

MALAYAN INSURANCE CO., INC., PETITIONER, VS. JARDINE DAVIES TRANSPORT SERVICES, INC. AND ASIAN TERMINALS, INC., RESPONDENTS.

G.R. No. 181300. September 18, 2009

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

On July 23, 1994, Petrosul International (Petrosul) shipped on board the vessel "MV Hoegh Merchant" (MV Hoegh) from Vancouver, Canada yellow crude sulphur "said to weigh 6,599.23 metric tons as per draft survey" for transportation to Manila, consigned to LMG Chemicals Corporation (LMG).[1]

Upon arrival of the MV Hoegh in Manila on September 5, 1994, the stevedores of respondent Asian Terminals, Inc. (ATI) undertook discharging operations of the shipment or cargo from the vessel directly onto the steel barges of Creed Customs Brokerage, Inc. (CCBI), which barges were later towed upriver and arrived at the consignee LMG's storage area in Pasig, Manila.

The consignee's hired workers thereupon received and unloaded the cargo with the use of an overhead crane and clamshell grab.

During the discharge of the cargo "ex vessel" onto CCBI's barges, SMS Average Surveyors and Adjusters, Inc. (SMS), LMG's appointed surveyors, reported the Outturn Quantity/Weight of the cargo at 6,247.199 Metric Tons (MT),[2] hence, given that as indicated in the Bill of Lading the weight was 6,599.23 MT, there was a shortage of 352.031 MT.

Once on board the barges, the weight of the cargo was again taken and recorded at 6,122.023 MT,[3] thus reflecting a shortage of 477.207 MT.

The weight of the cargo, taken a third time upon discharge at LMG's storage area, was recorded at 6,206.748 MT[4] to thus reflect a shortage of 392.482 MT.

The cargo having been insured, LMG filed a claim for the value of shortage of cargo with its insurer Malayan Insurance Co., Inc., (petitioner) which paid LMG the sum of P1,144,108.43 in February 1995[5] and was accordingly subrogated to the rights of LMG.

For failing to heed demands to pay for the value of the cargo loss and on the basis of Marine Risk Note RN-0001-17551[6] and Marine Insurance Policy No. 001-0343,[7] petitioner as subrogee[8] filed on September 5, 1995 a Complaint[9] against herein respondents ATI and Jardine Davies Transport Services, Inc. (Jardine Davies), as alleged shipagent of MV Hoegh, together with CCBI and the "Unknown Owner and Unknown Shipagent" of the MV Hoegh, before the Regional Trial Court (RTC) of Manila, for recovery of the amount it paid to LMG. As the identities and addresses of CCBI and the "Unknown Owner and Unknown Shipagent" could not be ascertained, only Jardine Davies and ATI were served with summons.[10]

ATI filed its Answer with Compulsory Counterclaim and Crossclaim[11] denying any liability for the value of the loss of part of the cargo, claiming that it had exercised due care and diligence in the discharge of the cargo from the vessel onto CCBI's barges; that its participation was limited to supplying the stevedores who undertook the discharging operations from the vessel to the barges; and that any loss to the cargo was sustained either prior to its discharge from the vessel or due to the negligence of CCBI.

Jardine Davies likewise filed its Answer with Compulsory Counterclaim and Crossclaim[12] claiming that it was not the shipagent of the MV Hoegh but a mere commercial agent; that any loss sustained by the cargo was due to the inherent vice or defect of the goods and unrecovered spillages, among other things; and that the complaint failed to state a cause of action as there was no valid subrogation.

By Decision of September 9, 2004, Branch 52 of the Manila RTC found for petitioner, disposing as follows:

WHEREFORE, in view of the foregoing, judgment is hereby rendered in favor of the plaintiff ordering the defendants Jardine Davies Transport Services, Inc. and Asian Terminals, Inc. to pay in solidum the former, the following:

- (a) P1,144,108.43 representing the unpaid principal obligation plus legal interest thereon from the time of demand until fully paid;
- (b) 25% of the amount due as and by way of attorney's fees;
- (c) costs of suit; and
- (d) Defendant Creed Customs Brokerage, Inc. and the unknown Owner and Unknown Shipagent of M/V "Hoegh Merchant" are ordered DROPPED from the complaint as the court has not acquired jurisdiction over their persons.

