

JOSE MENDOZA, PLAINTIFF AND APPELLANT, VS. PHILIPPINE AIR LINES, INC., DEFENDANT AND APPELLEE.*G.R. No. L-3678. February 29, 1952*

Ponente: MONTEMAYOR, J.

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The present appeal by plaintiff Jose Mendoza from the decision of the Court of First Instance of Camarines Sur, has come directly to this Tribunal for the reason that both parties, appellant and appellee, accepted the findings of fact made by the trial court and here raise only questions of law. On our part, we must also accept said findings of fact of the lower court.

In the year 1948, appellant Jose Mendoza was the owner of the Cita Theater located in the City of Naga, Camarines Sur, where he used to exhibit movie pictures booked from movie producers or film owners in Manila. The fiesta or town holiday of the City of Naga, held on September 17 and 18, yearly, was usually attended by a great many people, mostly from the Bicol region, especially since the Patron Saint Virgin of Pena Francia was believed by many to be miraculous. As a good businessman, appellant, taking advantage of these circumstances, decided to exhibit a film which would fit the occasion and have a special attraction and significance to the people attending said fiesta. A month before the holiday, that is to say, August 1948, he contracted with the LVN pictures Inc., a movie producer in Manila for him to show during the town fiesta the Tagalog film entitled "Himala ng Birhen" or Miracle of the Virgin. He made extensive preparations; he had two thousand posters printed and later distributed not only in the City of Naga but also in the neighboring towns. He also advertised in a weekly of general circulation in the province. The posters and advertisement stated that the film would be shown in the Cita Theater on the 17th and 18th of September, corresponding to the eve and day of the fiesta itself.

In pursuance of the agreement between the LVN Pictures Inc. and Mendoza, the former on September 17th, 1948, delivered to the defendant Philippine Airlines (PAL) whose planes carried passengers and cargo and made regular trips from Manila to the Pili Air Port near Naga, Camarines Sur, a can containing the film "Himala ng Birhen" consigned to the Cita Theater. For this shipment the defendant issued its Air Way Bill No. 317133 marked Exhibit "1". This can of films was loaded on flight 113 of the defendant, the plane arriving at the Air Port at Pili a little after four o'clock in the afternoon of the same day, September 17th. For reasons not explained by the defendant, but which would appear to be the fault of its employees or agents, this can of film was not unloaded at Pili Air Port and it was brought back to Manila. Mendoza who had completed all arrangements for the exhibition of the film beginning in the evening of September 17th, to exploit the presence of the big crowd that came to attend the town fiesta, went to the Air Port and inquired from the defendant's station master there about the can of film. Said station master could not explain why the film was not unloaded and sent several radiograms to his principal in Manila making inquiries and asking that the film be sent to Naga immediately. After investigation and search in the Manila office, the film was finally located the following day, September 18th, and then shipped to the Pili Air Port on September 20th. Mendoza received it and exhibited the film but he had missed his opportunity to realize a large profit as he expected for the people after the fiesta had already left for their towns. To recoup his losses,

Mendoza brought this action against the PAL. After trial, the lower court found that because of his failure to exhibit the film "Himala ng Birhen" during the town fiesta, Mendoza suffered damages or rather failed to earn profits in the amount of P3,000.00, but finding the PAL not liable for said damages, dismissed the complaint.

To avoid liability, defendant appellee, called the attention of the trial court to the terms and conditions of paragraph 6 of the Way Bill printed on the back thereof, which paragraph reads as follows:

"6. The Carrier does not obligate itself to carry the Goods by any specified aircraft or on a specified time. Said Carrier being hereby authorized to deviate from the route of the shipment without any liability therefore."

It claimed that since there was no obligation on its part to carry the film in question on any specified time, it could not be held accountable for the delay of about three days. The trial court, however, found and held that although the defendant was not obligated to load the film on any specified plane or on any particular day, once said can of film was loaded and shipped on one of its planes making the trip to Camarines, then it assumed the obligation to unload it at its point of destination and deliver it to the consignee, and its unexplained failure to comply with this duty constituted negligence. It however found that fraud was not involved and that the defendant was a debtor in good faith.

