AEROSPACE CHEMICAL INDUSTRIES, INC., PETITIONER, VS. COURT OF APPEALS, PHILIPPINE PHOSPHATE FERTILIZER, CORP., RESPONDENTS.

G.R. No. 108129. September 23, 1999

Ponente: QUISUMBING, J.

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QUISUMBING, J.:

This petition for review assails the Decision[1] dated August 19, 1992, of the Court of Appeals, which set aside the judgment of the Regional Trial Court of Pasig, Branch 151. The case stemmed from a complaint filed by the buyer (herein petitioner) against the seller (private respondent) for alleged breach of contract. Although petitioner prevailed in the trial court, the appellate court reversed and instead found petitioner guilty of delay and therefore liable for damages, as follows:

> "WHEREFORE, the Decision of the court a quo is SET ASIDE and a new one rendered, dismissing the complaint with costs against the plaintiff (herein petitioner) and, on the counterclaim, ordering the plaintiff Aerospace Chemical Industries, Inc. to pay the defendant, Philippine Phosphate Fertilizer Corporation the sum of P324,516.63 representing the balance of the maintenance cost and tank rental charges incurred by the defendant for the failure of the plaintiff to haul the rest of the sulfuric acid on the designated date.
>
> Costs against plaintiff-appellee."[2]

As gleaned from the records, the following are the antecedents:

On June 27, 1986, petitioner Aerospace Industries, Inc. (Aerospace) purchased five hundred (500) metric tons of sulfuric acid from private respondent Philippine Phosphate Fertilizer Corporation (Philphos). The contract[3] was in letter-form as follows:

> 27 June 1986
>
> AEROSPACE INDUSTRIES INC.
> 203 E. Fernandez St.
> San Juan, Metro Manila
>
> Attention : Mr. Melecio Hernandez
> Manager.
>
> Subject : Sulfuric Acid Shipment
>
> Gentlemen:
>
> This is to confirm our agreement to supply your Sulfuric Acid requirement under the following terms and conditions:
>
> A. Commodity

:

Sulfuric Acid in Bulk

B. Concentration
:

98-99% H2SO4

C. Quantity :

500MT -100 MT Ex-Basay

400 MT Ex-Sangi

D. Price :

US$50.00/MT -FOB Cotcot, Basay, Negros Or.

US$54.00/MT -FOB Sangi, Cebu

E. Payment :

Cash in Philippine currency payable to Philippine Phosphate Fertilizer Corp. (MAKATI) at PCIB selling rate at the time of payment at least five (5) days prior to shipment date

F. Shipping Conditions

1. Laycan

:

July

2. Loadport

:

Cotcot, Basay, Negros Or. and

Atlas Pier, Sangi, Cebu

x x x

11. Other terms and Conditions: To be mutually agreed upon.

Very truly yours,

Philippine Phosphate Fertilizer Corp.

Signed: Herman J. Rustia

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Sr. Manager, Materials & Logistics

CONFORME:

AEROSPACE INDUSTRIES, INC.

Signed: Mr. Melecio Hernandez

Manager

Initially set beginning July 1986, the agreement provided that the buyer shall pay its purchases in equivalent Philippine currency value, five days prior to the shipment date. Petitioner as buyer committed to secure the means of transport to pick-up the purchases from private respondent's loadports. Per agreement, one hundred metric tons (100 MT) of sulfuric acid should be taken from Basay, Negros Oriental storage tank, while the remaining four hundred metric tons (400 MT) should be retrieved from Sangi, Cebu.

On August 6, 1986, private respondent sent an advisory letter[4] to petitioner to withdraw the sulfuric acid purchased at Basay because private respondent had been incurring incremental expense of two thousand (P2,000.00) pesos for each day of delay in shipment.

On October 3, 1986, petitioner paid five hundred fifty-three thousand, two hundred eighty (P553,280.00) pesos for 500 MT of sulfuric acid.

On November 19, 1986, petitioner chartered M/T Sultan Kayumanggi, owned by Ace Bulk Head Services. The vessel was assigned to carry the agreed volumes of freight from designated loading areas. M/T Kayumanggi withdrew only 70.009 MT of sulfuric acid from Basay because said vessel heavily tilted on its port side. Consequently, the master of the ship stopped further loading. Thereafter, the vessel underwent repairs.

