THE AMERICAN EXPRESS CO., INC., PLAINTIFF AND APPELLANT, VS. JOAQUIN NATIVIDAD, DEFENDANT AND APPELLANT.

G.R. No. 22073. September 25, 1924

Ponente: MALCOLM, J.

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MALCOLM, J.:

During the latter part of 1920 and the first part of 1921, certain shipments of merchandise from Japan were discharged at Cebu, Philippine Islands. Joaquin Natividad was then the collector of customs of that port. The merchandise was delivered to Chua Cho Pack & Co., without the presentation of bills of lading, after the execution of bonds in favor of the Government of the Philippine Islands. Subsequently, the American Express Co., Inc., presented the bills of lading and demanded the merchandise or its value, but Mr. Natividad having delivered the goods to another was unable to comply with this demand.

As the outcome of the incidents above narrated, the American Express Co., Inc., sought in the Court of First Instance of Manila by nine causes of action to recover from Joaquin Natividad a total amount of P55,102.18, later reduced to P43,131.78. The demurrer of the defendant set up that he, as a private individual, was not a proper party defendant, and when this demurrer was overruled, he defended on the ground that the merchandise was delivered to another upon the execution of bonds to produce the corresponding bills of lading. After trial judgment was rendered in favor of the plaintiff and against "al Administrador de Aduanas de Cebu" for the sum of P43,131.78, without interest and costs.

From this judgment, both parties have appealed. The plaintiff-appellant assigns as its principal error, that judgment was entered against the collector of customs of Cebu and not against Joaquin Natividad personally. The defendant-appellant assigns as his principal error, the failure of the trial court to find and declare that the plaintiff is not the real party in interest in this cause.

Reversing the order of presentation, we now propose to take up for consideration, first, the appeal of the defendant-appellant, and second, the appeal of the plaintiff-appellant.

DEPENDANT-APPELLANT'S APPEAL

It is enough to entitle plaintiff to maintain the action, as real party in interest, if he has the legal title to the demand and defendant will be protected in a payment to or recovery by him. Here, the record discloses that the bills of lading were issued to the order of the shipper, indorsed by the latter in blank, and delivered to the American Express Company, with drafts attached for collection, the latter being drawn through the Bank of Taiwan on Chua Cho Pack & Co., and either indorsed by the Bank of Taiwan in blank, or to the Philippine National Bank, or order, and transferred by the latter to the order of the American Express Company. The American Express Company is also the holder of a power of attorney accomplished by the Bank of Taiwan. The conclusion is thus unavoidable that the American Express Company, Inc., the plaintiff, is the real party in interest and not the Bank of Taiwan as contended by the defendant. (Code of Commerce, art. 708; S. S. Thames vs. Seamen [1872], 14 Wall., 98;

Hieskell vs. Farmers' and Mechanics' National Bank [1879], 89 Pa. St., 155.)

A further potent reason working against the pretensions of the defendant, is that neither in the demurrer nor the answer was any objection made in the lower court to the right of the plaintiff to prosecute this action. The rule is that the objection, that the plaintiff is not the real party in interest, must be set up in the answer to enable defendant to rely upon it, or it will be unavailing on the trial. (1 Sutherland, Code Pleading, Practice, and Forms, sec. 547.) A party cannot be permitted to follow one theory at the trial, abandon it, and then announce a new theory in the appellate court. (Agoncillo and Marino vs. Javier [1918], 38 Phil., 424.)

For two reasons, therefore, the first predicated on the facts, and the second predicated on the pleadings, we rule against the defendant-appellant.

PLAINTIFF-APPELLANT'S APPEAL

Plaintiff asks us to modify the judgment appealed from so that instead of the collector of customs of Cebu being made officially liable, Joaquin Natividad shall be made personally liable. A discussion of this phase of the case requires us to set forth the applicable law and to analyze applicable decisions.

