

CHOA TIEK SENG, DOING BUSINESS UNDER THE NAME AND STYLE OF SENG'S COMMERCIAL ENTERPRISES, PETITIONER, VS. HON. COURT OF APPEALS, FILIPINO MERCHANTS' INSURANCE COMPANY, INC., BEN...

G.R. NO. 84507. March 15, 1990

Ponente: GANCAYCO, J.

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GANCAYCO, J.:

This is an appeal from a decision of the Court of Appeals dated February 18, 1988 in CA-G.R. CV No. 09627 which affirmed the decision of the Regional Trial Court (RTC) of Manila which in turn dismissed the complaint.[1]

On November 4, 1976 petitioner imported some lactose crystals from Holland. The importation involved fifteen (15) metric tons packed in 600 6-ply paper bags with polythelene inner bags, each bag at 25 kilos net. The goods were loaded at the port at Rotterdam in sea vans on board the vessel "MS Benalder" as the mother vessel, and thereafter aboard the feeder vessel "Wesser Broker V-25" of respondent Ben Lines Container, Ltd. (Ben Lines for short). The goods were insured by the respondent Filipino Merchants' Insurance Co., Inc. (insurance company for short) for the sum of P98,882.35, the equivalent of US\$8,765.00 plus 50% mark-up or US\$13,147.50, against all risks under the terms of the insurance cargo policy. Upon arrival at the port of Manila, the cargo was discharged into the custody of the arrastre operator respondent E. Razon, Inc. (broker for short), prior to the delivery to petitioner through his broker. Of the 600 bags delivered to petitioner, 403 were in bad order. The surveys showed that the bad order bags suffered spillage and loss later valued at P33,117.63.

Petitioner filed a claim for said loss dated February 16, 1977 against respondent insurance company in the amount of P33,117.63 as the insured value of the loss.

Respondent insurance company rejected the claim alleging that assuming that spillage took place while the goods were in transit, petitioner and his agent failed to avert or minimize the loss by failing to recover spillage from the sea van, thus violating the terms of the insurance policy sued upon; and that assuming that the spillage did not occur while the cargo was in transit, the said 400 bags were loaded in bad order, and that in any case, the van did not carry any evidence of spillage.

Hence, petitioner filed the complaint dated August 2, 1977 in the Regional Trial Court of Manila against respondent insurance company seeking payment of the sum of P33,117.63 as damages plus attorney's fee and expenses of litigation. In its answer, respondent insurance company denied all the material allegations of the complaint and raised several special defenses as well as a compulsory counterclaim. On February 24, 1978, respondent insurance company filed a third-party complaint against respondents Ben Lines and broker. Respondent broker filed its answer to the third-party complaint denying liability and arguing, among others, that the petitioner has no valid cause of action against it. Similarly, Ben Lines filed its answer denying any liability and as special defense arguing that respondent insurance company was not the proper party in interest and has no

connection whatsoever with Ben Lines Containers, Ltd. and that the third-party complaint has prescribed under the applicable provisions of the Carriage of Goods by Sea Act.

On November 6, 1979, respondent Ben Lines filed a motion for preliminary hearing on the affirmative defense of prescription. In an order dated February 28, 1980, the trial court deferred resolution of the aforesaid motion after trial on the ground that the defense of prescription did not appear to be indubitable.

After the pre-trial conference and trial on the merits, on March 31, 1986, the court a quo rendered a judgment dismissing the complaint, the counterclaim and the third-party complaint with costs against the petitioner.

Hence, the appeal to the Court of Appeals by petitioner which, in due course, as aforestated, affirmed the judgment of the trial court.

A motion for reconsideration of said judgment was denied by the appellate court in a resolution dated August 1, 1988.

Petitioner now filed this petition for review on certiorari in this Court predicated on the following grounds:

"I

RESPONDENT COURT ERRED IN HOLDING THAT THE INSURED SHIPMENT DID NOT SUSTAIN ANY DAMAGE/LOSS DESPITE ADMISSION THEREOF ON THE PART OF RESPONDENT INSURANCE COMPANY AND THE FINDING OF THE LATTER'S SURVEYORS.