In a demand letter[5] dated December 12, 1986, private respondent asked petitioner to retrieve the remaining sulfuric acid in Basay tanks so that said tanks could be emptied on or before December 15, 1986. Private respondent said that it would charge petitioner the storage and consequential costs for the Basay tanks, including all other incremental expenses due to loading delay, if petitioner failed to comply.

On December 18, 1986, M/T Sultan Kayumanggi docked at Sangi, Cebu, but withdrew only 157.51 MT of sulfuric acid. Again, the vessel tilted. Further loading was aborted. Two survey reports conducted by the Societe Generale de Surveillance (SGS) Far East Limited, dated December 17, 1986 and January 2, 1987, attested to these occurrences.

Later, on a date not specified in the record, M/T Sultan Kayumanggi sank with a total of 227.51 MT of sulfuric acid on board.

Petitioner chartered another vessel, M/T Don Victor, with a capacity of approximately 500 MT.[6] On January 26 and March 20, 1987, Melecio Hernandez, acting for the petitioner, addressed letters to private respondent, concerning additional orders of sulfuric acid to replace its sunken purchases, which letters are hereunder excerpted:

> January 26, 1987

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x x x
"We recently charter another vessel M/T DON VICTOR who will be authorized by us to lift the balance approximately 272.49 MT.

We request your goodselves to grant us for another Purchase Order with quantity of 227.51 MT and we are willing to pay the additional order at the prevailing market price, provided the lifting of the total 500 MT be centered/confined to only one safe berth which is Atlas Pier, Sangi, Cebu."[7]

March 20, 1987

"This refers to the remaining balance of the above product quantity which were not loaded to the authorized cargo vessel, M/T Sultan Kayumanggi at your loadport - Sangi, Toledo City.

Please be advised that we will be getting the above product quantity within the month of April 1987 and we are arranging for a 500 MT Sulfuric Acid inclusive of which the remaining balance: 272.49 MT an additional product quantity thereof of 227.51 MT."[8]

Petitioner's letter[9] dated May 15, 1987, reiterated the same request to private respondent.

On January 25, 1988, petitioner's counsel, Atty. Pedro T. Santos, Jr., sent a demand letter[10] to private respondent for the delivery of the 272.49 MT of sulfuric acid paid by his client, or the return of the purchase price of three hundred seven thousand five hundred thirty (P307,530.00) pesos. Private respondent in reply,[11] on March 8, 1988, instructed petitioner to lift the remaining 30 MT of sulfuric acid from Basay, or pay maintenance and storage expenses commencing August 1, 1986.

On July 6, 1988, petitioner wrote another letter, insisting on picking up its purchases consisting of 272.49 MT and an additional of 227.51 MT of sulfuric acid. According to petitioner it had paid the chartered vessel for the full capacity of 500 MT, stating that:

"With regard to our balance of sulfuric acid - product at your shore tank/plant for 272.49 metric ton that was left by M/T Sultana Kayumanggi due to her sinking, we request for an additional quantity of 227.51 metric ton of sulfuric acid, 98% concentration.

The additional quantity is requested in order to complete the shipment, as the chartered vessel schedule to lift the high grade sulfuric acid product is contracted for her full capacity/load which is 500 metric tons more or less.

We are willing to pay the additional quantity - 227.51 metric tons high grade sulfuric acid in the prevailing price of the said product."[12]

x x x
By telephone, petitioner requested private respondent's Shipping Manager, Gil Belen, to get its additional order of 227.51 MT of sulfuric acid at Isabel, Leyte.[13] Belen relayed the information to his associate, Herman Rustia, the Senior Manager for Imports and International Sales of private respondent. In a letter dated July 22, 1988, Rustia replied:

"Subject: Sulfuric Acid Ex-Isabel

Gentlemen:

Confirming earlier telcon with our Mr. G.B. Belen, we regret to inform you that we cannot accommodate your request to lift Sulfuric Acid ex-Isabel due to Pyrite limitation and delayed arrival of imported Sulfuric Acid from Japan."[14]

On July 25, 1988, petitioner's counsel wrote to private respondent another demand letter for the delivery of the

purchases remaining, or suffer tedious legal action his client would commence.

