

**O'FARREL Y CIA., DOING BUSINESS UNDER THE NAME OF
MALAYSIAN NAVIGATION COMPANY, PLAINTIFF AND APPELLANT,
VS. THE MANILA ELECTRIC COMPANY, DEFENDANT AND APPELLEE.**

G.R. No. 31222. October 29, 1929

Ponente: STREET, J.

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STREET, J.:

This action was instituted in the Court of First Instance of the City of Manila by O'Farrel y Cia., a commercial partnership doing business under the name of the Malaysian Navigation Company, with its principal offices in the City of Manila, for the purpose of recovering from the Manila Electric Company, upon three causes of action, the aggregate amount of P163,990, with interest, alleged to be due to the plaintiff for breach of contract. About four months after the action was begun, O'Farrel y Cia. was declared insolvent, and W. J. O'donovan was appointed assignee in insolvency. Thereafter the action was prosecuted under his direction, by authority of the court, though the title of the case was not changed. In the course of the proceedings in the Court of First Instance the case was consolidated with another action instituted in the same court, against the same defendant, by the Societe Francaise des Charbonnages du Tonkin, but in this appeal we are concerned only with the action instituted by O'Farrel y Cia. Upon hearing the case now under review the trial court found that the action was not well founded and absolved the defendant from the complaint, with costs against the plaintiff. From this judgment the plaintiff appealed.

It appears that the Societe Francaise des Charbonnages du Tonkin (hereinafter referred to as the coal company) is engaged in mining coal in Hongay, Tongking, China while the Manila Electric Company is operating a plant for the generation of electricity in the City of Manila. At the same time O'Farrel y Cia. (Malaysian Navigation Company) was, during the period with which we are here concerned, a shipping company engaged in operating freight vessels in Oriental seas. In the operation of its plant the defendant company consumes large quantities of coal, and in years past it has taken its supplies in part from the coal company in Hongay. The old arrangement under which the defendant had been purchasing coal from said company having been found to be unsatisfactory, for some reason or other, to the defendant, a new contract was entered into, in the month of August, 1923, whereby the coal company agreed to sell and the defendant agreed to buy, in the period from September 8, 1923, to August 31, 1924, 75,000 tons of dust coal, with a margin of 10 per cent more or less. In this contract it was agreed that delivery should be taken by the defendant in lots of about from 2,000, to 4,000 tons at regular intervals, as could best be arranged to suit both purchasers and sellers, the purchasers agreeing to take not less than about 6,000 tons per month and to send not more than one steamer to be loaded at the same time. It was also stipulated that the dust coal, the subject of the sale, should be loaded either in the stream or alongside the wharf or quay at Hongay, at the option of the coal company, "with quick despatch, vessels taking their turn in loading." As neither the coal company nor the Manila Electric Company was engaged in operating seagoing vessels, it became necessary for the defendant to make arrangement with some shipping company for the service necessary to transport the coal to Manila. This need being apparent, Gaston O'Farrel, the agent of the coal company, in Manila,

directed the attention of the defendant company to the Malaysian Navigation Company, the trade-name of O'Farrel y Cia., as operating vessels that would be available for transporting the coal. In this connection it should be noted that O'Farrel was agent both of the coal company and the Malaysian Navigation Company.

The contract between the plaintiff and the defendant for the transportation of the coal purchased by the defendant from the coal company was, in substance, as follows:

- The Malaysian Navigation Co. undertakes to transport seventy-five thousand tons of coal (10 per cent more or less), from Hongay to Manila at the freight rate of four pesos and fifty centavos (P4.50), per ton of 1,016 kilos, less a rebate of 1 per cent.
- Freight to be paid on arrival of each shipment at Manila as per B/L.
- Loading to be for account and risk of shippers according to customary quick despatch subject to turn of mines.
- For discharging at Manila the Manila Electric Co. will provide sufficient lighters to receive the coal at ship side as fast as the ship can discharge. Demurrage, if any, to be at the rate of P600 per day or fraction thereof; it is understood that the Manila Electric Co. will not be compelled to pay demurrage for days when it shall have received at least 500 tons of coal.

The practice followed by the parties in the performance of this contract was that, upon the receipt of information in Manila by the defendant company from the coal company, advising that a cargo of coal was, or soon would be available in Hongay, the message was turned over to O'Farrel y Cia., and the latter company made the arrangements for the sending of a boat to Hongay. But delay in the taking on of coal occurred in Hongay, owing to the inability of the coal company to deliver the coal to the waiting boats. The preponderance of the proof shows that this delay was due to the fact that the cranes of the coal company at Hongay were defective and often out of order. At any rate the result was that the plaintiff's boats were frequently kept waiting in the port; and it in fact appears that altogether they were held there idle one hundred twenty-three days, to say nothing of the time occupied in the lading of the ships after their turn had come for taking cargo. There can be no doubt, we think, that these delays were attributable to the coal company.

