

INTERNATIONAL HARVESTERS COMPANY IN RUSSIA, PLAINTIFF AND APPELLEE, VS. HAMBURG-AMERICAN LINE, DEFENDANT AND APPELLANT.

G.R. No. 11515. July 29, 1918

Ponente: STREET, J.

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STREET, J.:

In the spring of 1914, the plaintiff, the International Harvester Company in Russia, an American corporation, organized under the laws of the State of Maine, delivered to the defendant, the Hamburg-American Line, at Baltimore, Maryland, to be laden on its steamer the Bulgaria, bound from that port to Hamburg, Germany, a large consignment of agricultural machinery, consisting of 852 boxes, crates, and parcels, all of which were to be delivered to the order of the consignor at Vladivostock, Russia. The freight charges were then and there prepaid to the ultimate destination.

The bill of lading which was issued to the plaintiff at Baltimore provided, among other things, that the goods should be forwarded by the defendant company from Hamburg to Vladivostock at the ship's expense but at the risk of the owner of the goods. It was also provided that goods thus destined for points beyond Hamburg should be subject to the terms expressed in the customary form of bill of lading in use at the time of shipment by the carrier completing the transit.

When the shipment arrived at Hamburg the carrier company transferred the cargo to the Suevia, a ship of its own line, and issued to itself therefor, as forwarding agent, another bill of lading in the customary form then in use in the port of Hamburg, covering the transportation from Hamburg to Vladivostock.

While the ship carrying said cargo was in the China Sea en route to Vladivostock war broke out in Europe; and as the Suevia was a German vessel, the master considered it necessary to take refuge in the nearest neutral port, which happened to be Manila. Accordingly he put into this harbor on August 6, 1914, and at the date of the trial in the court below the ship still remained in refuge in this port.

After it became apparent that the Suevia would be detained indefinitely in the port of Manila, the plaintiff company, as owner of the cargo above described, in January, 1915, made demand upon the agent of the defendant company in Manila to the effect that it should forward the cargo to Vladivostock, if not by the Suevia then by some other steamer. This the defendant company refused to do except upon the condition that the plaintiff would agree to subject said cargo to liability upon general average to satisfy the costs and expenses of the Suevia incident to its stay in the port of Manila. To this condition the plaintiff did not assent and on the contrary thereupon demanded the immediate delivery of the cargo to it in Manila. The defendant company replied with an offer to deliver the cargo provided the owner would deposit with the defendant company a sum of money equivalent to 20 per cent of the value of said cargo, as security for the aforesaid costs and expenses to be adjusted as general average. In this connection it may be stated that the costs and expenses incurred by the Suevia from the date the ship entered the port of Manila until March 30, 1915, amounted to the sum of P63,024.50, which included

port charges, repairs, and wages and maintenance of officers and crew.

Having thus far failed in its efforts to obtain possession of its property, the plaintiff company instituted the present action in the Court of First Instance of the city of Manila upon February 13, 1915. The purpose of the proceeding is to recover the possession of the cargo, together with damages for breach of contract and unlawful detention of the property. At the time the action was instituted, or soon thereafter, the plaintiff obtained the delivery of the property from the Suevia by means of a writ of replevin and forwarded it to Vladivostock by another steamer. In its answer the defendant company denies liability for damages and asserts that it has a lien on the property for general average, as already indicated. In the court below judgment was given in favor of the plaintiff, recognizing its right to the possession of the goods and awarding damages to it in the sum of P5,421.28, the amount shown to have been expended in forwarding the goods to Vladivostock. From this judgment the defendant appealed.

The two main questions raised by the appeal are, first whether the cargo belonging to the plaintiff is liable to be made to contribute, by way of general average, to the costs and expenses incurred by reason of the internment of the Suevia in the port of Manila, and, secondly, whether the defendant is liable for the expenses of transferring the cargo to another ship and transporting it to the port of destination.

Upon the first question it is clear that the cargo in question is not liable to a general average. It is not claimed that this agricultural machinery was contraband of war; and being neutral goods, it was not liable to forfeiture in the event of capture by the enemies of the ship's flag. It follows that when the master of the Suevia decided to take refuge in the port of Manila, he acted exclusively with a view to the protection of his vessel. There was no common danger to the ship and cargo; and therefore it was not a case for a general average. The point here in dispute has already been determined by this court unfavorably to the contention of the appellant. (*Compagnie de Commerce et de Navigation D'Extreme Orient vs. Hamburg Amerika Packetfahrt Actien Gesellschaft*, 36 Phil., 550.) The following provision contained in the York-Antwerp Rules, as we interpret it, is conclusive against the appellant's contention:

"When a ship shall have entered a port of refuge * * * in consequence of accident, sacrifice, or other extraordinary circumstance which renders that necessary for the common safety, the expense of entering such port shall be admitted as general average." (York-Antwerp Rules, section 10.)

