

TAN PHO, PETITIONER, VS. HASSAMAL DALAMAL, RESPONDENT.*G.R. No. 45598. April 26, 1939*

Ponente: CONCEPCION, J.

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In this appeal on certiorari, the question raised is whether the delivery of certain merchandise by the carrier to an agent without presenting the bill of lading, constitutes misdelivery or nondelivery.

The facts are briefly as follows: Enrique Aldeguer purchased on credit from Hassamal Dalamal certain merchandise valued at P583.60, Hassamal Dalamal, the plaintiff and herein respondent, shipped said merchandise on the ship of Tan Pho, defendant and herein petitioner, and endorsed the bill of lading to the Chartered Bank of China, India & Australia, which, in turn, endorsed it to the Philippine National Bank. The said bill of lading was made to order and contains the initials of Enrique Aldeguer, "E. A." Upon arrival of the goods in Sorsogon, the agent of the defendant-petitioner delivered the merchandise to Enrique Aldeguer who presented the invoice and signed a receipt. The plaintiff-respondent; upon learning that Aldeguer had received the merchandise, made him sign a forty-day draft for the value of said merchandise. The Philippine National Bank, with the consent of the plaintiff-respondent, gave Aldeguer an extension of ten days to pay the amount of the merchandise in question, and upon the expiration of the period, the plaintiff-respondent required Aldeguer to pay the merchandise. Unable to get such payment, the plaintiff-respondent brought suit on November 28, 1934, that is, after the expiration of 174 days from the delivery of the merchandise to Aldeguer.

The bill of lading signed by the parties provides in part as follows:

"Section. 7. * * * Claim for nondelivery of shipment must be presented in writing to the carrier within thirty days from the date of accrual. Suits based upon claims arising from shortage, damage, or nondelivery of shipment shall be instituted within sixty days from the date of accrual of the right of action. Failure to make claims, to institute judicial proceedings as herein provided shall institute a waiver of claim or right of action."

The court decided in favor of the defendant and against the plaintiff upon the theory that the delivery of the goods to Aldeguer constitutes nondelivery, wherefore, the claim not having been filed within thirty days nor the action instituted within sixty days, the plaintiff-respondent waived his claim or right of action against the defendant.

On appeal the Court of Appeals upheld the contrary view and rendered judgment in favor of the plaintiff and against the defendant for the sum of P586.60, with legal interest from the filing of the complaint, and the costs of both instances. From this decision, the defendant has taken this, appeal on certiorari.

Considering that the bill of lading covering the goods in question has been made to order, which means that said goods cannot be delivered without previous payment of the value thereof, it is evident that, the said goods having been delivered to Aldeguer without paying the price of the same, these facts constitute misdelivery and not nondelivery, because there was in fact delivery of merchandise. We do not believe it can be seriously and reasonably argued that what took place, as contended by the petitioner, is a case of misdelivery with respect to Aldeguer and at the same time nondelivery with respect to the Philippine National Bank who had the bill of

lading, because the only thing to consider in this question is whether Enrique Aldeguer was entitled to get the merchandise or whether, on the contrary, the Philippine National Bank is the one entitled thereto. Under the facts, the defendant-petitioner should not have delivered the goods to Aldeguer but to the Philippine National Bank. Having made the delivery to Aldeguer, the delivery is a case of misdelivery. If the goods have been delivered, it cannot at the same time be said that they have not been delivered.

According to the bill of lading which was issued in the case at bar to the order of the shipper, the carrier was under a duty not to deliver the merchandise mentioned in the bill of lading except upon presentation of the bill of lading duly endorsed by the shipper. (10 C. J., 259.) Hence, the defendant-petitioner Tan Pho having delivered the goods to Enrique Aldeguer without the presentation by the latter of the bill of lading duly endorsed to him by the shipper, the said defendant made a misdelivery and violated the bill of lading, because his duty was not only to transport the goods entrusted to him safely, but to deliver them to the person indicated in the bill of lading. (10 C. J., 262.)

In conclusion, inasmuch as the action commenced by the plaintiff, the herein respondent, is not founded upon non-delivery of the merchandise, but upon the misdelivery thereof to Aldeguer, the period of limitation stipulated in section 7 of the bill of lading is without application.

The defendant-petitioner contends that the demand made by the plaintiff-respondent upon Aldeguer to sign a forty-day draft for the amount of the goods which he received from the defendant-petitioner was tantamount to an act of ratification of the misdelivery made by the said defendant-petitioner.

Such contention is belied by the fact that the plaintiff-respondent required Aldeguer to return the goods, and it has been held that when the owner of the goods transported attempts to secure the value thereof from the person to whom they have been delivered by mistake, he cannot be deemed to have ratified the misdelivery or to have waived his right against the carrier. (10 C. J., 268 [footnote]; *McSwegan vs. Pennsylvania R. Co.*, 77 App. Div., 301; 40 N. Y., 51; *Arrington vs. Wilmington, etc. R. Co.*, 51 N. C., 68; 72 Am. Dec., 559.)

It will not be amiss to mention a defect which the respondent notes in his brief, a defect which consists in that the Court of Appeals has not been made a party in this petition as held by this court in *Mayol vs. Blanco* (61 Phil., 547). This defect being merely technical, the same cannot be considered as a ground for denying the petition; however, in view of the foregoing, we hold that the writ of certiorari does not lie and that the decision of the Court of Appeals should be, as the same is hereby, affirmed, with the costs to the petitioner. So ordered.

Avanceña, C. J., Villa-Real, Imperial, Diaz, and Laurel, JJ., concur.

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