

ESTRELLITA M. BASCOS, PETITIONER, VS. COURT OF APPEALS AND RODOLFO A. CIPRIANO, RESPONDENTS.

G.R. No. 101089. April 07, 1993

Ponente: CAMPOS, JR., J.

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CAMPOS, JR., J.:

This is a petition for review on certiorari of the decision* of the Court of Appeals in "RODOLFO A. CIPRIANO, doing business under the name CIPRIANO TRADING ENTERPRISES, plaintiff-appellee, vs. ESTRELLITA M. BASCOS, doing business under the name of BASCOS TRUCKING, defendant-appellant," C.A.-G.R. CV No. 25216, the dispositive portion of which is quoted hereunder:

"PREMISES considered, We find no reversible error in the decision appealed from, which is hereby affirmed in toto. Costs against appellant."[1]

The facts, as gathered by this Court, are as follows:

Rodolfo A. Cipriano representing Cipriano Trading Enterprise (CIPTRADE for short) entered into a hauling contract[2] with Jibfair Shipping Agency Corporation whereby the former bound itself to haul the latter's 2,000 m/tons of soya bean meal from Magallanes Drive, Del Pan, Manila to the warehouse of Purefoods Corporation in Calamba, Laguna. To carry out its obligation, CIPTRADE, through Rodolfo Cipriano, subcontracted with Estrellita Bascos (petitioner) to transport and to deliver 400 sacks of soya bean meal worth P156,404.00 from the Manila Port Area to Calamba, Laguna at the rate of P50.00 per metric ton. Petitioner failed to deliver the said cargo. As a consequence of that failure, Cipriano paid Jibfair Shipping Agency the amount of the lost goods in accordance with the contract which stated that:

"1. CIPTRADE shall be held liable and answerable for any loss in bags due to theft, hijacking and non-delivery or damages to the cargo during transport at market value, x x x"[3]

Cipriano demanded reimbursement from petitioner but the latter refused to pay. Eventually, Cipriano filed a complaint for a sum of money and damages with writ of preliminary attachment[4] for breach of a contract of carriage. The prayer for a Writ of Preliminary Attachment was supported by an affidavit[5] which contained the following allegations:

"4. That this action is one of those specifically mentioned in Sec. 1, Rule 57 the Rules of Court, whereby a writ of preliminary attachment may lawfully issue, namely:

"(e) in an action against a party who has removed or disposed of his property, or is about to do so, with intent to defraud his creditors;"

5. That there is no sufficient security for the claim sought to be enforced by the present action;

6. That the amount due to the plaintiff in the above-entitled case is above all legal counterclaims;"

The trial court granted the writ of preliminary attachment on February 17, 1987.

In her answer, petitioner interposed the following defenses: that there was no contract of carriage since CIPTRADE leased her cargo truck to load the cargo from Manila Port Area to Laguna; that CIPTRADE was liable to petitioner in the amount of P11,000.00 for loading the cargo; that the truck carrying the cargo was hijacked along Canonigo St., Paco, Manila on the night of October 21, 1988; that the hijacking was immediately reported to CIPTRADE and that petitioner and the police exerted all efforts to locate the hijacked properties; that after preliminary investigation, an information for robbery and carnapping were filed against Jose Opriano, et al.; and that hijacking, being a force majeure, exculpated petitioner from any liability to CIPTRADE.

After trial, the trial court rendered a decision* the dispositive portion of which reads as follows:

"WHEREFORE, judgment is hereby rendered in favor of plaintiff and against defendant ordering the latter to pay the former:

1. The amount of ONE HUNDRED FIFTY-SIX THOUSAND FOUR HUNDRED FOUR PESOS (P156,404.00) as an (sic) for actual damages with legal interest of 12% per cent per annum to be counted from December 4, 1986 until fully paid;
2. The amount of FIVE THOUSAND PESOS (P5,000.00) as and for attorney's fees; and
3. The costs of the suit.

The "Urgent Motion To Dissolve/Lift preliminary Attachment" dated March 10, 1987 filed by defendant is DENIED for being moot and academic.

