

FAUSTINO LICHAUCO, PLAINTIFF AND APPELLEE, VS. GEORGE ARMSTRONG AND JOHN A. MACKAY, DEFENDANTS AND APPELLANTS.*G. R. No. 5963. September 13, 1910*

Ponente: JOHNSON, J.

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In January, 1908, the plaintiff was engaged in the importation of cattle and in connection with that business had chartered the steamer Solstad for a period of some months. On or about the 28th day of January he discovered that he would have no use for said steamer for some weeks. He therefore called upon the defendants, Armstrong & Mackay, brokers, and requested them to find a subcharterer for said steamer in the Saigon-Manila rice trade. After some effort the defendants were unable to secure a subcharterer, as requested, and reported the fact to the plaintiff. The plaintiff then suggested that the defendants make an effort to find a subcharterer for said steamer in Hongkong. After some negotiations with George Grimble (the agent of the defendants in Hongkong) two charter contracts were entered into for the Hongkong-Saigon trade, for the use of said steamer Solstad. These contracts (Exhibits C and D) were duly signed by the subcharterers in Hongkong and by the said George Grimble, representing the defendants. These contracts (Exhibits C and D) were finally sent to Manila. They were dated, respectively, the 6th and 10th days of February, 1908. Later the defendants entered into two contracts (Exhibits A and B) with the plaintiff. The contracts A and B were dated, respectively, the 12th and 15th days of February, 1908. The record does not disclose just why the contracts, Exhibits A and B, were executed and delivered after the contracts C and D had been executed and delivered. The provisions of the contracts C and D and A and B are in general terms the same. Paragraphs 16 and 17 of Exhibit C are as follows:

"16. In consideration of all which, charterers hereby agree to pay, or cause to be paid, freight to the said vessel as follows:

"(14) fourteen cents of a Mexican dollar, Hongkong currency, for every picul of 133 1/3 lbs. English, of rice and or broken rice, net weight delivered.

"(25%) twenty-five per cent additional freight for every picul of 133 1/3 lbs. English of paddy and or rice flour No. 1 and or broken rice No. 2, and (50%.) fifty per cent additional freight for every picul of 133½ lbs. English of rice flour No. 2 and or cargo broken rice No. 3, net weight delivered.

"Freight payable in cash on right and true delivery of the cargo as per bill of lading.

"17. If a mixed cargo be shipped, freight to be paid at the above rate on the estimated capacity of the vessel, say on thirty thousand piculs at fourteen cents per picul."

Paragraphs 16 and 17 of Exhibit D are in exactly the same terms as paragraphs 16 and 17 of Exhibit C, except that in paragraph 16 of Exhibit D the price of each picul of 133 1/3 lbs. English of rice, etc., is 16 cents instead of 14 cents as mentioned in said paragraph 16 of Exhibit C.

Paragraphs 13 and 14 of Exhibit A are as follows:

"13. In consideration of all which, charterers hereby agree to pay, or cause to be paid, freight of the said vessel, as follows:

"(14) fourteen cents of a Mexican dollar, Hongkong currency, less 2 1/2 per cent (two & one-half per cent) for every picul of 133 1/3 lbs. English of rice, net weight delivered.

"Freight payable in cash on right and true delivery of the cargo as per bill of lading.

"14. If a mixed cargo be shipped, freight to be paid at the above rate on the estimated capacity of the vessel, say on thirty thousand piculs at fourteen cents per picul, less 2 1/2%."

Paragraphs 13 and 14 of Exhibit A are exactly in the same terms as said paragraphs of Exhibit B, except that in paragraph 13 of Exhibit B 16 cents was the price for each picul of 133 1/3 pounds English, of rice, instead of 14, as given in Exhibit A.

From an examination it will be seen that paragraph 17 of Exhibits C and D are practically in the same language as paragraph 14 of Exhibits A and B (with the corresponding change of 14 and 16 cents) except that in paragraph 14 of Exhibits A and B the percentage of the defendants of 2 1/2 per cent is provided for. In the contracts C and D there is no provision whatever for the payment of any sum to the defendants for securing said contracts. The theory of the attorney for the defendants is that A and B were executed simply for the purpose of securing a contract for the commission of 2 1/2 per cent.