On May 4, 1989, petitioner filed a complaint for specific performance and/or damages before the Regional Trial Court of Pasig, Branch 151. Private respondent filed its answer with counterclaim, stating that it was the petitioner who was remiss in the performance of its obligation in arranging the shipping requirements of its purchases and, as a consequence, should pay damages as computed below:

Advanced Payment by Aerospace (Oct. 3, 1986) P553,280.00

Less Shipments

70.009 MT sulfuric acid

P 72,830.36

151.51 MT sulfuric acid

176,966.27
(249,796.63)

Balance P303,483.37

Less Charges

Basay Maintenance Expense from Aug. 15 to Dec. 15, 1986 (P2,000.00/day x 122 days)

P244,000.00

Sangi - Tank Rental

from Aug. 15, 1986 to Aug. 15, 1987 (P32,000.00/mo. x 12 mos.)

384,000.00

(628,000.00)

Receivable/Counterclaim (P324,516.63)

Trial ensued and after due proceedings, judgment was rendered by the trial court in petitioner's favor, disposing as follows:

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

1.

P306,060.77 - representing the value of the undelivered 272.49 metric tons of sulfuric acid plaintiff paid to defendant;

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2.

P91,818.23 - representing unrealized profits, both items with 12% interest per annum from May 4, 1989, when the complaint was filed until fully paid;

3.

P30,000.00 - as exemplary damages; and

4.

P30,000.00 - as attorney's fees and litigation expenses, both last items also with 12% interest per annum from date hereof until fully paid.

Defendant's counterclaims are hereby dismissed for lack of merit.

Costs against defendant."[15]

In finding for the petitioner, the trial court held that the petitioner was absolved in its obligation to pick-up the remaining sulfuric acid because its failure was due to force majeure. According to the trial court, it was private respondent who committed a breach of contract when it failed to accommodate the additional order of the petitioner, to replace those that sank in the sea, thus:

"To begin with, even if we assume that it is incumbent upon the plaintiff to 'lift' the sulfuric acid it ordered from defendant, the fact that force majeure intervened when the vessel which was previouly (sic) listing, but which the parties, including a representative of the defendant, did not mind, sunk, has the effect of absolving plaintiff from 'lifting' the sulfuric acid at the designated load port. But even assuming the plaintiff cannot be held entirely blameless, the allegation that plaintiff agreed to a payment of a 2,000-peso incremental expenses per day to defendant for delayed 'lifting has not been proven. ...

Also, if it were true that plaintiff is indebted to defendant, why did defendant accept a second additional order after the transaction in litigation? Why also, did defendant not send plaintiff statements of account until after 3 years?

All these convince the Court that indeed, defendant must return what plaintiff has paid it for the goods which the latter did not actually receive."[16]

On appeal by private respondent, the Court of Appeals reversed the decision of the trial court, as follows:

"Based on the facts of this case as hereinabove set forth, it is clear that the plaintiff had the obligation to withdraw the full amount of 500 MT of sulfuric acid from the defendant's loadport at Basay and Sangi on or before August 15, 1986. As early as August 6, 1986 it had been accordingly warned by the defendant that any delay in the hauling of the commodity would mean expenses on the part of the defendant amounting to P2,000.00 a day. The plaintiff sent its vessel, the 'M/T Sultan Kayumanggi', only on November 19, 1987. The vessel, however, was not capable of loading the entire 500 MT and in fact, with its load of only 227.519 MT, it sank.