SO ORDERED."[6]

Petitioner appealed to the Court of Appeals but respondent Court affirmed the trial court's judgment.

Consequently, petitioner filed this petition where she makes the following assignment of errors; to wit:

"I. THE RESPONDENT COURT ERRED IN HOLDING THAT THE CONTRACTUAL RELATIONSHIP BETWEEN PETITIONER AND PRIVATE RESPONDENT WAS CARRIAGE OF GOODS AND NOT LEASE OF CARGO TRUCK.

II. GRANTING, EX GRATIA ARGUMENTI, THAT THE FINDING OF THE RESPONDENT COURT THAT THE CONTRACTUAL RELATIONSHIP BETWEEN PETITIONER AND PRIVATE RESPONDENT WAS CARRIAGE OF GOODS IS CORRECT, NEVERTHELESS, IT ERRED IN FINDING PETITIONER LIABLE THEREUNDER BECAUSE THE LOSS OF THE CARGO WAS DUE TO FORCE MAJEURE, NAMELY, HIJACKING.

III. THE RESPONDENT COURT ERRED IN AFFIRMING THE FINDING OF THE TRIAL COURT THAT PETITIONER'S MOTION TO DISSOLVE/LIFT THE WRIT OF PRELIMINARY ATTACHMENT HAS BEEN RENDERED MOOT AND ACADEMIC BY THE DECISION OF THE MERITS OF THE CASE."[7]

The petition presents the following issues for resolution: (1) was petitioner a common carrier?; and (2) was the hijacking referred to a force majeure?

The Court of Appeals, in holding that petitioner was a common carrier, found that she admitted in her answer that she did business under the name A.M. Bascos Trucking and that said admission dispensed with the presentation by private respondent, Rodolfo Cipriano, of proofs that petitioner was a common carrier. The respondent Court also adopted in toto the trial court's decision that petitioner was a common carrier. Moreover, both courts appreciated the following pieces of evidence as indicators that petitioner was a common carrier: the fact that the truck driver of petitioner, Maximo Sanglay, received the cargo consisting of 400 bags of soya bean meal as evidenced by a cargo receipt signed by Maximo Sanglay; the fact that the truck helper, Juanita Morden, was also

an employee of petitioner; and the fact that control of the cargo was placed in petitioner's care.

In disputing the conclusion of the trial and appellate courts that petitioner was a common carrier, she alleged in this petition that the contract between her and Rodolfo A. Cipriano, representing CIPTRADE, was lease of the truck. She cited as evidence certain affidavits which referred to the contract as "lease". These affidavits were made by Jesus Bascos[8] and by petitioner herself.[9] She further averred that Jesus Bascos confirmed in his testimony his statement that the contract was a lease contract.[10] She also stated that she was not catering to the general public. Thus, in her answer to the amended complaint, she said that she does business under the same style of A.M. Bascos Trucking, offering her trucks for lease to those who have cargo to move, not to the general public but to a few customers only in view of the fact that it is only a small business.[11]

We agree with the respondent Court in its finding that petitioner is a common carrier.

Article 1732 of the Civil Code defines a common carrier as "(a) person, corporation or firm, or association engaged in the business of carrying or transporting passengers or goods or both, by land, water or air, for compensation, offering their services to the public." The test to determine a common carrier is "whether the given undertaking is a part of the business engaged in by the carrier which he has held out to the general public as his occupation rather than the quantity or extent of the business transacted." [12] In this case, petitioner herself has made the admission that she was in the trucking business, offering her trucks to those with cargo to move. Judicial admissions are conclusive and no evidence is required to prove the same.[13]

But petitioner argues that there was only a contract of lease because they offer their services only to a select group of people and because the private respondents, plaintiffs in the lower court, did not object to the presentation of affidavits by petitioner where the transaction was referred to as a lease contract.