The trial court presided over by Judge Jose N. Leuterio in a well considered decision citing authorities, particularly the case of *Daywalt vs. Corporación de PP. Agustinos Recoletos*, 39 Phil 587, held that not because plaintiff failed to realize profits in the sum of P3,000.00 due to the negligence of the defendant, should the latter be made to reimburse him said sum. Applying the provisions of Art. 1107 of the Civil Code which provides that losses and damages for which a debtor in good faith is liable are those foreseen, or which might have been foreseen, at the time of constituting the obligation, and which are a necessary consequence of the failure to perform it, the trial court held that inasmuch as these damages suffered by Mendoza were not foreseen or could not have been foreseen at the time that the defendant accepted the can of film for shipment, for the reason that neither the shipper LVN Pictures Inc. nor the consignee Mendoza had called its attention to the special circumstances attending the shipment and the showing of the film during the town fiesta of Naga, plaintiff may not recover the damages sought.

Counsel for appellant insists that the articles of the Code of Commerce rather than those of the Civil Code should have been applied in deciding this case for the reason that the shipment of the can of film is an act of commerce; that the contract of transportation in this case should be considered commercial under Art. 349 of the Code of Commerce because it not only involves merchandise or an object of commerce but also the transportation company, the defendant herein, was a common carrier, that is to say, customarily engaged in transportation for the public, and that although the contract of transportation was not by land or waterways as defined in said Art. 349, nevertheless, air transportation being analogous to land and water transportation, should be considered as included, especially in view of the second paragraph of Art. 2 of the same Code which says that transactions covered by the Code of Commerce and all others of analogous character shall be deemed acts of commerce. The trial court, however, disagreed to this contention and opined that air transportation not being expressly covered by the Code of Commerce, cannot be governed by its provisions.

We believe that whether or not transportation by air should be regarded as a commercial contract under Art. 349, would be immaterial in the present case, as will be explained later. Without making a definite ruling on the civil or commercial nature of transportation by air, it being unnecessary, we are inclined to believe and to hold that a contract of transportation by air may be regarded as commercial. The reason is that at least in the present case the transportation company (PAL) is a common carrier; besides, air transportation is clearly similar or analogous to land and water transportation. The obvious reason for its non-inclusion in the Code of Commerce was that at the time of its promulgation, transportation by air on a commercial basis was not yet known. In the United States

where air transportation has reached its highest development, an airline company engaged in the transportation business is regarded as a common carrier.

"The principles which govern carriers by other means, such as by railroad or motor bus, govern carriers by aircraft." 6 Am. Jur., Aviation, Sec. 56, p. 33.

"When Aircraft Operator is Common Carrier.—That aircraft and the industry of carriage by aircraft are new is no reason why one in fact employing aircraft as common-carrier vehicles should not be classified as a common carrier and charged with liability as such. There can be no doubt, under the general law of common carriers, that those air lines and aircraft owners engaged in the passenger service on regular schedules on definite routes, who solicit the patronage of the traveling public, advertise schedules for routes, times of leaving, and rates of fare, and make the usual stipulation as to baggage, are common carriers by air. A flying service company which, according to its printed advertising, will take anyone anywhere at any time, though not operating on regular routes or schedules, and basing its charges not on the number of passengers, but on the operating cost of the plane per mile, has been held to be a common carrier. It is not necessary, in order to make one carrying passengers by aircraft a common carrier of passengers that the passengers be carried from one point to another; the status and the liability as a common carrier may exist notwithstanding the passenger's ticket issued by an airplane carrier of passengers for hire contains a statement that it is not a common carrier, etc., or a stipulation that it is to be held only for its proven negligence. But an airplane owner cannot be classed as a common carrier of passengers unless he undertakes, for hire, to carry all persons who apply for passage indiscriminately as long as there is room and no legal excuse for refusing. * * *" 6 Am. Jur., Aviation, Sec. 58, pp. 34-35.

