

LEA MER INDUSTRIES, INC., PETITIONER, VS. MALAYAN INSURANCE CO., INC., RESPONDENT.

G.R. No. 161745. September 30, 2005

Ponente: PANGANIBAN, J.

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PANGANIBAN, J.:

Common carriers are bound to observe extraordinary diligence in their vigilance over the goods entrusted to them, as required by the nature of their business and for reasons of public policy. Consequently, the law presumes that common carriers are at fault or negligent for any loss or damage to the goods that they transport. In the present case, the evidence submitted by petitioner to overcome this presumption was sorely insufficient.

The Case

Before us is a Petition for Review[1] under Rule 45 of the Rules of Court, assailing the October 9, 2002 Decision[2] and the December 29, 2003 Resolution[3] of the Court of Appeals (CA) in CA-GR CV No. 66028. The challenged Decision disposed as follows:

"WHEREFORE, the appeal is GRANTED. The December 7, 1999 decision of the Regional Trial Court of Manila, Branch 42 in Civil Case No. 92-63159 is hereby REVERSED and SET ASIDE. [Petitioner] is ordered to pay the [herein respondent] the value of the lost cargo in the amount of P565,000.00. Costs against the [herein petitioner]." [4]

The assailed Resolution denied reconsideration.

The Facts

Ilian Silica Mining entered into a contract of carriage with Lea Mer Industries, Inc., for the shipment of 900 metric tons of silica sand valued at P565,000.[5] Consigned to Vulcan Industrial and Mining Corporation, the cargo was to be transported from Palawan to Manila. On October 25, 1991, the silica sand was placed on board Judy VII, a barge leased by Lea Mer.[6] During the voyage, the vessel sank, resulting in the loss of the cargo.[7]

Malayan Insurance Co., Inc., as insurer, paid Vulcan the value of the lost cargo.[8] To recover the amount paid and in the exercise of its right of subrogation, Malayan demanded reimbursement from Lea Mer, which refused to comply. Consequently, Malayan instituted a Complaint with the Regional Trial Court (RTC) of Manila on September 4, 1992, for the collection of P565,000 representing the amount that respondent had paid Vulcan.[9]

On October 7, 1999, the trial court dismissed the Complaint, upon finding that the cause of the loss was a fortuitous event.[10] The RTC noted that the vessel had sunk because of the bad weather condition brought about by Typhoon Trining. The court ruled that petitioner had no advance knowledge of the incoming typhoon, and that the vessel had been cleared by the Philippine Coast Guard to travel from Palawan to Manila.[11]

Ruling of the Court of Appeals

Reversing the trial court, the CA held that the vessel was not seaworthy when it sailed for Manila. Thus, the loss

of the cargo was occasioned by petitioner's fault, not by a fortuitous event.[12]

Hence, this recourse.[13]

The Issues

Petitioner states the issues in this wise:

"A. Whether or not the survey report of the cargo surveyor, Jesus Cortez, who had not been presented as a witness of the said report during the trial of this case before the lower court can be admitted in evidence to prove the alleged facts cited in the said report.

"B. Whether or not the respondent, Court of Appeals, had validly or legally reversed the finding of fact of the Regional Trial Court which clearly and unequivocally held that the loss of the cargo subject of this case was caused by fortuitous event for which herein petitioner could not be held liable.

"C. Whether or not the respondent, Court of Appeals, had committed serious error and grave abuse of discretion in disregarding the testimony of the witness from the MARINA, Engr. Jacinto Lazo y Villegal, to the effect that the vessel 'Judy VII' was seaworthy at the time of incident and further in disregarding the testimony of the PAG-ASA weather specialist, Ms. Rosa Barba y Saliente, to the effect that typhoon 'Trining' did not hit Metro Manila or Palawan." [14]

In the main, the issues are as follows: (1) whether petitioner is liable for the loss of the cargo, and (2) whether the survey report of Jesus Cortez is admissible in evidence.

The Court's Ruling

The Petition has no merit.

First Issue:

Liability for Loss of Cargo

Question of Fact

The resolution of the present case hinges on whether the loss of the cargo was due to a fortuitous event. This issue involves primarily a question of fact, notwithstanding petitioner's claim that it pertains only to a question of law. As a general rule, questions of fact may not be raised in a petition for review.[15] The present case serves as an exception to this rule, because the factual findings of the appellate and the trial courts vary.[16] This Court meticulously reviewed the records, but found no reason to reverse the CA.

