

JOAQUIN CASTRO & CO., PLAINTIFF AND APPELLEE, VS. MAERSK LINE, DEFENDANT AND APPELLANT.*G.R. No. 42233. October 16, 1935*

Ponente: IMPERIAL, J.

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On November 3, 1932, the plaintiff and the defendant, through their agents, entered into a contract whereby the latter, for the sum of P277.50 as freight, agreed to transport by the motorship Peter Maersk a 40-ton boiler from Manila to Cebu for transshipment at Cebu to the vessel Islas Visayas. The contract expressly stated that the boiler should not weigh more than 40 tons because the boom of the Peter Maersk was incapable of lifting heavier objects. During a conversation had on board the Peter Maersk between Augusto Suzara, agent for the plaintiff, Captain Petersen of said vessel, in the presence of R. T. Fitzsimmons, Suzara carried various papers one of which showed that the boiler weighed a little less than 40 tons and another more than 41 tons, whereupon Captain Petersen, in the face of such uncertainty, demanded from Suzara a certificate showing that the boiler did not weigh to exceed 40 tons, otherwise he would refuse to transport it. Suzara negotiated for said certificate but failed to obtain it. In view of this, the defendant, on the 7th of said month, formally notified the plaintiff, or rather Suzara, that it could not transport the boiler, being convinced that it weighed more than 42 1/2 tons, placing the freight paid by the plaintiff at the latter's disposal.

Upon the defendant's refusal to transport the boiler, the plaintiff brought an action against the former for specific performance of the contract and to recover damages. Its demurrer overruled, the defendant set up various special defenses in its answer, calculated to relieve it from all responsibility. It finally appealed from the judgment ordering it to pay to the plaintiff the sum of P4,438, to refund the freight charges of P277.50, with legal interest on both sums, and to pay the costs.

In its appeal, the defendant contends that the court erred in overruling its demurrer; in declaring that the boiler weighed less than 40 tons; in awarding the plaintiff indemnity in said amount, and in ordering the refund of the freight charges.

The action was for specific performance of the contract to transport and to recover damages. The defendant, relying upon the provisions of article 1124 of the Civil Code, filed a demurrer to the complaint on the ground that the plaintiff was obliged to choose between the two actions, not both. The pertinent part of the article in question reads: "The person prejudiced may choose between exacting the fulfillment of the obligation or its resolution with indemnity for damages and payment of interest in either case. He may also demand the resolution of the obligation even after having requested its fulfillment, should the latter be found impossible." Under this article, the person prejudiced may demand indemnity for damages and payment of interest when he chooses to exact specific performance of the obligation as well as when he decides to rescind it because the phrase "in either case" cannot mean otherwise. It follows, therefore, that the first assignment of error is unfounded. We shall skip the defendant's defense relative to special damages because its discussion proves unnecessary in view of the conclusions to be mentioned hereinbelow.

The second and third assignments of error more properly involve questions of fact. We agree that the principal question at issue upon which hinges the determination of the case refers to the weight of the boiler. Inasmuch as the contract expressly stated that the boiler should weigh not more than 40 tons, the defendant was justified in rescinding it, if, upon the evidence, the weight of the boiler was greater. The appealed judgment is based entirely on the alleged preponderance of the evidence in support of the proposition that the boiler weighed only 40 tons, which finding was likewise premised on the expert testimony of Suzara, Magsaysay and Miller. We have carefully reviewed the evidence and have arrived at a different conclusion. Magsaysay and Miller testified upon a plan of the boiler not prepared by them. The former's inspection of the boiler was so superficial and made to conform to the plan, that his estimate cannot be made the basis of a judgment. This observation is no less true with respect to the testimony of Miller whose estimate likewise was based on the data afforded by the plan not prepared by him. Referring to Suzara's testimony, it appears that he had admitted to Captain Petersen, in the presence of Fitzsimmons, and to Grimm that the boiler weighed 41 or 42 tons. After the rejection of the boiler, Suzara, during another conversation with Thomson in the presence of Captain Petersen, again stated having seen in the original invoice of the boiler or in a copy thereof that it weighed 42½ tons. Upon this evidence, we are forced to conclude that the preponderance thereof supports the defendant's theory that the boiler exceeded the weight assured by the plaintiff's agent, thereby justifying it in rescinding the contract.

The last assignment of error refers to the refund of the freight charges ordered in the judgment. Inasmuch as the amount thereof was deposited with the clerk of court, subject to the outcome of the suit, we are of the opinion that the resolution should have directed the clerk of court to deliver it to the plaintiff.

Wherefore, reversing the judgment appealed from, the defendant is absolved from the complaint, with the costs of both instances against the plaintiff. So ordered.

Avanceña, C.J., Malcolm, Villa-Real, Abad Santos, Hull, Vickers, Goddard, and Recto, JJ., concur.

Judgment reversed.

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