SO ORDERED.[13] (Underscoring supplied)

Discussing in two paragraphs the basis for holding herein respondents Jardine Davies and ATI solidarily liable for the loss, the trial court stated:

It must be emphasized that the loss occurred while the cargo was in the possession, custody and control of the defendants. Absent any proof of exercise of due diligence required by law in the vigilance over the cargo, defendants are presumed to be at fault or to have acted negligently. Such presumption, the defendants failed to overturn to the satisfaction of this court.

Moreover, defendants cannot escape liability by raising as a defense any defect in the contract of insurance as they are not privies thereto. Besides, whatever defect found therein is deemed to have been waived by the subsequent payment made by the plaintiff of consignee's claim (*Compania Maritima v. Insurance Co. of North America*, 12 SCRA 213).

x x x [14] (Underscoring supplied)

On respondents' appeal, the Court of Appeals, by Decision of January 14, 2008,[15] vacated the trial court's decision and dismissed the complaint. It, however, upheld the dropping from the complaint of CCBI and the "Unknown Owner and Unknown Shipagent" of M/V Hoegh.

Thus the appellate court disposed:

WHEREFORE, the assailed Decision is MODIFIED, in that portions (a), (b), and (c) of the same are VACATED and SET ASIDE. Accordingly, judgment is hereby rendered DISMISSING the complaint against Asian Terminals, Inc. and Jardine Davies Transport Services, Inc. in Civil Case No. 95-75224. Costs against Malayan Insurance Corp., Inc.

SO ORDERED.[16]

In sustaining respondents' appeal, the appellate court held that petitioner failed to establish the fact of shortage in the cargo, doubts having arisen from the disparity in quantity as stated the bill of lading (6,559.23 MT) and the shipment invoice[17] (6,477.81 MT), as well as the discrepancy in quantity as reflected in SMS's Report of Survey[18] and the Comparison of Outturns[19] incorporated therein; that the same Report shows that inaccuracies or errors in the manner of/or equipment used in measuring the weight of the cargo might have resulted in variances in the outturn quantity; and that the testimonies of petitioner's witnesses, Eutiquiano Patiag[20] and Emmanuel Gotladera,[21] relative to the contents of the bill of lading may not be credited since they were not present at the actual weighing and loading of the cargo.

In fine, the appellate court held that the presumption accorded to a bill of lading - as prima facie evidence of the goods described therein, had been sufficiently rebutted.

Since the right of subrogation in favor of an insurer arises only upon payment of a valid insurance claim, the appellate court held that petitioner was not entitled to restitution, the insurance policy between LMG and petitioner having already expired on December 31, 1993[22] or seven (7) months prior to the loading of the shipment on July 23, 1994; and that the premium for Marine Risk Note RN-0001-17551 and/or the Endorsements[23] which purportedly extended the effectivity of the policy was paid only on October 6, 1994 or a month after the arrival of the cargo.[24]

The appellate court went on to note that petitioner also failed to prove that respondent Jardine Davies was the local shipagent of the MV Hoegh given that such vessel was sub-chartered by LMG's shipper Petrosul from Jardine Davies' principal Pacific Commerce Line (PCL), thereby making Petrosul the carrier which undertook to transport LMG's cargo.

The appellate court thus concluded that liability could not be imputed to Jardine Davies, its principal PCL not being the carrier of the cargo and no privity of contract existed between it (Jardine Davies) and Petrosul.

Respecting ATI, the appellate court held that no evidence that any shortage occurred since neither LMG nor its surveyors lodged any protest on the manner by which ATI's stevedores carried out the discharging operations.[25]

Hence, the present petition raising the following issues:

I

WHETHER OR NOT THE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT (THE) PRESUMPTION ACCORDED ON THE BILL OF LADING HAS BEEN REBUTTED.

II

WHETHER OR NOT THE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT MALAYAN IS NOT ENTITLED TO REIMBURSEMENT SINCE THERE WAS NO VALID SUBROGATION.

III

WHETHER OR NOT THE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT DEFENDANT ASIAN TERMINALS, INC. IS NOT SOLIDARILY LIABLE WITH DEFENDANT JARDINE DAVIES.