Contrary to the position of the trial court, the sinking of the 'M/T Sultan Kayumanggi' did not absolve the plaintiff from its obligation to lift the rest of the 272.481 MT of sulfuric acid at the agreed time. It was the plaintiff's duty to charter another vessel for the purpose. It did contract for the services of a new vessel, the 'M/T Don Victor', but did not want to lift the balance of 272.481 MT only but insisted that its additional order of 227.51 MT be also given by the defendant to complete 500 MT. apparently so that the vessel may be availed

of in its full capacity.
x x x
We find no basis for the decision of the trial court to make the defendant liable to the plaintiff not only for the cost of the sulfuric acid, which the plaintiff itself failed to haul, but also for unrealized profits as well as exemplary damages and attorney's fees."[17]

Respondent Court of Appeals found the petitioner guilty of delay and negligence in the performance of its obligation. It dismissed the complaint of petitioner and ordered it to pay damages representing the counterclaim of private respondent.

The motion for reconsideration filed by petitioner was denied by respondent court in its Resolution dated December 21, 1992, for lack of merit.

Petitioner now comes before us, assigning the following errors:

I.
RESPONDENT COURT OF APPEALS ERRED IN NOT HOLDING PRIVATE RESPONDENT TO HAVE COMMITTED A BREACH OF CONTRACT WHEN IT IS NOT DISPUTED THAT PETITIONER PAID IN FULL THE VALUE OF 500 MT OF SULFURIC ACID TO PRIVATE RESPONDENT BUT THE LATTER WAS ABLE TO DELIVER TO PETITIONER ONLY 227.51 M.T.

II.
RESPONDENT COURT OF APPEALS GRAVELY ERRED IN HOLDING PETITIONER LIABLE FOR DAMAGES TO PRIVATE RESPONDENT ON THE BASIS OF A XEROX COPY OF AN ALLEGED AGREEMENT TO HOLD PETITIONER LIABLE FOR DAMAGES FOR THE DELAY WHEN PRIVATE RESPONDENT FAILED TO PRODUCE THE ORIGINAL IN CONTRAVENTION OF THE RULES ON EVIDENCE.

III.
RESPONDENT COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE UNDISPUTED FACTS THAT PETITIONER'S PAYMENT FOR THE GOODS WAS RECEIVED BY PRIVATE RESPONDENT WITHOUT ANY QUALIFICATION AND THAT PRIVATE RESPONDENT ENTERED INTO ANOTHER CONTRACT TO SUPPLY PETITIONER 227.519 MT OF SULFURIC ACID IN ADDITION TO THE UNDELIVERED BALANCE AS PROOF THAT ANY DELAY OF PETITIONER WAS DEEMED WAIVED BY SAID ACTS OF RESPONDENT.

IV.

RESPONDENT COURT OF APPEALS ERRED IN NOT CONSIDERING THE LAW THAT WHEN THE SALE INVOLVES FUNGIBLE GOODS AS IN THIS CASE THE EXPENSES FOR STORAGE AND MAINTENANCE ARE FOR THE ACCOUNT OF THE SELLER (ARTICLE 1504 CIVIL CODE).

V.
RESPONDENT COURT OF APPEALS ERRED IN FAILING TO RENDER JUDGMENT FOR PETITIONER AFFIRMING THE DECISION OF THE TRIAL COURT.

From the assigned errors, we synthesize the pertinent issues raised by the petitioner as follows:

1.

Did the respondent court err in holding that the petitioner committed breach of contract, considering that:

a)

the petitioner allegedly paid the full value of its purchases, yet received only a portion of said purchases?

b)

petitioner and private respondent allegedly had also agreed for the purchase and supply of an additional 227.519 MT of sulfuric acid, hence prior delay, if any, had been waived?

2.

Did the respondent court err in awarding damages to private respondent?

3.

Should expenses for the storage and preservation of the purchased fungible goods, namely sulfuric acid, be on seller's account pursuant to Article 1504 of the Civil Code?

To resolve these issues, petitioner urges us to review factual findings of respondent court and its conclusion that the petitioner was guilty of delay in the performance of its obligation. According to petitioner, that conclusion is contrary to the factual evidence. It adds that respondent court disregarded the rule that findings of the trial court are given weight, with the highest degree of respect. Claiming that respondent court's findings conflict with those of the trial court, petitioner prays that the trial court's findings be upheld over those of the appellate court.