It appears that, upon the visits that the plaintiff's ships made to Hongay, the coal necessary for the operation of said ships was there taken on board with the assent of the coal company; and in the end the plaintiff became indebted, to the coal company, on account of such advances of coal, in the amount of \$21,817.79, Hongkong currency. As a result of the inability of the plaintiff to liquidate this claim for coal advanced to the plaintiff, the officers of the latter became reluctant to send its vessels any longer to Hongay, for fear that the ships would be libeled for the coal company's claim.

Owing to the causes above suggested, deliveries of coal to the defendant company under its contract with the coal company amounted in June, 1924, only to about 41,375 tons, or some 18,625 tons less than the amount that should have been delivered; and the only delivery thereafter made to the defendant was a shipment that came on the Sealda in the latter part of August, 1924. This boat did not belong to the Malaysian Navigation Company but was obtained by it from another owner. Upon giving notice of the dispatch of the Sealda for coal in the latter part of August, 1924, the general manager of the Manila Electric Company called the attention of the coal company to the fact that that company was short nearly 20,000 tons in its contractual deliveries, and in view of this fact the coal company was advised to consider the contract closed. This step received the approval of the coal company, and contractual relations between it and the defendant terminated. In a conversation that occurred at about this time between an officer of the defendant and a representative of the Malaysian Navigation Company, the latter communicated to the former the fact that it would be unable to proceed further under the contract for the

transportation of coal, herein-above quoted, and, on behalf of the Malaysian Navigation Company, he acquiesced in the termination of the contract existing between them.

In the plaintiff's complaint three separate causes of action are stated, in the first of which the plaintiff seeks to recover the sum of P80,190, as compensation which the plaintiff would have received had all of the coal been delivered to it for transportation, as contemplated in the contract between the plaintiff and the defendant. In the second cause of action the plaintiff seeks to recover the sum of P73,800, being the amount represented by the demurrage claimed by the plaintiff, at the rate of P600 per day, for the one hundred twenty-three days during which its ships were detained in Hongay awaiting their turn to take on coal. In the third cause of action the plaintiff seeks to recover the sum of P10,000 for demurrage of a boat at Hongay which had to sail for Saigon in ballast and without cargo.

Directing our attention to the plaintiff's three causes of action in the order in which they are stated in the complaint, we are of the opinion that the trial court committed no error in holding that the plaintiff is not entitled to recover damages against the defendant for breach of the contract for the transportation of coal, for more than one reason, namely, first, because the plaintiff, the Malaysian Navigation Company, was unable to fulfill its contract to supply ships for the transportation of the coal and desisted therefrom; and, secondly, because in the end the contract was in effect cancelled by mutual consent. The difficulty in which the plaintiff found itself was due evidently to the failure of the coal company to make prompt deliveries of coal aboard the plaintiff's boats at Hongay. But the defendant was in no wise chargeable with either the causes or consequences of these delays, as will be more clearly seen in our discussion of the second cause of action. The theory underlying the plaintiff's case throughout is that the coal company was agent of the defendant in the matters affecting the performance of the contract between the plaintiff and the defendant. We are unable to see any basis for this contention; and, on the contrary, the position of O'Farrel as agent both of the coal company and of the plaintiff indicates the impropriety of considering the coal company as the agent of the defendant. No error was in our opinion committed in denying damages to the plaintiff under the first cause of action.

The heart of the controversy is, we think, more properly found in the issue presented under the second cause of action, which raises the question of the responsibility of the defendant for demurrage of the plaintiff's vessels at Hongay. In connection with this matter it will be noted, upon careful inspection of the contract between the plaintiff and the defendant, that the stipulation for demurrage at the rate of P600 per day, or fraction thereof, is found in the paragraph of the contract which deals especially with the discharge of coal at Manila. There is no stipulation for demurrage incident to delay at Hongay; and, on the contrary, it is stipulated, in the third paragraph of the contract, that loading at Hongay should be "according to customary quick despatch subject to turn of mines." In appellant's brief emphasis has been placed upon the words customary quick despatch and the other words subject to turn of mines have not been taken so much into account. It appears in the proof that the vessels desirous of lading coal at Hongay were laden according to the custom of the port, in strict rotation, except in one instance where a Malaysian ship was given preference over two other ships whose owners did not object. The expression "subject to turn of mines" should be interpreted, we think, to mean that the lading of the vessels should be subject to the output of the mines and that vessels should take their turn in taking on the coal. It results that the lading of coal was dependent upon the output of the mines and the order of ships seeking cargo at the loading places. The expression "subject to turn of mines" was no doubt inserted in the contract in lieu of a stipulation for demurrage. The insertion of that expression in clause 3 made the Malaysian ships dependent upon the loading facilities of the coal company at Hongay, and relieved the defendant from any liability for demurrage by reason of delays that might occur in that port incident to the obtaining and loading of the coal.

