

A. MAGSAYSAY, INC., PLAINTIFF AND APPELLEE, VS. ANASTACIO AGAN, DEFENDANT AND APPELLANT.*G.R. No. L-6393. January 31, 1955*

Ponente: REYES, A., J.

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The S S "San Antonio", a vessel owned and operated by plaintiff, left Manila on October 6, 1949, bound for Basco, Batanes, via Aparri, Cagayan, with general cargo belonging to different shippers, among them the defendant. The vessel reached Aparri on the 10th of that month, and after a day's stopover in that port, weighed anchor to proceed to Basco. But while still in port, it ran aground at the mouth of the Cagayan river, and, attempts to refloat it under its own power having failed, plaintiff had it refloated by the Luzon Stevedoring Co. at an agreed compensation. Once afloat, the vessel returned to Manila to refuel and then proceeded to Basco, the port of destination. There the cargoes were delivered to their respective owners or consignees, who, with the exception of defendant, made a deposit or signed a bond to answer for their contribution to the average.

On the theory that the expenses incurred in floating the vessel constitute general average to which both ship and cargo should contribute, plaintiff brought the present action in the Court of First Instance of Manila to make defendant pay his contribution, which, as determined by the average adjuster, amounts to P841.40. Defendant, in his answer, denies liability for this amount, alleging, among other things, that the stranding of the vessel was due to the fault, negligence and lack of skill of its master, that the expenses incurred in putting it afloat did not constitute general average, and that the liquidation of the average was not made in accordance with law. After trial, the lower court found for plaintiff and rendered judgment against the defendant for the amount of the claim, with legal interests. From this judgment defendant has appealed directly to this Court.

Although appellant assigns various errors, under our view of the case only the following need be considered:

"The trial court erred in allowing the general average for floating a vessel unintentionally stranded inside a port and at the mouth of a river during a fine weather."

For the purposes of this assignment of error we may well accept the finding below that the stranding of plaintiff's vessel was due to the sudden shifting of the sandbars at the mouth of the river which the port pilot did not anticipate. The stranding may, therefore, be regarded as accidental, and the question is whether the expenses incurred in floating a vessel so stranded should be considered general average and shared by the cargo owners.

The law on averages is contained in the Code of Commerce . Under that law, averages are classified into simple or particular and general or gross. Generally speaking, simple or particular averages include all expenses and damages caused to the vessel or cargo which have not inured to the common benefit (Art. 809, and are, therefore, to be borne only by the owner of the property which gave rise to the same (Art. 810); while general or gross averages include "all the damages and expenses which are deliberately caused in order to save the vessel, its cargo, or both at the same time,, from a real and known risk" (Art. 811). Being for the common benefit, gross averages are to be borne by the owners of the articles saved (Art. 812).

In classifying averages into simple or particular and general or gross and defining each class, the Code (Art. 809 and 811) at the same time enumerates certain specific cases as coming specially under one or the other denomination. Going over the specific cases enumerated we find that, while the expenses incurred in putting plaintiff's vessel afloat may well come under number 2 of article 809—which refers to expenses suffered by the vessel "by reason of an accident of the sea or force majeure"—and should therefore be classified as particular average, the said expenses do not fit into any of the specific cases of general average enumerated in article 811. No. 6 of this article does mention "expenses caused in order to float a vessel," but it specifically refers to "a vessel intentionally stranded for the purpose of saving it" and would have no application where, as in the present case, the stranding was not intentional.

Let us now see whether the expenses here in question could come within the legal concept of general average. Tolentino, in his commentaries on the Code of Commerce, gives the following requisites for general average:

"First, there must be a common danger. This means, that both the ship and the cargo, after it has been loaded, are subject to the same danger, whether during the voyage, or in the port of loading or unloading; that the danger arises from accidents of the sea, dispositions of the authority, or faults of men, provided, that the circumstance producing the peril should be ascertained and imminent or may rationally be said to be certain and imminent. This last requirement excludes measures undertaken against a distant peril.

"Second, that for the common safety part of the vessel or of the cargo or both is sacrificed deliberately.

"Third, that from the expenses or damages caused follows the successful saving of the vessel and cargo.

"Fourth, that the expenses or damages should have been incurred or inflicted after taking proper legal steps and authority." (Vol. I, 7th ed., p. 155.)

With respect to the first requisite, the evidence does not disclose that the expenses sought to be recovered from defendant were incurred to save vessel and cargo from a common danger. The vessel ran aground in fine weather inside the port at the mouth of a river, a place described as "very shallow". It would thus appear that vessel and cargo were at the time in no imminent danger or a danger which might "rationally be sought to be certain and imminent." It is, of course, conceivable that, if left indefinitely at the mercy of the elements, they would run the risk of being destroyed. But as stated in the above quotation, "this last requirement excludes measures undertaken against a distant peril." It is the deliverance from an immediate, impending peril, by a common sacrifice, that constitutes the essence of general average. (*The Columbian Insurance Company of Alexandria vs. Ashby & Stribling et al.*, 13 Peters 331; 10 L. Ed., 186). In the present case there is no proof that the vessel had to be put afloat to save it from an imminent danger. What does appear from the testimony of plaintiff's manager is that the vessel had to be salvaged in order to enable it "to proceed to its port of destination." But as was said in the case just cited, it is the safety of the property, and not of the voyage, which constitutes the true foundation of general average.

As to the second requisite, we need only repeat that the expenses in question were not incurred for the common safety of vessel and cargo, since they, or at least the cargo, were not in imminent peril. The cargo could, without need of expensive salvage operation, have been unloaded by the owners if they had been required to do so.

With respect to the third requisite, the salvage operation, it is true, was a success. But as the sacrifice was for the benefit of the vessel—to enable it to proceed to destination—and not for the purpose of saving the cargo, the cargo owner³ are not in law bound to contribute to the expenses.

The final requisite has not been proved, for it does not appear that the expenses here in question were incurred after following the procedure laid down in articles 813 et seq.

In conclusion, we find that plaintiff has not made out a case for general average, with the result that its claim for contribution against the defendant cannot be granted.

Wherefore, the decision appealed from is reversed and plaintiff's complaint ordered dismissed with costs.

Paras, C.J., Bengzon, Padilla, Montemayor, Jugo, Bautista Angelo, and Reyes, J.B.L., JJ., concur.

Judgment reversed.

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