IV

WHETHER OR NOT THE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT PLAINTIFF DID NOT CONSIDER JARDINE DAVIES AS "M/V HOEGH'S" LOCAL SHIPAGENT.[26]

The issue boils down to whether petitioner discharged its burden of proving by clear, competent and convincing evidence that there was shortage in the shipment of yellow crude sulphur to the consignee LMG.

The Court holds not.

Before proceeding to the substantive issues, the Court deems it fit to first resolve a procedural issue raised by respondents in their respective Comments[27] - that the present petition seeks to pass upon questions of fact which is not allowed in a certiorari petition whose province is confined to questions of law.

While it is settled that the Court's jurisdiction in a petition for review on certiorari under Rule 45 of the Revised Rules of Court is limited to a review of errors of law and does not, as a rule, involve the re-examination of the evidence presented by the parties, the Court has recognized several exceptions, viz:

The rule in our jurisdiction is that only questions of law may be entertained by this Court in a petition for review on certiorari. This rule, however, is not ironclad and admits certain exceptions, such as when (1) the conclusion is grounded on speculations, surmises or conjectures; (2) the inference is manifestly mistaken, absurd or impossible; (3) there is grave abuse of discretion; (4) the judgment is based on a misapprehension of facts; (5) the findings of fact are conflicting; (6) there is no citation of specific evidence on which the factual findings are based; (7) the findings of absence of facts are contradicted by the presence of evidence on record; (8) the findings of the CA are contrary to those of the trial court; (9) the CA manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion; (10) the findings of the CA are beyond the issues of the case; and (11) such findings are contrary to the admissions of both parties.[28] (Emphasis supplied)

Given the bold-faced exceptions in the immediately-quoted ruling of the Court, which are present in the case at bar, not to mention the fact that the trial court's conclusion "that the loss occurred while the cargo was in the possession, custody and control of the defendants" is bereft of any reference to specific evidence on record upon which it was based, the Court takes a second, hard look at the evidence.[29]

Petitioner argues, in the main, that the appellate court erred in failing to consider the bill of lading as a binding contract between the carrier and shipper or consignee insofar as the accuracy of the weight of the cargo is concerned. It insists:

x x x [T]here is no need to confirm the correctness of its contents by other evidence outside the Bill of Lading as it is already conclusive upon the parties. To argue otherwise would be to allow an anomalous situation since defendant carrier can opt not to honor the terms and conditions of the bill of lading which they themselves [sic] prepared by simply questioning the disparity of the quantity between the bill of lading and the invoice. x x x[30]

The presumption that the bill of lading, which petitioner relies upon to support its claim for restitution, constitutes prima facie evidence of the goods therein described was correctly deemed by the appellate court to have been rebutted in light of abundant evidence casting doubts on its veracity.

That MV Hoegh undertook, under the bill of lading, to transport 6,599.23 MT of yellow crude sulphur on a "said to weigh" basis is not disputed. Under such clause, the shipper is solely responsible for the loading of the cargo while the carrier is oblivious of the contents of the shipment.[31] Nobody really knows the actual weight of the cargo inasmuch as what is written on the bill of lading, as well as on the manifest, is based solely on the shipper's declaration.[32]

The bill of lading carried an added clause - the shipment's weight, measure, quantity, quality, condition, contents and value unknown." Evidently, the weight of the cargo could not be gauged from the bill of lading.

As observed by the Court of Appeals, there were also significant differences in shipment quantity at various stages of transit. These disparities in the quantity at various stages of the cargo's transfer after its arrival to its final destinations in Manila are reflected in the Comparison of Outturns[33] embodied in SMS's Report of Survey, the pertinent portions of which read:

GENERAL REMARKS

The resultant variations among the foregoing figures per stage of transit as compared against the Bill of Lading Quantity/Weight could probably be attributed to any and/or a confluence of the following factors:

1. Variance in moisture content; evaporation and/or absorption of moisture due to exposure of the subject shipment to the elements otherwise atmospheric change, attendant all throughout the stages of transit from port of loading/origin to final destination at consignee's receiving terminal;
2. Unrecovered spillages during unloading of the subject shipment from vessel to barges, and during receiving at LMG Terminal from barges to stock pile area;
3. Shortage of about 352.031 Metric Tons as established on completion of discharging the subject shipment per vessel's draft, and/or 477.207 Metric Tons as established based on quantity/weight received by barges at shipside per displacement method;
4. Probable error/oversight aboard vessel and barges due rough sea condition prevailing at the time of initial and final draft surveys; and
5. Variance due to inaccuracies or errors in manner, procedure, method, and/or equipments used or applied in determining the outturn quantity/weight of the subject shipment per stage of transit from port of loading/origin to final port of destination at consignee's designated receiving terminal.[34] (Underscoring supplied)

In the absence of clear, convincing and competent evidence to prove that the cargo indeed weighed, albeit the Bill of Lading qualified it by the phrase "said to weigh," 6,599.23 MT at the port of origin when it was loaded onto the MV Hoegh, the fact of loss or shortage in the cargo upon its arrival in Manila cannot be definitively established. The legal basis for attributing liability to either of the respondents is thus sorely wanting.

Petitioner points out, however, that the shipment was covered not only by the Marine Risk Note but also by Open Marine Insurance Policy which, it explains, means that the value of the thing insured has not been agreed upon but left to be ascertained in the event of loss and, therefore, covered by a continuing insurance long before the cargo even loaded on board; and that Jardine Davies cannot set up any defect in the insurance policy as a defense since it is not privy to the contract of insurance between it (petitioner) and LMG.

These matters pointed out by petitioner are closely intertwined with the terms and conditions embodied in the insurance contract between petitioner and LMG such that petitioner's right to recovery unquestionably derives from contractual subrogation as an incident to an insurance relationship.[35]

Jurisprudence mandates the presentation in evidence of the marine insurance policy so that its terms and conditions can be scrutinized and the extent of coverage[36] can be determined. Respondents were thus well within their rights to scrutinize the contents thereof for the purpose of determining the terms of its validity or effectivity, among other things.

Given that it is respondents who stand to be prejudiced by any claims for restitution arising from petitioner's right of subrogation under the open policy, it is, at best specious to insist that they are barred from invoking any contractual defect as a defense under the pretext that they were not privy to the insurance contract.

Recall that petitioner's main cause of action under the complaint was based on both the Marine Risk Note and the

Open Policy. The Subrogation Receipt[37] clearly states that the amount paid was in full settlement of LMG's claim under petitioner's Marine Risk Note Number RN-001-17551. The Marine Risk Note, however, is not the insurance policy. It merely constitutes an acknowledgment or declaration of the shipper about the specific shipment covered by the marine insurance policy, the evaluation of the cargo and the chargeable premium.[38] The marine open policy is the blanket insurance to be undertaken by the insurer on all goods to be shipped by the consignee during the existence of the contract.

Apart from not being a legal source of subrogation, the Marine Risk Note is invalid for, as earlier stated, it was issued only on July 20, 1994 or after the main insurance contract had already lapsed (by the end of December 1993), and the insurance premium on this risk note was paid only on October 6, 1994[39] or a month after the shipment had already arrived in Manila, a peculiarity that none of petitioner's witnesses has endeavored to explain.

Petitioner's marine insurance policy explicitly states under its effectivity clause that it shall cover "all shipments effective January 10, 1993 sailings and all shipments made thereafter until December 31, 1993 sailings." [40] Coverage had, therefore, expired almost seven (7) months prior to the loading of the shipment on July 23, 1994.

Petitioner can take no refuge in its claim that the Endorsement dated December 29, 1993[41] proves that the subject insurance policy was amended or renewed. The said Endorsement was never adverted to in the complaint filed before the trial court, its existence coming to light only at the close of the testimony on cross of petitioner's witness Emmanuel Gotladera on the expired marine insurance policy.[42] In fact, said witness did not identify the signatory to the Endorsement nor on its genuineness and due execution, thus rendering his testimony thereon as mere hearsay.

A final note. It bears stressing that there is nothing in the records showing that ATI was negligent in its handling of the cargo when its stevedores discharged the same from the vessel directly onto the steel barges of CCBI.

Contrary to the trial court's findings, ATI was never in custody or possession of the shipment, its participation having been limited to where "the stevedores of Asian Terminals, Inc. (ATI) undertook the discharging operations of the shipment ex vessel to barges thru the use of vessel's cargo gears, and clamshell/ grab,"[43] a fact confirmed by petitioner's own witness Eutiquiano Patiag.