Rule on Common Carriers

Common carriers are persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods, or both -- by land, water, or air -- when this service is offered to the public for compensation.[17] Petitioner is clearly a common carrier, because it offers to the public its business of transporting goods through its vessels.[18]

Thus, the Court corrects the trial court's finding that petitioner became a private carrier when Vulcan chartered it.[19] Charter parties are classified as contracts of demise (or bareboat) and affreightment, which are distinguished as follows:

"Under the demise or bareboat charter of the vessel, the charterer will generally be considered as owner for the voyage or service stipulated. The charterer mans the vessel with his own people and becomes, in effect, the owner pro hac vice, subject to liability to others for damages caused by negligence. To create a demise, the owner of a vessel must completely and exclusively relinquish possession, command and navigation thereof to

the charterer; anything short of such a complete transfer is a contract of affreightment (time or voyage charter party) or not a charter party at all." [20]

The distinction is significant, because a demise or bareboat charter indicates a business undertaking that is private in character. [21] Consequently, the rights and obligations of the parties to a contract of private carriage are governed principally by their stipulations, not by the law on common carriers. [22]

The Contract in the present case was one of affreightment, as shown by the fact that it was petitioner's crew that manned the tugboat M/V Ayalit and controlled the barge Judy VII. [23] Necessarily, petitioner was a common carrier, and the pertinent law governs the present factual circumstances.

Extraordinary Diligence Required

Common carriers are bound to observe extraordinary diligence in their vigilance over the goods and the safety of the passengers they transport, as required by the nature of their business and for reasons of public policy. [24] Extraordinary diligence requires rendering service with the greatest skill and foresight to avoid damage and destruction to the goods entrusted for carriage and delivery. [25]

Common carriers are presumed to have been at fault or to have acted negligently for loss or damage to the goods that they have transported. [26] This presumption can be rebutted only by proof that they observed extraordinary diligence, or that the loss or damage was occasioned by any of the following causes: [27]

- "(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." [28]

Rule on Fortuitous Events

Article 1174 of the Civil Code provides that "no person shall be responsible for a fortuitous event which could not be foreseen, or which, though foreseen, was inevitable." Thus, if the loss or damage was due to such an event, a common carrier is exempted from liability.

Jurisprudence defines the elements of a "fortuitous event" as follows: (a) the cause of the unforeseen and unexpected occurrence, or the failure of the debtors to comply with their obligations, must have been independent of human will; (b) the event that constituted the *caso fortuito* must have been impossible to foresee or, if foreseeable, impossible to avoid; (c) the occurrence must have been such as to render it impossible for the debtors to fulfill their obligation in a normal manner; and (d) the obligor must have been free from any participation in the aggravation of the resulting injury to the creditor. [29]

To excuse the common carrier fully of any liability, the fortuitous event must have been the proximate and only cause of the loss. [30] Moreover, it should have exercised due diligence to prevent or minimize the loss before, during and after the occurrence of the fortuitous event. [31]

Loss in the Instant Case

There is no controversy regarding the loss of the cargo in the present case. As the common carrier, petitioner bore the burden of proving that it had exercised extraordinary diligence to avoid the loss, or that the loss had been occasioned by a fortuitous event -- an exempting circumstance.

It was precisely this circumstance that petitioner cited to escape liability. Lea Mer claimed that the loss of the cargo was due to the bad weather condition brought about by Typhoon Trining.[32] Evidence was presented to show that petitioner had not been informed of the incoming typhoon, and that the Philippine Coast Guard had given it clearance to begin the voyage.[33] On October 25, 1991, the date on which the voyage commenced and the barge sank, Typhoon Trining was allegedly far from Palawan, where the storm warning was only "Signal No. 1." [34]

The evidence presented by petitioner in support of its defense of fortuitous event was sorely insufficient. As required by the pertinent law, it was not enough for the common carrier to show that there was an unforeseen or unexpected occurrence. It had to show that it was free from any fault -- a fact it miserably failed to prove.

First, petitioner presented no evidence that it had attempted to minimize or prevent the loss before, during or after the alleged fortuitous event.[35] Its witness, Joey A. Draper, testified that he could no longer remember whether anything had been done to minimize loss when water started entering the barge.[36] This fact was confirmed during his cross-examination, as shown by the following brief exchange:

"Atty. Baldovino, Jr.:

Other than be[a]ching the barge Judy VII, were there other precautionary measure[s] exercised by you and the crew of Judy VII so as to prevent the los[s] or sinking of barge Judy VII?

x x x x x x x x

Atty. Baldovino, Jr.:

Your Honor, what I am asking [relates to the] action taken by the officers and crew of tugboat Ayalit and barge Judy VII x x x to prevent the sinking of barge Judy VII?

x x x x x x x x

Court:

Mr. witness, did the captain of that tugboat give any instruction on how to save the barge Judy VII?