Petitioner argues that it paid the purchase price of sulfuric acid, five (5) days prior to the withdrawal thereof, or on October 3, 1986, hence, it had complied with the primary condition set in the sales contract. Petitioner claims its failure to pick-up the remaining purchases on time was due to a storm, a force majeure, which sank the vessel. It thus claims exemption from liability to pay damages. Petitioner also contends that it was actually the private respondent's shipping officer, who advised petitioner to buy the additional 227.51 MT of sulfuric acid, so as to fully utilize the capacity of the vessel it chartered. Petitioner insists that when its ship was ready to pick-up the remaining balance of 272.49 MT of sulfuric acid, private respondent could not comply with the contract commitment due to "pyrite limitation."

While we agree with petitioner that when the findings of the Court of Appeals are contrary to those of the trial court,[18] this Court may review those findings, we find the appellate court's conclusion that petitioner violated the subject contract amply supported by preponderant evidence. Petitioner's claim was predicated merely on the allegations of its employee, Melecio Hernandez, that the storm or force majeure caused the petitioner's delay and failure to lift the cargo of sulfuric acid at the designated loadports. In contrast, the appellate court discounted Hernandez' assertions. For on record, the storm was not the proximate cause of petitioner's failure to transport its purchases on time. The survey report submitted by a third party surveyor, SGS Far East Limited, revealed that the vessel, which was unstable, was incapable of carrying the full load of sulfuric acid. Note that there was a premature termination of loading in Basay, Negros Oriental. The vessel had to undergo several repairs before continuing its voyage to pick-up the balance of cargo at Sangi, Cebu. Despite repairs, the vessel still failed to carry the whole lot of 500 MT of sulfuric acid due to ship defects like listing to one side. Its unfortunate sinking was not due to force majeure. It sunk because it was, based on SGS survey report, unstable and unseaworthy.

Witness surveyor Eugenio Rabe's incident report, dated December 13, 1986 in Basay, Negros Oriental, elucidated this point:

"Loading was started at 1500hrs. November 19. At 1600Hrs. November 20, loading operation was temporarily stopped by the vessel's master due to ships stability was heavily tilted to port side, ship's had tried to transfer the loaded acid to stbdside but failed to do so, due to their auxiliary pump on board does not work out for acid.

x x x

Note. Attending surveyor arrived BMC Basay on November 22, due to delayed advice of said vessel Declared quantity loaded onboard based on data's provided by PHILPHOS representative.

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> On November 26, two representative of shipping company arrived Basay to assist the situation, at 1300Hrs repairing and/or welding of tank number 5 started at 1000Hrs November 27, repairing and/or welding was suspended due to the explosion of tank no. 5. Explosion ripped about two feet of the double bottom tank.
>
> November 27 up to date no progress of said vessel"[19]

While at Sangi, Cebu, the vessel's condition (listing) did not improve as the survey report therein noted:

> "Declared quantity loaded on board was based on shore tank withdrawal due to ship's incomplete tank calibration table. Barge displacement cannot be applied due to ship was listing to Stboard side which has been loaded with rocks to control her stability."[20]

These two vital pieces of information were totally ignored by trial court. The appellate court correctly took these into account, significantly. As to the weather condition in Basay, the appellate court accepted surveyor Rabe's testimony, thus:

> "Q.
>
> Now, Mr. Witness, what was the weather condition then at Basay, Negros Oriental during the loading operation of sulfuric acid on board the Sultana Kayumanggi?
>
> A.
>
> Fair, sir."[21]

Since the third party surveyor was neither petitioner's nor private respondent's employee, his professional report should carry more weight than that of Melecio Hernandez, an employee of petitioner. Petitioner, as the buyer, was obligated under the contract to undertake the shipping requirements of the cargo from the private respondent's loadports to the petitioner's designated warehouse. It was petitioner which chartered M/T Sultan Kayumanggi. The vessel was petitioner's agent. When it failed to comply with the necessary loading conditions of sulfuric acid, it was incumbent upon petitioner to immediately replace M/T Sultan Kayumanggi with another seaworthy vessel. However, despite repeated demands, petitioner did not comply seasonably.

