaking more of the nature of ordinary business rather than functions of a governmental or political character. are not regarded as suits against the State.
>
> 'The latter is true, although the State may own the stock or property of such a corporation, for by engaging in business operations through a corporation the State divests itself so far of its sovereign character, and by implicating consents to suits against the corporation. (81 O.J.S. 1319).

The foregoing rule was applied to State Dock Commissions carrying on business relating to pilots, terminals and transportation (*Standard Oil Co. of New Jersey vs. U.S.*, 27 Fed. 2nd 370) and to State Highways Commissions created to build public roads and given appropriations in advance to discharge obligations incurred in their behalf (*Arkansas State Highway Commission vs. Dodge*, 26 SW 2nd 879 and *State Highway Commission of Missouri vs. Bates*, 296 SW 418, cited in National Airports case).

The point is that when the government enters into a commercial business it abandons its sovereign capacity and is to be treated like any other private corporation (*Bank of the U.S. vs. Planters' Bank, 9 Wheat,* 904, 6 L. ed. 244, cited in *Manila Hotel Employees Association vs. Manila Hotel Company, et al.*, 73 Phil. 374, 388). The Manila Hotel case also relied on the following rulings:

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> 'By engaging in a particular business through the instrumentality of a corporation, the government divests itself *pro hac vice* of its sovereign character, so as to render the corporation subject to the rules of law governing private corporations.'
>
> 'When the State acts in its proprietary capacity, it is amenable to all the rules of law which bind private individuals.'
>
> 'There is not one law for the sovereign and another for the subject; but when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the contract in any form comes before the courts, the rights and obligation of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor' (*People vs. Stephens*, 71 N.Y. 549).

It should be noted that in *Philippine National Railways vs. Union de Maquinistas, etc.*, L-31948, July 25, 1978, 84 SCRA 223, it was held that the PNR funds could be garnished at the instance of a labor union.

It would be unjust if the heirs of the victim of an alleged negligence of the PNR employees could not sue the PNR for damages. Like any private common carrier, the PNR is subject to the obligations of persons engaged in that private enterprise. It is not performing any governmental function.

Thus, the National Development Company is not immune from suit. It does not exercise sovereign functions. It is an agency for the performance of purely corporate, proprietary or business functions (*National Development Company vs. Tobias*, 117 Phil. 703, 705 and cases cited therein; *National Development Company vs. NDC Employees and Workers' Union*, L-32387, August 19, 1975, 66 SCRA 181, 184).

Other government agencies not enjoying immunity from suit are the Social Security System (*Social Security System vs. Court of Appeals*, L-41299, February 21, 1983, 120 SCRA 707) and the *Philippine National Bank* (*Republic vs. Philippine National Bank*, 121 Phil. 26)." (at pp. 66-68).

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We come now to the question of whether respondent court properly agreed with the trial court in imputing negligence on the part of the train engineer and his employer.

It was demonstrated beyond cavil in the course of the pre-trial hearings held for the purpose of stipulating on critical facts that the bus was hit on the rear portion thereof after it crossed the railroad tracks. Then, too the train engineer was frank enough to say that he saw the jeep maneuvering into a parking area near the crossing which caused the obstruction in the flow of traffic such that the gravel and sand truck including the bus of herein private respondent were not able to move forward or to take the opposite lane due to other vehicles. The unmindful demeanor of the train engineer in surging forward despite the construction before him is definitely anathema to the conduct of a prudent person placed under the same set of perceived danger. Indeed:

> "When it is apparent, or when in the exercise of reasonable diligence commensurate with the surroundings it should be apparent, to the company that a person on its track or to get on its track is unaware of his danger or cannot get out of the way, it becomes the duty of the company to use such precautions, by warnings, applying brakes, or otherwise, as may be reasonably necessary to avoid injury to him." (65 *Am. Jur.*, Second Edition, p. 649)

Likewise, it was established that the weather condition was characterized with intermittent rain which should have prompted the train engineer to exercise extra precaution. Also, the train reached Calumpit, Bulacan ahead of scheduled arrival thereat, indicating that the train was travelling more than the normal speed of 30 kilometers per hour. If the train were really running at 30 kilometers per hour when it was approaching the intersection, it would probably not have travelled 190 meters more from the place of the accident (page 10, Brief for Petitioners). All of these factors, taken collectively, engendered the concrete and yes, correct conclusion that the train engineer was negligent who, moreover, despite the last opportunity within his hands *vis-a-vis* the weather condition including the presence of people near the intersection, could have obviated the impending collision

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had he sickened his speed and applied the brakes (*Picart vs. Smith*, 37 Phil. 809 [1918]). Withal, these considerations were addressed to the trial judge who, unlike appellate magistrates, was in a better position to assign weight on factual question. Having resolved the question of negligence between the train engineer and the bus driver after collating the mass of evidence, the conclusion reached thereafter thus commands great respect especially so in this case where respondent court gave its nod of approval to the findings of the court of origin (*Co vs. Court of Appeals*, 193 SCRA 198; 206 [1991]); *Amigo vs. Teves*, 50 O.G. 5799; *Regalado*, Remedial Law Compendium, Fifth edition, page 353).

What exacerbates against petitioners' contention is the authority in this jurisdiction to the effect that the failure of a railroad company to install a semaphore or at the very least, to post a flagman or watchman to warn the public of the passing train amounts to negligence (*Lilius vs. Manila Railroad Company*, 59 Phil. 758 [1934]).

WHEREFORE, the petition is hereby *DISMISSED* and the decision of respondent court *AFFIRMED*.

SO ORDERED.

Gutierrez, Jr. (Chairman), Davide, Jr., and *Romero, JJ.*, concur.

Bidin, J., no part. *Ponente* of CA Decision under review)