"The rules governing the business of a common carrier by airship or flying machine may be readily assimilated to those applied to other common carriers." 2 C.J. S., 1951, Cumulative Pocket Part, Aerial Navigation, Sec. 38, p. 99.

"The test of whether one is a common carrier by air is whether he holds out that he will carry for hire, so long as he has room, goods of everyone bringing goods to him for carriage, not whether he is carrying; as a public employment or whether he carries to a fixed place." (Ibid., Sec. 39, p. 99.)

Appellant contends that Art. 358 of the Code of Commerce should govern the award of damages in his favor. Said article provides that if there is no period fixed for the delivery of the goods, the carrier shall be bound to forward them in the first shipment of the same or similar merchandise which he may make to the point of delivery, and that upon failure to do so, the damages caused by the delay should be suffered by the carrier. This is a general provision for ordinary damages and is no different from the provisions of the Civil Code, particularly Art. 1101 thereof, providing for the payment of damages caused by the negligence or delay in the fulfillment of one's obligation. Even applying the provisions of the Code of Commerce, as already stated, the pertinent provisions regarding damages only treats of ordinary damages or damages in general, not special damages like those suffered by the plaintiff herein. Article 2 of the Code of Commerce provides that commercial transactions are to be governed, by the provisions of the Code of Commerce, but in the absence of applicable provisions, they will be governed by the usages of commerce generally observed in each place; and in default of both, by those of the Civil Law. So that assuming that the present case involved a commercial transaction, still inasmuch as the special damages herein claimed finds no applicable provision in the Code of Commerce, neither has it been shown that there are any commercial usages applicable thereto, then in the last analysis, the rules of the civil law would have to come into play. Under Art. 1107 of the Civil Code, a debtor in good faith like the defendant herein, may be held liable only for damages that were foreseen or might have been foreseen at the time the contract of transportation was entered into. The trial court correctly found that the defendant company could not have foreseen the damages that would be suffered by Mendoza upon failure to deliver the can of film on the 17th of September, 1948 for the reason that the plans of Mendoza to exhibit that film during the town fiesta and his preparations, specially the announcement of said exhibition by posters and advertisement in the newspaper, were

not called to the defendant's attention.

In our research for authorities we have found a case very similar to the one under consideration. In the case of *Chapman vs. Fargo, L.R.A. (1918 F) p. 1049*, the plaintiff in Troy, New York, delivered motion picture films to the defendant Fargo, an express company, consigned and to be delivered to him in Utica. At the time of shipment the attention of the express company was called to the fact that the shipment involved motion picture films to be exhibited in Utica, and that they should be sent to their destination, rush. There was delay in their delivery and it was found that the plaintiff because of his failure to exhibit the film in Utica due to the delay suffered damages or loss of profits. But the highest court in the State of New York refused to award him special damages. Said appellate court observed:

"But before defendant could be held to special damages, such as the present alleged loss of profits on account of delay or failure of delivery, it must have appeared that he had notice at the time of delivery to him of the particular circumstances attending the shipment, and which probably would lead to such special loss if he defaulted. Or, as the rule has been stated in another form, in order to impose on the defaulting party further liability than for damages naturally and directly, i.e., in the ordinary course of thing's, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting. Generally, notice then of any special circumstances which will show that the damages to be anticipated from a breach would be enhanced has been held sufficient for this effect."

As may be seen, that New York case is a stronger one than the present case for the reason that the attention of the common carrier in said case was called to the nature of the articles shipped, the purpose of shipment, and the desire to rush the shipment, circumstances and facts absent in the present case.