More importantly, representatives of SMS, the consignee's assigned surveyors, were present throughout the entire discharging operations - from the time the cargo was unloaded from the MV Hoegh until its discharge at LMG's chemical terminal - and never reported any mishap or incidence of mishandling on the part of ATI.[44]

WHEREFORE, the assailed Court of Appeals January 14, 2008 Decision in connection with CA-G.R. CV No. 84139 is AFFIRMED.

Costs against petitioner.

SO ORDERED.

Ynares-Santiago[*], Brion, Del Castillo, and Abad, JJ., concur.

[*] Additional member per Special Order No. 691 dated September 4, 2009.

[1] Vide Bill of Lading, Exhibit "C"; records, p. 182,

[2] Vide Report of Survey, Exhibits "H-2"; id. at 189.

- [3] Id., Exhibit "H-3"; id. at 190.
- [4] Id., Exhibit "H-5"; id. at 192.
- [5] Based on the shortage of 392.482 MT.
- [6] Exhibit "A"; records, p. 175.
- [7] Exhibit "B"; id. at 176-181.
- [8] Vide Subrogation Receipt, Exhibit "F"; id. at 185.
- [9] Id. at 1-5.
- [10] Vide October 21, 1996 Order; id. at 79-80.
- [11] Id. at 18-21.
- [12] Id. at 27-33.
- [13] Vide note 2 at 405-406.
- [14] Records, p. 405.
- [15] Penned by Justice Normandie B. Pizarro, with the concurrence of Justices Edgardo P. Cruz and Fernanda Lampas Peralta; CA rollo , pp. 171-173.
- [16] Id. at 183.
- [17] Invoice No. 114171, Exhibit "G;" records, p.186.
- [18] Exhibit "H"; id. at 187-193.
- [19] Exhibit "4"; id. at 192.
- [20] A surveyor employed with SM Santos Adjusters and Surveyors (formerly SMS Average Surveyors and Adjusters, Inc.).
- [21] A Claims Processor for petitioner Malayan Insurance.
- [22] Vide note 9 at 179.
- [23] Exhibits "K" and "M," dated December 8, 1994 and December 29, 1993, respectively; id. at 196 and 198.
- [24] The phrase was erroneously stated in the appellate court's decision as "or a month after the loading of the cargo."
- [25] Vide note 15.
- [26] Rollo, p. 28. Bracketed insertion supplied.
- [27] Jardine's and ATI's Comment; id. at 75-83 and 85-96, respectively.
- [28] International Container Services, Inc. v. FGU Insurance Corporation, G.R. No. 161539, June 27, 2008, 556 SCRA 194, 199 citing Philippine Charter Insurance Corporation v. Unknown Owner of the Vessel M/V "National Honor, G.R. No. 161833.
- [29] Wallem Philippines Shipping, Inc. v. Prudential Guarantee & Assurance, Inc., G.R. No. 152158, February 7, 2003, 397 SCRA 158, 167.

[30] Vide Petition, rollo, p. 31.

[31] Wallem Philippines Shipping, Inc. v. Prudential Guarantee & Assurance, Inc., supra note 29.

[32] Ibid.

[33] Vide note 19.

[34] Exhibits "H-5" to "H-6"; records, pp. 192-193.

[35] Malayan Insurance Co., Inc. v. Regis Brokerage Corp., G.R. No. 172156, November 23, 2007, 538 SCRA 681, 690.

[36] Malayan Insurance Co., Inc. v. Regis Brokerage Corp.; Wallem Philippines Shipping, Inc., v. Prudential Guarantee and Assurance, Inc., supra notes 36 and 29 respectively.

[37] Vide note 8.

[38] Aboitiz Shipping Corporation v. Philippine American General Insurance, Co., G.R. No. 77530, October 5, 1989, 178 SCRA 357, 360.

[39] Vide Exhibit "I"; records, p. 194.

[40] Exhibit "B-3-b"; id. at 179.

[41] Vide note 23.

[42] TSN September 1, 2000, pp. 10-12.

[43] Vide Report of Survey at note 18; records, p. 188.

[44] Vide TSN January 26, 2001 (Eutiquiano Patiag), pp. 5-8.

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