Upon the question of the liability of the defendant company for the expenses incident to the transshipment and conveyance of the cargo to Vladivostock, it is noteworthy that the original bill of lading issued to the shipper in Baltimore contained the provision that the goods should be forwarded from Hamburg to Vladivostock at the steamer's expense and this term appeared not only in the paragraph numbered 17 in the body of the bill of lading but also conspicuously printed in the shipping directions on the face of the instrument.

In the tenth paragraph of the General Rules contained in the bill of lading which was issued at Hamburg upon account of the Suevia, for the forwarding of the cargo to Vladivostock, there is found the following provision:

"X. If on account of quarantine, threatening quarantine, ice blockade, war disturbances, strike, lockout, boycott, or reason of a similar nature, the master is in doubt as to whether he can safely reach the port of destination, there discharge in the usual manner, or proceed thence on his voyage unmolested he is at liberty to discharge the goods at another place or harbour which he may consider safe, whereby his obligations are fulfilled. * * * If the goods for any reason whatsoever cannot be discharged * * * at the port of destination, the ship is at liberty to * * * forward them by some other means to the port of destination, for ship's account but not at ship's risk."

Further on in the same bill of lading under the head "Special Clauses" is found an addendum to rule ten to the following effect:

"Special—Condition to rule X.—The forwarding of through goods to be effected as soon as possible, but the shipowner not to be responsible for delay in the conveyance. The shipowner to have the liberty to store the goods at the expense and risk of the owner, shipper or consignee. The shipowner further to be entitled to forward the goods by rail from the port of discharge to the final place of destination, at his expense, but at the risk of the owner, shipper or consignee."

It is now insisted for the appellant that inasmuch as war had broken out between Germany and Russia and the master had brought the cargo into a neutral harbor, all the obligations of the company have been fulfilled. We think that this contention is untenable. The outbreak of the war between Germany and Russia undoubtedly absolved the defendant company from so much of the contract of affreightment as required the defendant company to convey the goods to Vladivostock upon the ship on which it was embarked; and no damages could be recovered by the plaintiff of the defendant for its failure to convey the goods to the port of destination on that ship. But by the terms of the contract of affreightment the defendant company was bound to forward the cargo to Vladivostock at the steamer's expense, not necessarily by a steamer belonging to the defendant company; and it does not by any means follow that it is not liable for the expense incurred by the owner in completing the unfinished portion of the voyage in another ship.

It will be noted that under paragraph X of the bill of lading, quoted above, the master is given the election to discharge at another port, if war should interfere with the completion of the voyage to the port of destination. No such election has been made by the master. On the contrary, after arrival in Manila, he refused to discharge the goods, and must be held to have elected to retain them, leaving the obligations of the contract intact, except in so far as they were modified, under the general principles of international law, by the fact that war existed. So far was the master from electing to discharge the goods in the port of Manila even on the demand of the owner, that he proposed to hold the cargo until such time as the Suevia might continue her voyage without fear of molestation from her enemies.

Furthermore, in the special condition to rule X, the defendant company recognizes its responsibility with respect to the forwarding of goods; and where it is said in paragraph X that the master's obligations will be fulfilled by discharge in another port, it must be understood that reference is had to the obligations incident to the carriage of the goods on the instant voyage.

It should be remembered that stipulations, in a bill of lading exempting a shipowner from the liability which would ordinarily attach to him under the law are to be strictly construed against him. (*Cia. de Navigation La Flecha vs. Brauer*, 168 U. S., 104.) This rule should be unhesitatingly applied in a case such as this where the bill of lading under which the exemption is claimed was issued by the defendant company to itself.