Additionally, petitioner claims that private respondent's employee, Gil Belen, had recommended to petitioner to fully utilize the vessel, hence petitioner's request for an additional order to complete the vessel's 500 MT capacity. This claim has no probative pertinence nor solid basis. A party who asserts that a contract of sale has been changed or modified has the burden of proving the change or modification by clear and convincing evidence.[22] Repeated requests and additional orders were contained in petitioner's letters to private respondent. In contrast, Belen's alleged action was only verbal; it was not substantiated at all during the trial. Note that, using the vessel to full capacity could redound to petitioner's advantage, not the other party's. If additional orders were at the instance of private respondent, the same must be properly proved together with its relevance to the question of delay. Settled is the principle in law that proof of verbal agreements offered to vary the terms of written agreements is inadmissible, under the parol evidence rule.[23] Belen's purported recommendation could not be taken at face value and, obviously, cannot excuse petitioner's default.

Respondent court found petitioner's default unjustified, and on this conclusion we agree:

> "It is not true that the defendant was not in a position to deliver the 272.481 MT which was the balance of the original 500 MT purchased by the plaintiff. The whole lot of 500 MT was ready for lifting as early as August 15, 1986. What the defendant could not sell to the plaintiff was the additional 227.51 MT which said plaintiff was ordering, for the reason that the defendant was short of the supply needed. The defendant, however, had no obligation to agree to this additional order and may not be faulted for its inability to meet the said additional requirements of the plaintiff. And the defendant's incapacity to agree to the delivery of another 227.51 MT is

> not a legal justification for the plaintiff's refusal to lift the remaining 272.481.
>
> It is clear from the plaintiff's letters to the defendant that it wanted to send the 'M/T Don Victor' only if the defendant would confirm that it was ready to deliver 500 MT. Because the defendant could not sell another 227.51 MT to the plaintiff, the latter did not send a new vessel to pick up the balance of the 500 MT originally contracted for by the parties. This, inspite the representations made by the defendant for the hauling thereof as scheduled and its reminders that any expenses for the delay would be for the account of the plaintiff."[24]

We are therefore constrained to declare that the respondent court did not err when it absolved private respondent from any breach of contract.

Our next inquiry is whether damages have been properly awarded against petitioner for its unjustified delay in the performance of its obligation under the contract. Where there has been breach of contract by the buyer, the seller has a right of action for damages. Following this rule, a cause of action of the seller for damages may arise where the buyer refuses to remove the goods, such that buyer has to remove them.[25] Article 1170 of the Civil Code provides:

> "Those who in the performance of their obligations are guilty of fraud, negligence, or delay and those who in any manner contravene the tenor thereof, are liable for damages."

Delay begins from the time the obligee judicially or extrajudicially demands from the obligor the performance of the obligation.[26] Art. 1169 states:

> "Art. 1169. Those obliged to deliver or to do something incur in delay from the time the obligee judicially or extrajudicially demands from them the fulfillment of their obligation."

In order that the debtor may be in default, it is necessary that the following requisites be present: (1) that the obligation be demandable and already liquidated; (2) that the debtor delays performance; and (3) that the creditor requires the performance judicially or extrajudicially.[27]

In the present case, private respondent required petitioner to ship out or lift the sulfuric acid as agreed, otherwise petitioner would be charged for the consequential damages owing to any delay. As stated in private respondent's letter to petitioner, dated December 12, 1986:

> Subject : M/T "KAYUMANGGI"
>
> Gentlemen:
>
> This is to reiterate our telephone advice and our letter HJR-8612-031 dated 2 December 1986 regarding your sulfuric acid vessel, M/T "KAYUMANGGI".
>
> As we have, in various instances, advised you, our Basay wharf will have to be vacated 15th December 1986 as we are expecting the arrival of our chartered vessel purportedly to haul our equipments and all other remaining assets in Basay. This includes our sulfuric acid tanks. We regret, therefore, that if these tanks are not emptied on or before the 15th of December, we either have to charge you for the tanks waiting time at Basay and its consequential costs (i.e. chartering of another vessel for its second pick-up at Basay, handling, etc.) as well as all other incremental costs on account of the protracted loading delay."[28] (Italics supplied)