After the execution and delivery of the said contracts nothing further was done by the plaintiff until after the Hongkong agent, George Grimble, had made his report upon the result of the said subcharter contracts. His report showed that he had received, under said contract C, for freight, the sum of P3,440.24 (see Exhibit E), and under contract D the sum of P3,931.64 (see Exhibit P). The bills and vouchers accompanying Exhibits E and F show that under each contract, C and D, the charterers had carried rice, broken rice, rice flour, and paddy. Upon receipt of this report the plaintiff claimed that the cargo carried under each contract (C and D) was a mixed cargo and that he was entitled to recover the sum of 14 and 16 cents, respectively, under paragraphs 14 and 17 of the respective contracts (C and D and A and B).

As was said, the above paragraph 17 of contracts C and D is exactly the same as paragraph 14 of A and B, except that said paragraph 14 contains a provision for the payment of a commission to the defendants. Paragraph 17 is as follows:

"17. If a mixed cargo be shipped, freight to be paid at the above rate (14 cts. and in Exhibit D, 16 cts.) on the estimated capacity of the vessel, say on thirty thousand piculs at 14 cts. per picul."

So far as this paragraph of the respective contracts C and D and A and B is concerned, the rights and obligations of the parties are the same whether the action be brought upon one or the other of the contracts.

The plaintiff claims that by reason of the fact that the charterers under contracts C and D carried rice, broken rice, rice flour, and paddy that the cargo was a mixed cargo and that he was entitled to recover 14 cents in one case and 16 cents in the other upon the estimated capacity of the vessel, or for 30,000 piculs. If this contention of the plaintiff is correct, then he should have recovered, under contract C (or A); the sum of P4,200 and under contract D (or B) the sum of P4,800.

The real question, therefore, presented in the record, without reference to the special assignments of error made by the appellant, is whether or not the cargo, composed of rice, broken rice, rice flour, and paddy, is a mixed cargo. If it is, then under either of the contracts the subcharterers are obliged to pay at the rate of 14 and 16 cents,

respectively, on the full estimated capacity of the vessel. It is admitted that the plaintiff has received the full amount due under the said contracts, based upon the rate of 14 and 16 cents, respectively, for the actual freight carried, composed of rice, broken rice, etc. The amount actually received by the plaintiff, as shown by said Exhibits E and F, was the sum of 7,371.88 pesos, Hongkong money, while the plaintiff claims that he should have received the sum of 9,000 pesos, Hongkong money, under said contract, for the reason that the cargo was a mixed cargo.

By comparing paragraph 16 of contracts C and D with paragraph 13 of contracts A and B, it will be seen that the following provision of contracts C and D was not included in paragraph 13 of contracts A and B:

"(25%) twenty-five per cent additional freight for every picul of 133 1/3 lbs. English of paddy and or rice flour No. 1 and or broken rice No. 2 and (50%) fifty per cent additional freight for every picul of 133 1/3 lbs. English of rice flour No. 2 and or cargo broken rice No. 3, net weight delivered."

The defendants contend that the addition of broken rice, rice flour, and paddy to the cargo of rice did not make the cargo a mixed cargo. In support of this contention the defendants presented a decision of Sir Francis Piggott, Kt., chief justice of the colony of Hongkong (Official Law Reports, Colony of Hongkong, vol. 3, p. 86), in which the said chief justice held that - "According to the customs of the Saigon-Hongkong trade, a cargo is not a mixed cargo, within the meaning of clause 17, unless other cargo not mentioned in the charter party, such as matches, piece goods, machinery, or fish, is shipped in the holds, together with rice, paddy, and flour."

It will be remembered that the contracts in question were made with reference to the Saigon-Hongkong trade. The custom, therefore, of that trade should govern in the interpretation of the contracts in question. It is the duty of the courts, so far as is possible in compliance with the express provisions of law, to adopt that interpretation given to contracts by the merchants themselves by actual practice.

Following the interpretation given to contracts such as the one in question by the courts and the merchants in the Saigon-Hongkong trade, and without attempting to define what is a mixed cargo generally, we are of the opinion and so hold that the decision of the lower court should be reversed, and the defendants are hereby absolved from any liability under said complaint.

Without any finding as to costs, it is so ordered.

Arellano, C. J., Torres and Trent, JJ., concur.

CONCURRING

MORELAND, J.,

I concur in the result. The basis of my conclusion is that the instrument presented in evidence as the contract upon which this action is brought was never, in effect, a contract between the parties, and especially not for the purposes set forth in the complaint and proofs.

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