Joey Draper:

I can no longer remember sir, because that happened [a] long time ago." [37]

Second, the alleged fortuitous event was not the sole and proximate cause of the loss. There is a preponderance of evidence that the barge was not seaworthy when it sailed for Manila.[38] Respondent was able to prove that, in the hull of the barge, there were holes that might have caused or aggravated the sinking.[39] Because the presumption of negligence or fault applied to petitioner, it was incumbent upon it to show that there were no holes; or, if there were, that they did not aggravate the sinking.

Petitioner offered no evidence to rebut the existence of the holes. Its witness, Domingo A. Luna, testified that the barge was in "tip-top" or excellent condition,[40] but that he had not personally inspected it when it left Palawan.[41]

The submission of the Philippine Coast Guard's Certificate of Inspection of Judy VII, dated July 31, 1991, did not conclusively prove that the barge was seaworthy.[42] The regularity of the issuance of the Certificate is disputably presumed.[43] It could be contradicted by competent evidence, which respondent offered. Moreover, this evidence did not necessarily take into account the actual condition of the vessel at the time of the commencement of the voyage.[44]

Second Issue:

Admissibility of the Survey Report

Petitioner claims that the Survey Report[45] prepared by Jesus Cortez, the cargo surveyor, should not have been admitted in evidence. The Court partly agrees. Because he did not testify during the trial,[46] then the Report that he had prepared was hearsay and therefore inadmissible for the purpose of proving the truth of its contents.

The Survey Report Not the Sole Evidence

The facts reveal that Cortez's Survey Report was used in the testimonies of respondent's witnesses -- Charlie M. Soriano; and Federico S. Manlapig, a cargo marine surveyor and the vice-president of Toplis and Harding Company.[47] Soriano testified that the Survey Report had been used in preparing the final Adjustment Report conducted by their company.[48] The final Report showed that the barge was not seaworthy because of the existence of the holes. Manlapig testified that he had prepared that Report after taking into account the findings of the surveyor, as well as the pictures and the sketches of the place where the sinking occurred.[49] Evidently, the existence of the holes was proved by the testimonies of the witnesses, not merely by Cortez' Survey Report.

Rule on Independently

Relevant Statement

That witnesses must be examined and presented during the trial,[50] and that their testimonies must be confined to personal knowledge is required by the rules on evidence, from which we quote:

"Section 36. Testimony generally confined to personal knowledge; hearsay excluded. --A witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception, except as otherwise provided in these rules."[51]

On this basis, the trial court correctly refused to admit Jesus Cortez's Affidavit, which respondent had offered as evidence.[52] Well-settled is the rule that, unless the affiant is presented as a witness, an affidavit is considered hearsay.[53]

An exception to the foregoing rule is that on "independently relevant statements." A report made by a person is admissible if it is intended to prove the tenor, not the truth, of the statements.[54] Independent of the truth or the falsity of the statement given in the report, the fact that it has been made is relevant. Here, the hearsay rule does not apply.[55]

In the instant case, the challenged Survey Report prepared by Cortez was admitted only as part of the testimonies of respondent's witnesses. The referral to Cortez's Report was in relation to Manlapig's final Adjustment Report. Evidently, it was the existence of the Survey Report that was testified to. The admissibility of that Report as part of the testimonies of the witnesses was correctly ruled upon by the trial court.

At any rate, even without the Survey Report, petitioner has already failed to overcome the presumption of fault that applies to common carriers.

WHEREFORE, the Petition is DENIED and the assailed Decision and Resolution are AFFIRMED. Costs against petitioner.

SO ORDERED.

Sandoval-Gutierrez, Corona, Carpio Morales, and Garcia, JJ., concur.

[*] The Petition included the Court of Appeals as a respondent. However, the CA was omitted by the Court from the title of the case because, under Section 4 of Rule 45 of the Rules of Court, the appellate court need not be impleaded in petitions for review.

[1] Rollo, pp. 12-27.

[2] Id., pp. 36-41. Tenth Division. Penned by Justice Elvi John S. Asuncion, with the concurrence of Justices Portia Aliño-Hormachuelos (Division chairperson) and Juan Q. Enriquez Jr. (member).

[3] Id., p. 48.

[4] Assailed Decision, pp. 5-6; rollo, pp. 40-41.

[5] Id., pp. 1 & 36.

[6] The barge was allegedly owned by J. T. Lighterage Services. (TSN dated September 27, 1995, p. 3) It was non-propelled therefore, it could only operate through its towing by petitioner's tugboat M/T Ayalit. (TSN dated April 26, 1995, p. 12; TSN dated April 25, 1996, p. 19)

[7] Assailed Decision, p. 1; rollo, p. 36.