Indeed the above demand, which was unheeded, justifies the finding of delay. But when did such delay begin? The above letter constitutes private respondent's extrajudicial demand for the petitioner to fulfill its obligation, and its dateline is significant. Given its date, however, we cannot sustain the finding of the respondent court that petitioner's delay started on August 6, 1986. The Court of Appeals had relied on private respondent's earlier letter to petitioner of that date for computing the commencement of delay. But as averred by petitioner, said letter

of August 6th is not a categorical demand. What it showed was a mere statement of fact, that "[F]for your information any delay in Sulfuric Acid withdrawal shall cost us incremental expenses of P2,000.00 per day." Noteworthy, private respondent accepted the full payment by petitioner for purchases on October 3, 1986, without qualification, long after the August 6th letter. In contrast to the August 6th letter, that of December 12th was a categorical demand.

Records reveal that a tanker ship had to pick-up sulfuric acid in Basay, then proceed to get the remaining stocks in Sangi, Cebu. A period of three days appears to us reasonable for a vessel to travel between Basay and Sangi. Logically, the computation of damages arising from the shipping delay would then have to be from December 15, 1986, given said reasonable period after the December 12th letter. More important, private respondent was forced to vacate Basay wharf only on December 15th. Its Basay expenses incurred before December 15, 1986, were necessary and regular business expenses for which the petitioner should not be obliged to pay.

Note that private respondent extended its lease agreement for Sangi, Cebu storage tank until August 31, 1987, solely for petitioner's sulfuric acid. It stands to reason that petitioner should reimburse private respondent's rental expenses of P32,000 monthly, commencing December 15, 1986, up to August 31, 1987, the period of the extended lease. Note further that there is nothing on record refuting the amount of expenses abovecited. Private respondent presented in court two supporting documents: first, the lease agreement pertaining to the equipment, and second a letter dated June 15, 1987, sent by Atlas Fertilizer Corporation to private respondent representing the rental charges incurred. Private respondent is entitled to recover the payment for these charges. It should be reimbursed the amount of two hundred seventy two thousand (P272,000.00)[29] pesos, corresponding to the total amount of rentals from December 15, 1986 to August 31, 1987 of the Sangi, Cebu storage tank.

Finally, we note also that petitioner tries to exempt itself from paying rental expenses and other damages by arguing that expenses for the preservation of fungible goods must be assumed by the seller. Rental expenses of storing sulfuric acid should be at private respondent's account until ownership is transferred, according to petitioner. However, the general rule that before delivery, the risk of loss is borne by the seller who is still the owner, is not applicable in this case because petitioner had incurred delay in the performance of its obligation. Article 1504 of the Civil Code clearly states:

> "Unless otherwise agreed, the goods remain at the seller's risk until the ownership therein is transferred to the buyer, but when the ownership therein is transferred to the buyer the goods are at the buyer's risk whether actual delivery has been made or not, except that:
>
> x x x
>
> (2) Where actual delivery has been delayed through the fault of either the buyer or seller the goods are at the risk of the party at fault." (italics supplied)

On this score, we quote with approval the findings of the appellate court, thus:

> ". . . The defendant [herein private respondent] was not remiss in reminding the plaintiff that it would have to bear the said expenses for failure to lift the commodity for an unreasonable length of time.
>
> But even assuming that the plaintiff did not consent to be so bound, the provisions of Civil Code come in to make it liable for the damages sought by the defendant.
> Article 1170 of the Civil Code provides:
>
> 'Those who in the performance of their obligations are guilty of fraud, negligence, or delay and those who in any manner contravene the tenor thereof, are liable for damages..'

Certainly, the plaintiff [herein petitioner] was guilty of negligence and delay in the performance of its obligation

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to lift the sulfuric acid on August 15, 1986 and had contravened the tenor of its letter-contract with the defendant."[30]

As pointed out earlier, petitioner is guilty of delay, after private respondent made the necessary extrajudicial demand by requiring petitioner to lift the cargo at its designated loadports. When petitioner failed to comply with its obligations under the contract it became liable for its shortcomings. Petitioner is indubitably liable for proven damages.