The plaintiff here invokes article 656 of the Code of Commerce, which reads as follows:

"If in the charter party the time in which the loading and unloading is to take place is not stated, the customs of the port where these acts take place shall be observed. After the period stipulated or the customary one has passed, and should there not be in the freight contract an express clause fixing the indemnification for the delay, the captain shall be entitled to demand demurrage for the usual and extra lay days which may have elapsed in loading and unloading."

We are of the opinion, however, that the stipulation of the contract making the loading of coal subject to the turn of mines renders article 656 inapplicable, this being a special stipulation determining the order of loading. It results that the defendant cannot be held responsible for the delay that occurred.

The point just determined is fatal also to the third cause of action, in which recovery is sought for delay incurred by one ship which left without cargo.

The judgment appealed from, in our opinion, is without error, and the same will be affirmed, with costs against the appellant. So ordered.

Avanceña, C. J., Ostrand, Villamor and Romualdez, JJ., concur.

DISSENTING

JOHNS, J., with whom concurs VILLA-REAL, J.:

In the main, we agree with the majority opinion. Our dissent is based upon the third clause of the contract which reads:

"3. Loading to be for account and risk of shippers according to customary quick despatch subject to turn of mines."

As we analyze it, the defendant is liable to the plaintiff for any breach of that part of the contract.

Speaking about the delay in loading the ships, the majority opinion says that:

"It in fact appears that altogether they were held there idle one hundred twenty-three days, to say nothing of the time occupied in the lading of the ships after their turn had come for taking cargo. There can be no doubt, we think, that these delays were attributable to the coal company."

The majority opinion also says:

"But delay in the taking on of coal occurred in Hongay, owing to the inability of the coal company to deliver the coal to the waiting boats. The preponderance of the proof shows that this delay was due to the fact that the cranes of the coal company at Hongay were defective and often out of order."

The contract expressly provides that the "loading to be for account and risk of shippers according to customary quick despatch." As we analyze it, any delay in the loading of the ships for and on account of the defective cranes or machinery of the coal company, should be at the expense of the defendant, who was the shipper of the coal. We concede that any delay in the loading of the ships caused by the failure of the mines to furnish the necessary amount of coal would be at the risk of the plaintiff, because the contract so provides. But it also provides that the loading shall be for account and risk of shippers "according to customary quick despatch," and the failure to load the ships with coal by reason of defective, worn out cranes and machinery is not loading the ship "according to customary quick despatch." Under the contract, as we construe it, plaintiff is clearly entitled to a judgment against the defendant for any damages which it may have sustained by reason of the failure to load its ships with coal "according to customary quick despatch," for the simple reason that the contract expressly provides that the

loading shall be "for account and risk of shippers" In the face of that provisions, how can it be said that any damages for such delay, as the majority opinion says, were for and on account of the plaintiff? The defendant is bound by the terms and conditions of its contract, which specifically says that the loading shall "be for account and risk of shippers," which in this case is the defendant, and the proof is conclusive that the loading was not made "according to customary quick despatch," and the majority opinion finds that the delay "was due to the fact that the cranes of the coal company at Hongay were defective and often out of order." The clause in the contract "subject to turn of mines" should only be applied to the failure of the mines to produce the amount of coal necessary to load the ships. The majority opinion having found as a fact that "the preponderance of the proof shows that this delay was due to the fact that the cranes of the coal company at Hongay were defective and often out of order," it must follow that the plaintiff is entitled to judgment against the defendant for damages for the delay caused by worn out, defective cranes in the loading of the ships. Be that as it may, the legal effect of the majority opinion is to hold that the loading of the ships by means of such defective cranes or worn out machinery was for and on account of the plaintiff and not the defendant which was the shipper under that clause of the contract. In other words, the majority opinion nullifies the third clause of the contract and makes the plaintiff the shipper of the coal and relieves the defendant from any liability for any delay in the loading of the ships caused by defective cranes or worn out machinery, and violates every rule of statutory construction.

Upon such grounds, I dissent.

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