

**SVERIGES ANGFARTYGS ASSURANS FORENING,
PLAINTIFF-APPELLANT, VS. QUA CHEE GAN,
DEFENDANT-APPELLEE.**

G.R. No. L-22146. September 05, 1967

Ponente: BENGZON, J.P., J.

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BENGZON, J.P., J.:

On August 23 and 24, 1947, defendant Qua Chee Gan, a sole proprietorship, shipped on board the S.S. NAGARA as per bills of lading Exhs. A and B 2,032,000 kilos of bulk copra at Siain, Quezon, consigned to DAL International Trading Co., in Gdynia, Poland. The vessel first called at the port of Karlshamn, Sweden, where it unload-ed 696,419 kilos of bulk copra. Then, it proceeded to Gdynia where it unloaded the remaining copra shipment. The actual outturn weights in the latter port showed that only 1,569,429 kilos were discharged.

Because of the alleged confirmed cargo shortage, the Polish cargo insurers had to indemnify the consignee for the value thereof. Thereafter, the former sued the ship-owner, the Swedish East Asia Company, in Gothenburg, Swe-den. The latter, in turn, sued defendant and had it summoned to Gothenburg. Defendant However refused to submit to that court's jurisdiction and its objection was sustained.

In March, 1951, a settlement was effected between the Polish cargo insurers and the shipowner. Plaintiff, as the indemnity insurer for the latter, paid approximate-ly \$60,733.53 to the Polish insurers. On August 16, 1954, claiming to have bee subrogated to the rights of the carrier, plaintiff sued defendant before the Court of First Instance of Manila to recover U.S. &60,733.53 plus 17% exchange tax, with legal interest, as the value of the al-legged cargo shortshipment and P10,000 as attorney's fees. Defendant answered in due time and countered with a P15,000 counterclaim for attorney's fees.

On August 1, 1955, defendant filed a motion to dismiss on the ground of prescription under the Carriage of Goods by Sea Act. The lower court sustained the motion and plaintiff appealed here. We reversed the order of dismissals and remanded the case for further proceedings.[1]

After trial the lower court September 28, 1963, rendered its decisions dismissing the complaint and awarding P10,000 as attorney's fees to defendant. It ruled (a) that there was no shortshipment on defendant's part (b) that plaintiff's insurance policy did not cover the shortshipment and (c) defendant was merely acting as an agent of Louis Dreyfus & Co., who was the real shipper.

Taking issue with all the foregoing, plaintiff has interposed the present appeal to Us on questions of fact and law, the amount involved exceeding P200,000.00.

Was the non-presentation of the insurance policy fa-tal to plaintiff's case? The lower court ruled so, reasoning that unless the same – as the best evidence – were presented, it could not be conclusively determined if “liability for shortshipment” was a covered risk. And the rule is that an insurer who pays the insured for loss or liability not covered by the policy is not subrogated to the latter.[2] However, even assuming that there was unwarranted - or

"volunteer" - payment, plaintiff could still recover what it paid - in effect - to the carrier from defendants shipper under Art. 1236 of the Civil Code which allows a third person who pays on behalf of another to recover from the latter, although there is no subrogation. But since the payment here was without the knowledge and consent of defendant, plaintiff's right of recovery is defeasible by the former's defenses since the Code is clear that the recovery only up to the amount by which the defendant was benefited.

This brings Us to the crux of them case: Was there a shortshipment? To support its case, plaintiff theorizes that defendant had two shipments at Siain, Quezon province: (1) 812,800 kilos for Karlshamn and (2) 2,032,000 kilos for Gdynia. The Karlshamn shipment was asserted to have been covered by a separate bill of lading which however was allegedly lost subsequently. Thus, the 696,419 kilos of copra unloaded in Karlshamn was not part of the Gdynia shipment and cannot explain the confirmed shortage at the latter port.

Plaintiff's cause of action suffers from several fa-tal defects and inconsistencies. The alleged shipment of 812,800 kilos for Karlshamn is contradicted by plaintiff's admission in paragraphs 2 and 3 of its complaint that defendant shipped only 2,032,000 kilos copra at Siain, purportedly for both Gdynia and Karlshamn.[3] Needless to state, plaintiff is bound by such judicial admission.[4] Moreover, the alleged existence of the Karlshamn bills of lading is negative by the fact that Exhibits A and B - the bills of lading presented by plaintiff - show that the 2,032,000 kilos of copra loaded in Siain were for Gdynia only. Further destroying its case is the testimony of plaintiff's own witness, Mr. Claro Pasicolan, who on direct examination affirmed[5] that these two exhibits constituted the complete set of documents which them shipping agent in charge of the vessel S.S. NAGARA issued covering the copra cargo loaded at Slain. In view of this admission and for want of evidentiary support, plaintiff's be-lated claim that there is another complete set of documents can not be seriously taken.