[8] Id., pp. 2 & 37.

[9] Ibid. The case was docketed as Civil Case No. 92-63159 and raffled to Branch 42.

[10] Ibid.

[11] RTC Decision dated December 7, 1999, p. 9; rollo, p. 58.

[12] Assailed Decision, p. 4; rollo, p. 39.

[13] The case was deemed submitted for decision on October 25, 2004, upon this Court's receipt of petitioner's sparse, 6-page (with only two pages of argument) Memorandum, signed by Atty. Romualdo M. Jubay. Respondent's Memorandum, signed by Atty. Frederick C. Angel, was received by this Court on October 7, 2004.

[14] Petition, p. 8; rollo, p. 19. Original in uppercase.

[15] §1 of Rule 45 of the Rules of Court.

[16] *Menchavez v. Teves Jr.*, 449 SCRA 380, 395, January 26, 2005; *Philippine American General Insurance Company v. PKS Shipping Company*, 401 SCRA 222, 230, April 9, 2003; *Commissioner of Internal Revenue v. Embroidery and Garments Industries (Phil.), Inc.*, 364 Phil. 541, 546, March 22, 1999.

[17] Art. 1732 of the Civil Code.

[18] Petition, pp. 4-5; rollo, pp. 14-15.

[19] RTC Decision dated December 7, 1999, p. 7; rollo, p. 56.

[20] *Puromines, Inc. v. Court of Appeals*, 220 SCRA 281, 288, per Nocon J. See also *National Food Authority v. Court of Appeals*, 370 Phil. 735, 743, August 4, 1999.

[21] *Philippine American General Insurance Company v. PKS Shipping Company*, supra, p. 228; *Coastwise Lighterage Corporation v. Court of Appeals*, 316 Phil. 13, 19, July 12, 1995.

[22] *National Steel Corporation v. Court of Appeals*, 347 Phil. 345, 362, December 12, 1997; *Valenzuela Hardwood and Industrial Supply, Inc. v. Court of Appeals*, 274 SCRA 642, 654, June 30, 1997.

[23] RTC Decision dated December 7, 1999, pp. 4-6; rollo, pp. 53-55.

[24] Art. 1733 of the Civil Code.

[25] *Calvo v. UCPB General Insurance Co., Inc.*, 429 Phil. 244, 252, March 19, 2002; *Compania Maritima v. Court of Appeals*, 164 SCRA 685, 692, August 29, 1988.

[26] Art. 1735 of the Civil Code.

[27] *Ibid.* See also *National Trucking and Forwarding Corp. v. Lorenzo Shipping Corporation*, GR No. 153563, February 7, 2005; *Asia Lighterage and Shipping, Inc. v. Court of Appeals*, 409 SCRA 340, 346, August 19, 2003; *Philippine American General Insurance Company v. PKS Shipping Company*, *supra*, p. 229; *Coastwise Lighterage Corporation v. Court of Appeals*, *supra*, p. 20; *Basco v. Court of Appeals*, 221 SCRA 318, 323, April 7, 1993.

[28] Art. 1734 of the Civil Code.

[29] *Mindex Resources Development v. Morillo*, 428 Phil. 934, 944, March 12, 2002; *Philippine American General Insurance Co. Inc. v. MGG Marine Services, Inc.*, 428 Phil. 705, 714, March 8, 2002; *Metal Forming Corp. v. Office of the President*, 317 Phil. 853, 859, August 28, 1995; *Vasquez v. Court of Appeals*, 138 SCRA 553, 557, September 13, 1985; *Republic v. Luzon Stevedoring Corp.*, 128 Phil. 313, 318, September 29, 1967.

[30] Art. 1739 of the Civil Code.

[31] *Ibid.*

[32] RTC Decision dated December 7, 1999, p. 9; rollo p. 58 (citing the testimony of Rosa S. Barba). See also Petitioner's Memorandum, p. 2; rollo, p. 157.

[33] *Ibid.* (citing the testimony of Domingo A. Luna).