II

RESPONDENT COURT ERRED IN HOLDING THAT AN "ALL RISKS" COVERAGE COVERS ONLY LOSSES OCCASIONED BY OR RESULTING FROM "EXTRA AND FORTUITOUS EVENTS" DESPITE THE CLEAR AND UNEQUIVOCAL DEFINITION OF THE TERM MADE AND CONTAINED IN THE POLICY SUED UPON.

III

THE HOLDING OF RESPONDENT COURT THAT AN "ALL RISKS" COVERAGE COVERS LOSSES OCCASIONED BY AND RESULTING FROM "EXTRA AND FORTUITOUS EVENTS" CONTRADICTS THE RULING OF THE SAME COURT IN ANOTHER CASE WHERE THE DEFINITION OF THE TERM "ALL RISKS" STATED IN THE POLICY WAS MADE TO CONTROL HENCE THE NEED FOR REVIEW."^[2]

The petition is impressed with merit.

The appellate court, in arriving at the conclusion that there was no damage suffered by the cargo at the time of the devanning thereof, held as follows:

"Appellant argued that the cargo in question sustained damages while still in the possession of the carrying vessel, because as his appointed surveyor reported, Worldwide Marine Survey Corporation, at the time of devanning at the pier, 403 bags were already in bad order and condition. Appellant found support to this contention on the basis of the survey report of Worldwide Marine Survey Corporation of the Philippines and of the Adjustment Corporation of the Philippines which were identified by his sole witness, Jose See. It must be pointed out, however, that witness Jose See was incompetent to identify the two survey reports because he was not actually present during the actual devanning of the cargo, which fact was admitted by him, hence, he failed to prove the authenticity of the aforesaid survey reports.

On the other hand, the evidence submitted by the appellee would conclusively establish the fact that there was no damage suffered by the subject cargo at the time of the devanning thereof. The cargo, upon discharge from the vessel, was delivered to the custody of the arrastre operator (E. Razon) under clean tally sheet (Exh.

6-FMIC). Moreover, the container van containing the cargo was found with both its seal and lock intact. Article IV, paragraph 4 of the Management Contract (Exh. 5) signed between the Bureau of Customs and the Arrastre Operator provides:

"4. Tally Sheets for Cargo Vans or Containers - The contractor shall give a clean tally sheet for cargo vans received by it in good order and condition with locks, and seals intact."

The same cargo was in turn delivered into the possession of the appellant by the arrastre operator at the pier in good order and condition as shown by the clean gate passes (Exhs. 2 and 3) and the delivery permit (Exh. 4). The clean gate passes were issued by appellee arrastre operator covering the shipment in question, with the conformity of the appellant's representative. The clean gate passes provide in part:

"xxx issuance of this Gate Pass constitutes delivery to and receipt by consignee of the goods as described above, in good order and condition, unless an accompanying B.O. (Bad Order) Certificate duly issued and noted on the face of this Gate Pass appears."

These clean gate passes are undoubtedly important and vital pieces of evidence. They are noted in the dorsal side of another important piece of document which is the permit to deliver (Exh. 4) issued by the Bureau of Customs to effect delivery of the cargo to the consignee. The significance and value of these documents is that they bind the shipping company and the arrastre operator whenever a cargo sustains damage while in their respective custody. It is worthy of note that there was no turnover survey executed between the vessel and the arrastre operator, indicating any damage to the cargo upon discharge from the custody of the vessel. There was no bad order certificate issued by the appellee arrastre operator, indicating likewise that there was no damage to the cargo while in its custody.

It is surprising to the point that one could not believe that if indeed there was really damage affecting the 403 bags out of the 600, with an alleged estimated spillage of 240%, this purportedly big quantity of spillage was never recovered which could have been easily done considering that the shipment was in a container van which was found to be sealed and intact."^[3]

However, in the same decision of the appellate court, the following evidence of the petitioner on this aspect was summarized as follows:

"The 600 bags which the original carrier received in apparent good order condition and certified to by the vessel's agent to be weighing 15,300 kg. gross, were unloaded from the transshipment vessel "Wesser Broker" stuffed in one container and turned over to the arrastre operator, third party defendant-appellee E. Razon, Inc. A shipboard surveyor, the Worldwide Marine Cargo Surveyor, as well as a representative of the vessel "Wesser Broker" and a representative of the arrastre operator attended the devanning of the shipment and the said shipboard surveyor certified that 403 bags were in bad order condition with estimated spillage as follows:

65 P/bags each of 20%
78 P/bags each of 35%
79 P/bags each of 45%
87 P/bags each of 65%
94 P/bags each of 75%
(Exh. F-1)

Defendant and third-party plaintiff-appellee's protective surveyor determined the exact spillage from the bad order bags as found by the shipboard surveyor at the consignee's warehouse by weighing the bad order bags. Said protective surveyor found after weighing the 403 bags in bad order condition that an aggregate of 5,173 kilos were missing therefrom (Exh. F)."^[4]

The assertion of the appellate court that the authenticity of the survey reports of the Worldwide Marine Cargo

Survey Corporation and the Adjustment Corporation of the Philippines were not established as Jose See who identified the same was incompetent as he was not actually present during the actual devanning of the cargo is not well taken.

In the first place it was respondent insurance company which undertook the protective survey aforestated relating to the goods from the time of discharge up to the time of delivery thereof to the consignee's warehouse, so that it is bound by the report of its surveyor which is the Adjustment Corporation of the Philippines.[5] The Worldwide Marine Cargo Survey Corporation of the Philippines was the vessel's surveyor. The survey report of the said Adjustment Corporation of the Philippines reads as follow:

"During the turn over of the contents delivery from the cargo sea van by the representative of the shipping agent to consignee's representative /Broker (Saint Rose Forwarders), 403 bags were bursted and/or torn, opened on one end contents partly spilled. The same were inspected by the vessel's surveyor (Worlwide Marine & Cargo Survey Corporation), findings as follows:

One (1) Container No. 2987789

Property locked and secured with Seal No. 18880.

FOUND:

197-Paper Bags (6-Ply each with One inner Plastic Lining Machine Stitched with cotton Twine on Both ends. Containing Lactose of Crystal 25 mesh Sep 061-09-03 in good order.

403-Bags, 6-ply torn and/or opened on one end, contents partly spilled, estimated spillages as follows:

65 P/Bags each of 20%

78 P/Bags each of 35%

79 P/Bags each of 45%

87 P/Bags each of 65%

94 P/Bags each of 75%

(Italics supplied)"[6]

The authenticity of the said survey report need not be established in evidence as it is binding on respondent insurance company who caused said protective survey.

Secondly, contrary to the findings of the appellate court that petitioner's witness Jose See was not present at the time of the actual devanning of the cargo, what the record shows is that he was present when the cargo was unloaded and received in the warehouse of the consignee. He saw 403 bags to be in bad order. Present then was the surveyor, Adjustment Corporation of the Philippines, who surveyed the cargo by segregating the bad order cargo from the good order and determined the amount of loss.[7] Thus, said witness was indeed competent to identify the survey report aforestated.

Thirdly, in its letter dated May 26, 1977 to petitioner, respondent insurance company admitted in no uncertain terms, the damages as indicated in the survey report in this manner:

"We do not question the fact that out of the 600 bags shipment 403 bags appeared to be in bad order or in damaged condition as indicated in the survey report of the vessel surveyor x x x."[8]

This admission even standing alone is sufficient proof of loss or damage to the cargo.

The appellate court observed that the cargo was discharged from the vessel and delivered to the custody of the broker under the clean tally sheet, that the container van containing the cargo was found with both its seal and lock intact; and that the cargo was delivered to the possession of the petitioner by the broker in good order and condition as shown by the clean gate passes and delivery permit.

The clean tally sheet referred to by the appellate court covers the van container and not the cargo stuffed therein.[9] The appellate court clearly stated that the clean tally sheet issued by the broker covers the cargo vans received by it in good order and condition with lock and seal intact. Said tally sheet is no evidence of the condition of the cargo therein contained. Even the witness of the respondent insurance company, Sergio Icasiano, stated that the clean gate passes do not reflect the actual condition of the cargo when released by the broker as it was not physically examined by the broker.[10]

There is no question, therefore, that there were 403 bags in damaged condition delivered and received by petitioner.