Regarding the first contention, the holding of the Court in *De Guzman vs. Court of Appeals*[14] is instructive. In referring to Article 1732 of the Civil Code, it held thus:

"The above article makes no distinction between one whose principal business activity is the carrying of persons or goods or both, and one who does such carrying only as an ancillary activity (in local idiom, as a "sideline"). Article 1732 also carefully avoids making any distinction between a person or enterprise offering transportation service on a regular or scheduled basis and one offering such service on an occasional, episodic or unscheduled basis. Neither does Article 1732 distinguish between a carrier offering its services to the "general public," i.e., the general community or population, and one who offers services or solicits business only from a narrow segment of the general population. We think that Article 1732 deliberately refrained from making such distinctions."

Regarding the affidavits presented by petitioner to the court, both the trial and appellate courts have dismissed them as self-serving and petitioner contests the conclusion. We are bound by the appellate court's factual conclusions. Yet, granting that the said evidence were not self-serving, the same were not sufficient to prove that the contract was one of lease. It must be understood that a contract is what the law defines it to be and not what it is called by the contracting parties.[15] Furthermore, petitioner presented no other proof of the existence of the contract of lease. He who alleges a fact has the burden of proving it.[16]

Likewise, We affirm the holding of the respondent court that the loss of the goods was not due to force majeure.

Common carriers are obliged to observe extraordinary diligence in the vigilance over the goods transported by them.[17] Accordingly, they are presumed to have been at fault or to have acted negligently if the goods are lost, destroyed or deteriorated.[18] There are very few instances when the presumption of negligence does not attach and these instances are enumerated in Article 1734.[19] In those cases where the presumption is applied, the common carrier must prove that it exercised extraordinary diligence in order to overcome the presumption.

In this case, petitioner alleged that hijacking constituted force majeure which exculpated her from liability for the loss of the cargo. In *De Guzman vs. Court of Appeals*,^[20] the Court held that hijacking, not being included in the provisions of Article 1734, must be dealt with under the provisions of Article 1735 and thus, the common carrier is presumed to have been at fault or negligent. To exculpate the carrier from liability arising from hijacking, he must prove that the robbers or the hijackers acted with grave or irresistible threat, violence, or force. This is in accordance with Article 1745 of the Civil Code which provides:

"Art. 1745. Any of the following or similar stipulations shall be considered unreasonable, unjust and contrary to public policy:

x x x x x

(6) That the common carrier's liability for acts committed by thieves, or of robbers who do not act with grave or irresistible threat, violence or force, is dispensed with or diminished;"

In the same case,^[21] the Supreme Court also held that:

"Under Article 1745 (6) above, a common carrier is held responsible--and will not be allowed to divest or to diminish such responsibility--even for acts of strangers like thieves or robbers, except where such thieves or robbers in fact acted "with grave or irresistible threat, violence or force." We believe and so hold that the limits of the duty of extraordinary diligence in the vigilance over the goods carried are reached where the goods are lost as a result of a robbery which is attended by "grave or irresistible threat, violence or force."

To establish grave and irresistible force, petitioner presented her accusatory affidavit,^[22] Jesus Bascos' affidavit,^[23] and Juanito Morden's^[24] "Salaysay". However, both the trial court and the Court of Appeals have concluded that these affidavits were not enough to overcome the presumption. Petitioner's affidavit about the hijacking was based on what had been told her by Juanito Morden. It was not a first-hand account. While it had been admitted in court for lack of objection on the part of private respondent, the respondent Court had discretion in assigning weight to such evidence. We are bound by the conclusion of the appellate court. In a petition for review on certiorari, We are not to determine the probative value of evidence but to resolve questions of law. Secondly, the affidavit of Jesus Bascos did not dwell on how the hijacking took place. Thirdly, while the affidavit of Juanito Morden, the truck helper in the hijacked truck, was presented as evidence in court, he himself was a witness as could be gleaned from the contents of the petition. Affidavits are not considered the best evidence if the affiants are available as witnesses.^[25] The subsequent filing of the information for carnapping and robbery against the accused named in said affidavits did not necessarily mean that the contents of the affidavits were true because they were yet to be determined in the trial of the criminal cases.