But appellant now contends that he is not suing on a breach of contract but on a tort as provided for in Art. 1902 of the Civil Code. We are a little perplexed as to this new theory of the appellant. First, he insists that the articles of the Code of Commerce should be applied; that he invokes the provisions of said Code governing the obligations of a common carrier to make prompt delivery of goods given to it under a contract of transportation. Later, as already said, he says that he was never a party to the contract of transportation and was a complete stranger to it, and that he is now suing on a tort or a violation of his rights as a stranger (*culpa aquiliana*). If he does not invoke the contract of carriage entered into with the defendant company, then he would hardly have any leg to stand on. His right to prompt delivery of the can of film at the Pili Air Port stems and is derived from the contract of carriage under which contract, the PAL undertook to carry the can of film safely and to deliver it to him promptly. Take away or ignore that contract and the obligation to carry and to deliver and the right to prompt delivery disappear. Common carriers are not obligated by law to carry and to deliver merchandise, and persons are not vested with the right to prompt delivery, unless such common carriers previously assume the obligation. Said rights and obligations are created by a specific contract entered into by the parties. In the present case, the findings of the trial court which as already stated, are accepted by the parties and which we must accept are to the effect that the LVN Pictures Inc. and Jose Mendoza on one side, and the defendant company on the other, entered into a contract of transportation, (p. 29, Rec. on Appeal). One interpretation of said finding is that the LVN Pictures Inc. through previous agreement with Mendoza acted as the latter's agent When he negotiated with the LVN Pictures Inc. to rent the film "Himala ng Birhen" and show it during the Naga town fiesta, he most probably authorized and enjoined the Picture Company to ship the film for him on the PAL on September 17th. Another interpretation is that even if the LVN Pictures Inc. as consignor of its own initiative, and acting independently of Mendoza for the time being, made Mendoza as consignee, a stranger to the contract if that is possible, nevertheless when he, Mendoza, appeared at the Pili Air Port armed with the copy of the Air Way Bill (Exh. 1) demanding the delivery of the shipment to him, he thereby made himself a party to the contract of transportation.

The very citation made by appellant in his memorandum supports this view. Speaking of the possibility of a conflict between the order of the shipper on the one hand and the order of the consignee on the other, as when the shipper orders the shipping company to return or retain the goods shipped while the consignee demands their delivery, Malagarriga in his book *Código de Comercio Comentado*, Vol. I, p. 400, citing a decision of Argentina Court of Appeals on commercial matters, cited by Tolentino in Vol. II of his book entitled "Commentaries and Jurisprudence on the Commercial Laws of the Philippines" p. 209, says that the right of the shipper to countermand the shipment terminates when the consignee or legitimate holder of the bill of lading appears with such bill of lading before the carrier and makes himself a party to the contract. Prior to that time, he is stranger to the contract.

Still another view of this phase of the case is that contemplated in Art. 1257, paragraph 2, of the old Civil Code which reads thus:

"Should the contract contain any stipulation in favor of a third person, he may demand its fulfillment, provided he has given notice of his acceptance to the person bound before the stipulation has been revoked."

Here, the contract of carriage between the LVN Pictures Inc. and the defendant carrier contains the stipulations of delivery to Mendoza as consignee. His demand for the delivery of the can of film to him at the Pili Air Port may be regarded as a notice of his acceptance of the stipulation of the delivery in his favor contained in the contract of carriage, such demand being one for the fulfillment of the contract of carriage and delivery. In this case he also made himself a party to the contract, or at least has come to court to enforce it. His cause of action must necessarily be founded on its breach.

One can readily sympathize with the appellant herein for his loss of profits which he expected to realize. But he overlooked the legal angle. In situations like the present where failure to exhibit films on a certain day would spell substantial damages or considerable loss of profits, including waste of efforts on preparations and expenses incurred in advertisements, exhibitors, for their security, may either get hold of the films well ahead of the time of exhibition in order to make allowance for any hitch in the delivery, or else enter into a special contract or make a suitable arrangement with the common carrier for the prompt delivery of the films, calling the attention of the carrier to the circumstances surrounding the case and the approximate amount of damages to be suffered in case of delay.

Finding no reversible error in the decision appealed from, the same is hereby affirmed. No pronouncement as to costs. So ordered.

Paras, C. J., Feria, Bengzon, Padilla, Reyes, Jugo, and Bautista Angelo, JJ., concur.

PARAS, C. J.:

I certify that Mr. Justice Tuason voted for the affirmance.

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