Considering, however, that petitioner made an advance payment for the unlifted sulfuric acid in the amount of three hundred three thousand, four hundred eighty three pesos and thirty seven centavos (P303,483.37), it is proper to set-off this amount against the rental expenses initially paid by private respondent. It is worth noting that the adjustment and allowance of private respondent's counterclaim or set-off in the present action, rather than by another independent action, is encouraged by the law. Such practice serves to avoid circuitry of action, multiplicity of suits, inconvenience, expense, and unwarranted consumption of the court's time.[31] The trend of judicial decisions is toward a liberal extension of the right to avail of counterclaims or set-offs.[32] The rules on counterclaims are designed to achieve the disposition of a whole controversy involving the conflicting claims of interested parties at one time and in one action, provided all parties can be brought before the court and the matter decided without prejudicing the right of any party.[33] Set-off in this case is proper and reasonable. It involves deducting P272,000.00 (rentals) from P303,483.37 (advance payment), which will leave the amount of P31,483.37 refundable to petitioner.

WHEREFORE, the petition is hereby DENIED. The assailed decision of the Court of Appeals in CA G.R. CV No. 33802 is AFFIRMED, with MODIFICATION that the amount of damages awarded in favor of private respondent is REDUCED to Two hundred seventy two thousand pesos (P272,000.00). It is also ORDERED that said amount of damages be OFFSET against petitioner's advance payment of Three hundred three thousand four hundred eighty three pesos and thirty-seven centavos (P303,483.37) representing the price of the 272.481 MT of sulfuric acid not lifted. Lastly, it is ORDERED that the excess amount of thirty one thousand, four hundred eighty three pesos and thirty seven centavos (P31,483.37) be RETURNED soonest by private respondent to herein petitioner.

Costs against the petitioner.

SO ORDERED.

Bellosillo, (Chairman), Mendoza, and Buena, JJ., concur.

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[1] Rollo, pp. 36-45, Penned by Justice Associate Justice Salome A. Montoya, concurred in by Justices Jose C. Campos and Serafin V.C. Guingona, of the Special Fifth Division of the Court of Appeals.

[2] Rollo p. 44.

[3] Records, pp. 5-6.

[4] Id. at 136.

[5] Id. at 137.

[6] TSN, September 1, 1989, pp. 28-29.

[7] Records, pp. 47-48. Emphasis ours.

[8] Id. at 49.

[9] Id. at 50.

[10] Id. at 41.

[11] Id. at 138.

[12] Id. at 40.

[13] Id. at 65, Affidavit of Gil B. Belen.

[14] Id. at 46.

[15] Rollo, p. 51.

[16] Id. at 52-53.

[17] Id. at 41-42.

[18] Mijares vs. CA, 271 SCRA 558, 566 (1997), citing Cuizon vs. Court of Appeals, 260 SCRA 645, (1996); Floro vs. Llenado, 244 SCRA 713 (1995).

[19] Records, p. 21.

[20] Id. at 23.

[21] TSN, December 20, 1989, p. 6.

[22] 77 Corpus Juris Secundum, Sales, Section 86, Evidence, p. 773.

[23] Gerales vs. Court of Appeals, 218 SCRA 638, 648-649 (1993); citing Continental Airlines Inc. vs. Santiago, 172 SCRA 490 (1989).

[24] Rollo, p. 42.

[25] 78 Corpus Juris Secundum, Sales, Action for Damages, Section 462, Right of Action, p. 112.

[26] SSS vs. Moonwalk Development and Housing Corporation, 221 SCRA 119, 127 (1993).

[27] Id. at 128.

[28] Records, p. 137.

[29] P32,000 x 8.5 months.

[30] Rollo, pp. 43-44.

[31] Development Bank of the Philippines vs. Court of Appeals, 249 SCRA 331, 341 (1995).

[32] Id., citing 20 Am. Jur. 2d, Counterclaim, 237-238.

[33] Id., citing Kuenzel vs. Universal Carloading and Distributing Co., Inc. (1939) 29 F. Supp. 407.

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