The presumption of negligence was raised against petitioner. It was petitioner's burden to overcome it. Thus, contrary to her assertion, private respondent need not introduce any evidence to prove her negligence. Her own failure to adduce sufficient proof of extraordinary diligence made the presumption conclusive against her.

Having affirmed the findings of the respondent Court on the substantial issues involved, We find no reason to disturb the conclusion that the motion to lift/dissolve the writ of preliminary attachment has been rendered moot and academic by the decision on the merits.

In the light of the foregoing analysis, it is Our opinion that the petitioner's claim cannot be sustained. The petition is DISMISSED and the decision of the Court of Appeals is hereby AFFIRMED.

SO ORDERED.

Narvasa, C.J.,(Chairman), Padilla, Regalado, and Nocon, JJ., concur.

* July 17, 1991; penned by Associate Justice Nicolas P. Lapeña, Jr., and concurred in by Associate Justices Ricardo L. Pronove, Jr., and Consuelo V. Santiago.

[1] Rollo, p. 59.

[2] Annex "K" of Memorandum for Petitioner; Rollo, p. 229.

[3] Ibid.

[4] Civil Case No: 49965; Regional Trial Court, Quezon City, Branch 83.

[5] Annex "L" of Memorandum for Petitioner; Rollo, p. 230.

* Civil Case No. 49965, October 12, 1989. Penned by Judge Reynaldo Roura.

[6] Rollo, p. 217.

[7] Rollo, p. 16.

[8] Petition, pp. 12-13; Rollo, pp. 20-21; Annex "G" of Memorandum for Petitioner; Rollo, p. 225.

[9] Petition, pp. 13-14; Rollo, pp. 21-22.

[10] Ibid.; Rollo, p. 21; Annex "E" of Memorandum for Petitioner; Rollo, p. 222.

[11] Court of Appeals Decision, p. 5; Rollo, p. 55.

[12] 4 AGBAYANI, COMMENTARIES AND JURISPRUDENCE ON THE COMMERCIAL LAWS OF THE PHILIPPINES, 5 (1987).

[13] Solivio vs. Court of Appeals, 182 SCRA 119 (1990).

[14] 168 SCRA 612 (1988).

[15] Schmid and Oberly, Inc. vs. RJL Martinez Fishing Corp., 166 SCRA 493 (1988).

[16] Imperial Victory Shipping Agency vs. NLRC, 200 SCRA 178 (1991).

[17] "Art. 1733. Common carriers, from the nature of their business and for reasons of public policy, are bound to observe extraordinary diligence in the vigilance over the goods and for the safety of the passengers transported by them, according to all the circumstances of each case.

Such extraordinary diligence in vigilance over the goods is further expressed in articles 1734, 1735, and 1745, Nos. 5, 6, and 7, while the extraordinary diligence for the safety of the passengers is further set forth in articles 1755 and 1756."

[18] "Art. 1735. In all cases other than those mentioned in Nos. 1, 2, 3, 4, and 5 of the preceding article, if the goods are lost, destroyed or deteriorated, common carriers are presumed to have been at fault or to have acted negligently, unless they prove that they observed extraordinary diligence as required in article 1733."

[19] "Art. 1734. Common carriers are responsible for the loss, destruction, or deterioration of the goods, unless

the same is due to any of the following causes only:

- (1) Flood, storm, earthquake, lightning, or other natural disaster or calamity;
- (2) Act of the public enemy in war, whether international or civil;
- (3) Act or omission of the shipper or owner of the goods;
- (4) The character of the goods or defects in the packing or in the containers;
- (5) Order or act of competent public authority."

[20] *Supra*, note 14.

[21] *Ibid.*, p. 621.

[22] Annex "G" of Memorandum for Petitioner; Rollo, p. 225; and Juanito Morden's affidavit Annex "H" of Memorandum for Petitioner; Rollo, p. 226.

[23] Annex "E" of Memorandum for Petitioner; Rollo, p. 222.

[24] Annex "H" of Memorandum for Petitioner; Rollo, p. 226.

[25] *Ayco vs. Fernandez*, 195 SCRA 328 (1991).

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