[34] The testimony of Rosa S. Barba, weather specialist of Philippine Atmosphere (PAGASA), was summarized by the RTC as follows:

"In May 1993, upon the request of [petitioner's] counsel, she issued a weather bureau report or certification, an official record of Pagasa, which weather report is based on their weather station at Puerto Princesa, Palawan. x x x The report on the weather condition on October 21, 1991 at around 11:00 am to 2:00 pm was weathercast sky. The bad weather condition on October 25, 26, and 27, 1991 was caused by typhoon 'Trining' but said typhoon then was far from Palawan, which was only signal No. 1. Tropical storm 'Trining' entered the Philippine area of responsibility on October 24. Pagasa did issue a warning that said storm was approaching the Philippines. Storm 'Trining' was classified, as super typhoon with a maximum of 185 kilometer[s] per hour and the coverage was big. On October 24, 1991, typhoon 'Trining' hit Batangas, the Ilocos Provinces, Isabela, but not Metro Manila or Palawan. Maybe Palawan was affected but if ever it was affected it was only minimal." RTC Decision dated December 7, 1999, p. 6; rollo, p. 55.

[35] See Art. 1739 of the Civil Code.

[36] The testimony of Joey A. Draper, the quarter master in charge of steering the tugboat, was summarized by the RTC as follows:

"On October 25, 1991, he was assigned in the tugboat 'M/T Ayalit.' x x x [The tugboat] was towing the barge 'Judy VII' which was carrying silica sand. x x x He was an ordinary seaman in 1991 and it was his first year as a seaman, although he made several trips to Palawan and Manila. x x x He does not know the qualification[s] of a seaman but he was then a second year high school [student] and though he did not take any examination,

he knew about navigation. When the incident happened in 1991[,] he had no seaman book as it was not yet strict at the time and the seaman book can be dispensed with. He was only 18 years and has an actual training of the work when he boarded the tugboat. Even if he has no formal schooling, the master allowed him to handle the wheel of the tugboat. When they left San Vicente, Palawan for Manila on said date at around 4:00 pm, the weather was fair. When they passed by Linapakan Island, the waves were quite big and the wind was a little bit strong. At that point in time, the barge patrol of 'Judy VII' wave[d] his hand [at] them. Their captain decided to approach the barge. They noticed that [there was] water already inside the barge. About two (2) days later, their captain decided to beach the barge. The said barge then sank and only the barge's house at the back portion of the barge ('the puppa') was above water. He could only remember that they save[d] the bargemen and proceeded to El Nido, Palawan where they secured themselves to save the tugboat. But he could no longer remember how long a time they stayed thereat nor if they went back to the barge 'Judy VII.'" RTC Decision, p. 6; rollo, p. 55.

[37] TSN dated November 22, 1995, pp. 27-29.

[38] In civil cases, parties who carry the burden of proof must establish their case by a preponderance of evidence. §1 of Rule 133 of the Rules of Court.

[39] Respondent proved this allegation through the testimony of its witnesses and submission of documentary evidence. Unseaworthiness was also the finding of the appellate court. Assailed Decision, p. 4; rollo, p. 39.

[40] TSN dated April 26, 1995, p. 44.

[41] TSN dated September 27, 1995, pp. 17-21.

[42] Petitioner's Exhibit "4."

[43] §3(m) of Rule 131 of the Rules of Court.

[44] Delsan Transport Lines, Inc. v. Court of Appeals, 420 Phil. 824, 834, November 15, 2001.

[45] Exhibit "H." See "Respondent's Offer of Evidence," p. 2; records, p. 159.

[46] Petitioner's Memorandum, p. 3; rollo, p. 160.

Respondent's witness, Federico S. Manlapig, testified that Jesus Cortez -- who had already migrated to Australia -- could no longer testify. TSN dated December 15, 1994, p. 9.

[47] RTC Decision dated December 7, 1999, p. 4; rollo, p. 53.

[48] Ibid.

[49] TSN dated December 15, 1994, pp. 9-13.

[50] §1 of Rule 132 of the Rules of Court.

[51] Rule 130 of the Rules of Court.

[52] RTC Order dated March 17, 1995; records, p. 165.

[53] Melchor v. Gironella, GR No. 151138, February 16, 2005; People v. Crispin, 383 Phil. 919, 931, March 2, 2000; People v. Villeza, 127 SCRA 349, 359, January 31, 1984; Paa v. Chan, 128 Phil. 815, 821, October 31, 1967.

[54] Country Bankers Insurance v. Lianga Bay and Community Multi-purpose Cooperative, 425 Phil. 511, 521, January 25, 2002. See also Presidential Commission on Good Government v. Desierto, 445 Phil. 154, 191,

February 10, 2003; *People v. Mallari*, 369 Phil. 872, 884, July 20, 1999; *People v. Cloud*, 333 Phil. 306, 322, December 10, 1996.

[55] *People v. Velasquez*, 352 SCRA 455, 476, February 21, 2001; *Gotesco Investment Corporation v. Chatto*, 210 SCRA 18, 32, June 16, 1992.

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