Section 1316 of the Administrative Code, in force when this action accrued, but subsequently amended by Act No. 3096, reads as follows:

"When a collector of customs delivers merchandise without the surrender of the proper bill of lading, he may protect himself from any liability to the rightful holder of the bill by requiring the person to whom delivery is made to execute a sufficient bond in an amount greater than the invoice, or manifest, or in the absence of both, greater than the appraised value of the merchandise. Such bond shall run to the Government of the Philippine Islands, for the benefit of whom it may concern, and shall be conditioned for the production of the proper bill of lading or for the satisfaction of any damages occasioned to its lawful holder by reason of wrongful delivery."

Arising out of the above-quoted legal provisions are three classes of cases. One series of cases culminating in the decision of this court in the case of Tagawa vs. Aldanese and Union Guarantee Co. ([1922], 43 Phil., 852), relate to actions brought by holders of bills of lading against the Insular Collector of Customs who delivered merchandise without the surrender of the proper bills of lading, and the parties which executed the indemnity bonds for the production of the bills of lading covering the shipments of merchandise. In the case cited is found the following sentence: "The liability of the collector of customs is determined not by the sum named in the indemnity bond, but by the value of the merchandise which he has surrendered without the proper bill of lading, and this latter sum in turn fixes the damages which the principal and surety on the indemnity bond should make good to the collector of customs so that he can reimburse the holder of the bill of lading."

A second type of cases is disclosed by our decision in Lung Chea Kung Kee & Co. vs. Aldanese and Chua Soco ([1924], 45 Phil., 784). There, the merchandise was wrongfully delivered without surrender of the bill of lading or the execution of a bond. The plaintiff accordingly sought to recover the value of the merchandise from the collector of customs solely, and in this he was successful. While it has not escaped our notice that throughout the decision the modifying word "officially" is used, to denominate the liability of the collector of customs, yet the judgment ultimately rendered was "in favor of the plaintiff and against Vicente Aldanese, as collector of customs" (the last clause being undoubtedly merely descriptive of the personality of the defendant). At least in the later case of Lung Chea Kung Kee & Co. vs. Wright (R. G. No. 22512),[1] the Insular Collector of Customs was not permitted to satisfy the judgment by drawing on Government funds.

And now we have before us a third kind of case. Here, although bonds have been offered and approved, redress is not sought against the makers of the indemnity bonds but only against the individual collector of customs. That

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the holder of the bills of lading has such option, we have no doubt.

From the moment merchandise is discharged on customs premises, it becomes the duty of the person acting as collector to hold the same until the bills of lading are duly surrendered to him. If the collector releases the merchandise without the production of the bills of lading, no matter what representations are made to him, he does so at his peril. He must take care that he delivers the merchandise to the right person and if he delivers it to the wrong person, he is personally liable. He may, of course, as provided by section 1316 of the Administrative Code, protect himself from any liability to the rightful holder of the bill of lading for damages occasioned by reason of a wrongful delivery, by requiring the person to whom delivery is made to execute a sufficient bond. Such a bond will entitle the collector to a judgment over against the bondsmen in the amount of the value of the merchandise surrendered without the proper bill of lading. But if the collector fails to protect himself, these are matters which affect his interest and not the interest of the rightful holder of the bills of lading.

We rule that a collector of customs is personally liable under section 1316 of the Administrative Code for the wrongful delivery of merchandise, and that this liability is in no way diminished because he has taken bonds to protect himself from liability. The result, therefore, may prove a hardship to the defendant, but it should not, if an endeavor is made to recoup himself from the persons who improperly secured the merchandise and the persons who went on the indemnity bonds. It is not as defendant states on account of "the chimera of being more solvent than the Government of the Philippine Islands that the action is pressed against him personally, but on account of his personal responsibility under the law.

Ruling, therefore, against defendant-appellant and in favor of plaintiff-appellant, the result is to affirm the judgment appealed from, with the sole modification that it shall run against Joaquin Natividad and not against the collector of customs of Cebu. Without costs in this instance, it is so ordered.

Johnson, Street, Avanceña, Villamor, Ostrand, and Romuadez, JJ., concur.

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