Lastly, if there really was a separate bill of lading for the Karlshamn shipment, plaintiff could not have failed to present a copy thereof. Mr. Pasicolan testi-fied[6] that the shipping agent makes 20 copies of the documents of which three signed ones are given to the shipper and the rest, marked as non-negotiable bills of lading - like Exhibits A and B - are kept on its file. For the three signed copies to be lost, We may believe, but not for all the remaining 17 other copies. Under the circumstances, it his more reasonable to hold that there was no separate shipment intended for Karlshamn, Sweden.

As a corollary to the foregoing conclusion, it stands to reason that the copra unloaded in Karlshamn formed part of the same - and only - shipment of defendant intended for Gdynia. Now the fact that the sum total of the cargo unloaded at Karlshamn and Gdynia would exceed what appears to have been loaded at Sian by as much as 233,848 kilos can only show that defendant really overshipped, not shortshipped. And while this would not tally with defendant's claim of having weighed the copra cargo 100% at Siain, thus exposing a flaw in defendant's case, yet it is elementary that plaintiff must rely on the strength of it own case to recover, and not bank on the weakness of the defense. Plaintiff here failed to establish its case by preponderance on evidence.

On the question whether defendant is the real shipped or merely an agent of Louis Dreyfus & Co., suffice it to say that although on Exhibit A and B his name appears as the shipper, yet the very loading certificate, Exhibit 3 [5-Deposition of Horle], issued and signed by the Chief Mate, and Master of the S.S. NAGARA shows that defendant was acting merely for account of Louis Dreyfus & Co. The other documentary exhibits[7] confirm this. Anyway, in whatever capacity defendant is considered, it cannot be liable since no shortshipment was shown.

Plaintiff's action against defendant cannot, however, be considered as clearly unfounded as to warrant an award of attorney's fees as damages to defendant under par. 4, Art. 2208 of the Civil Code. The facts do not show that plaintiff's cause of action was so frivolous or untenable as to amount to gross and evident bad faith.[8]

WHEREFORE, but for the award of attorney's fees to defendant which is eliminated, the decision appealed from

is, in all other respects, hereby affirmed. Costs against plaintiff-appellant.

SO ORDERED.

Concepcion, C.J., Reyes, Dizon, Makalintal, Zaldivar, Sanchez, Castro, Angeles, and Fernando, JJ., concur.

[1] *Sveriges Angfartygs Assurans Forening v. Qua Cheen Gan*, G.R. No. L-9757, April 16, 1959.

[2] *Couch on Insurance* 2d., pp. 259-272.

[3] Said paragraphs read:

"That in the month of August, 1949, defendant loaded bulk copra on board the SS 'Nagara', at Siain, Quezon Province, and at Tabaco and Legaspi, Albay Province, for carriage to Karlshamn, Sweden, and to Gdynia, Poland; that the loading on board the vessel was done by defendant;

"That after the loading was completed, defendant informed International Harvester Company of the Philippines, the vessel's agent in the Philippines, that he had loaded 2,000 long tons of bulk copra or 2,032,000 gross kilos; that the agent, relying on defendant's representation, issued the corresponding bills of lading in favor of the consignees at Karlshamn and Gdynia but qualified them with the statement that the bulk copra was 'said to weigh' 2,000 long tons or 2,032,000 gross kilos;" (Emphases supplied)

[4] Sec. 2, Rule 129, Rev. Rules; *Joe's Radio and Electrical Supply v. Alto Electronics Corp.*, L-12376, 22, 1958.

[5] Session of June 18, 1963, TSN, pp. 5-6.

[6] *Id.*, pp. 4-6.

[7] See Exhibit 1 (the daily shipping list) and Exhibit 8 (certificate of quality and weight issued by the General Superintendence Co.)

[8] *Rizal Surety & Insurance Co. v. Court of Appeals*, G.R. No. L-2372, May 16, 1967.

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