We find it stated in a well known treatise that where cargo has been taken aboard a ship at a foreign port and war breaks out between the country to which the vessel belongs and the country of the port of discharge, the neutral owner of the goods cannot complain of her not going to her destination. (*Carver, Carriage of Goods by Sea*, sec: 239.) The same learned author adds:

"Where goods have been loaded and partly carried on the agreed voyage, though the exact performance of the contract may become legally impossible, it will not be regarded as completely at an end, if it can by any reasonable construction be treated as still capable of being performed in substance. Thus, where a Prussian vessel, carrying goods under charter, had been ordered to discharge at Dunkirk, and it became impossible for her to do so, because war broke out between France and Germany, it was held in the Privy Council, that the contract was not dissolved, and that the shipowner might still hold the goods at Dover, where he had taken the ship, for the freight which would have been payable under the charter-party had she been ordered to that port." (*The Teutonia* (1872),

L. R., 4 P. C, 171.)

In the case now before us we see no reason for holding that the defendant company has been absolved by the outbreak of war from its contractual obligation to bear the expenses of forwarding the goods to Vladivostock, even though it is immediately absolved from the duty to convey them on its own ship.

It must not be forgotten that the outbreak of the war between Germany and Russia did not make the contract of affreightment absolutely illegal as between the German company and the American shipper. If war had broken out between Germany and the United States, and refuge had been taken in some port in a neutral country, it might be said that this contract was dissolved on both sides, and a different question would thus have been presented; but even in that case, it could not be successfully maintained that the German company was wholly absolved from every duty to the shipper.

There is another aspect of the case which is highly pertinent to the matter now under consideration. The freight was prepaid by the shipper from Baltimore to destination, but has been only in part earned. The defendant company has broken the voyage by stopping at the intermediate port of Manila. Admitting that the defendant company is absolved from the obligation to convey the cargo further on its course, it is nevertheless clear that upon principles of equity the company should be bound to restore so much of the freight as represents the unaccomplished portion of the voyage. If the freight had not been paid, the most that could be claimed by the defendant would be an amount *pro rata itineris peracti*, as was conceded in the case of the *Teutonia*, to which reference has been already made; and now that the freight has been prepaid, there is a clear obligation on the part of the company to refund the excess, as money paid upon a consideration that has partially failed.

But it will be said that the contract to convey the cargo to Hamburg and to forward it from there to Vladivostock was an entirety, and that inasmuch as the defendant company is absolved from its obligation to proceed further with performance, there can be no apportionment as between the voyage which has been accomplished and that which was yet to be performed. The reply to this is that the break in the continuity of the voyage was a result of the voluntary act of the master of the *Suevia*, adopted with a view to the preservation of the ship; and it can not be permitted that the defendant company should escape the consequences of that act, so far as necessary to effect an equitable adjustment of the rights of the owner of the cargo. There being no evidence before us with respect to the amount of freight which was prepaid, nor with respect to the proportion earned and unearned, but only the fact that the owner paid out a certain amount for transshipment to Vladivostock, it can be assumed that this amount approximately represents the unearned portion of the freight.

We have not overlooked the provision in the original bill of lading which provides that freight paid in advance will not be returned, goods lost or not lost. There is also a somewhat similar provision in the second bill of lading issued at Hamburg. These provisions contemplate the special case of the loss of the goods and can not be extended to the situation which arises when the ship for purposes of its own protection abandons the enterprise.

From what has been said it is apparent that the Court of First Instance was correct not only in adjudging possession of the cargo to the plaintiff but also in imposing upon the defendant company liability with respect to the amount expended by the plaintiff in forwarding the goods to their destination.

The only other point raised by the bill of exceptions, which we deem it necessary to notice, is based on a provision in the bill of lading to the effect that all disputes arising under the contract are, at the option of the defendant company, to be decided according to German law and exclusively by the Hamburg courts. From this it is argued that the Court of First Instance erred in assuming jurisdiction of the action and that the case should have been decided in accordance with the principles of German law.

It can not be admitted that a provision of this character has the effect of ousting the jurisdiction of the courts of the Philippine Islands in the matter now before it. An express agreement tending to deprive a court of jurisdiction conferred on it by law is of no effect. (*Molina vs. De la Riva*, 6 Phil., 12.) Besides, whatever the effect of this provision, the benefit of it was waived when the defendant company appeared and answered generally without objecting to the jurisdiction of the court.

As regards the contention that the rights of the parties should be determined in accordance with the law of Germany, it is sufficient to say that when it is proposed to invoke the law of a foreign country as supplying the proper rules for the solution of a case, the existence of such law must be pleaded and proved. Defendant has done neither. In such a case it is to be presumed that the law prevailing in the foreign country is the same as that which prevails in our own.

The judgment appealed from is affirmed, with costs against the appellant. So ordered.

Torres, Johnson, Malcolm, Avanceña, and Fisher, JJ., concur.

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