Nevertheless, on the assumption that the cargo suffered damages, the appellate court ruled:

"Even assuming that the cargo indeed sustained damage, still the appellant cannot hold the appellee insurance company liable on the insurance policy. In the case at bar, appellant failed to prove that the alleged damage was due to risks connected with navigation. A distinction should be made between "perils of the sea" which render the insurer liable on account of the loss and/or damage brought about thereof and "perils of the ship" which do not render the insurer liable for any loss or damage. Perils of the sea or perils of navigation embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, collision and every specie of damage done to the ship or goods at sea by the violent action of the winds or waves. They do not embrace all losses happening on the sea. A peril whose only connection with the sea is that it arises aboard ship is not necessarily a peril of the sea; the peril must be of the sea and not merely one accruing on the sea (The Phil. Insurance Law, by Guevarra, 4th ed., 1961, p. 143). In *Wilson, Sons and Co. vs. Owners of Cargo per the Xantho* (1887) A.C. 503, 508, it was held:

"There must, in order to make the insurer liable be "some casualty," something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen."

Moreover, the cargo in question was insured in an "against all risk policy." Insurance "against all risk" has a technical meaning in marine insurance. "Under an "all risk" marine policy, there must as a general rule be a fortuitous event in order to impose liability on the insurer; losses occasioned by ordinary circumstances or wear and tear are not covered, thus, while an "all risk" marine policy purports to cover losses from casualties at sea, it does not cover losses occasioned by the ordinary circumstances of a voyage, but only those resulting from extra and fortuitous events."

"It has been held that damage to a cargo by high seas and other weather is not covered by an "all risk" marine policy, since it is not fortuitous, particularly where the bad weather occurs at a place where it could be expected at the time in question." (44 Am. Jur. 2d. 216) In *Go Tiaoco Hermanas vs. Union Insurance Society of Canto*, 40 Phil. 40, it was held:

"In the present case, the entrance of the sea water into the ship's hold through the defective pipe already described was not due to any accident which happened during the voyage, but to the failure of the ship's owner properly to repair a defect of the existence of which he was apprised. The loss was therefore more analogous to that which directly results from simple unseaworthiness than to that whose results, from perils of the sea. "[11]

The Court disagrees.

In *Gloren Inc. vs. Filipinas Cia. de Seguros*,[12] it was held that an all risk insurance policy insures against all causes of conceivable loss or damage, except as otherwise excluded in the policy or due to fraud or intentional misconduct on the part of the insured. It covers all losses during the voyage whether arising from a marine peril or not, including pilferage losses during the war.

In the present case, the "all risks" clause of the policy sued upon reads as follows:

"5. This insurance is against all risks of loss or damage to the subject matter insured but shall in no case be deemed to extend to cover loss, damage, or expense proximately caused by delay or inherent vice or nature of the subject matter insured. Claims recoverable hereunder shall be payable irrespective of percentage." [13]

The terms of the policy are so clear and require no interpretation. The insurance policy covers all loss or damage to the cargo except those caused by delay or inherent vice or nature of the cargo insured. It is the duty of the respondent insurance company to establish that said loss or damage falls within the exceptions provided for by law, otherwise it is liable therefor.

An "all risks" provision of a marine policy creates a special type of insurance which extends coverage to risks not usually contemplated and avoids putting upon the insured the burden of establishing that the loss was due to peril falling within the policy's coverage. The insurer can avoid coverage upon demonstrating that a specific provision expressly excludes the loss from coverage. [14]

In this case, the damage caused to the cargo has not been attributed to any of the exceptions provided for nor is there any pretension to this effect. Thus, the liability of respondent insurance company is clear.

WHEREFORE, the decision appealed from is hereby REVERSED AND SET ASIDE and another judgment is hereby rendered ordering the respondent Filipinas Merchants Insurance Company, Inc. to pay the sum of P33,117.63 as damages to petitioner with legal interest from the filing of the complaint, plus attorney's fees and expenses of litigation in the amount of P10,000.00 as well as the costs of the suit.

SO ORDERED.

Narvasa, (Chairman), Cruz, Griño-Aquino, and Medialdea, JJ., concur.

[1] Justice Bonifacio Cacdac, Jr. was the ponente, concurred in by Justices Floreliana Castro Bartolome and Ricardo L. Pronove, Jr.

[2] Page 9, Rollo.

[3] Pages 38 to 39, Rollo.

[4] Pages 34 to 35, Rollo.

[5] See Paragraph 7 of the complaint of the petitioner and paragraph 5 of the answer of respondent insurance company; pages 13 to 14, Rollo.

[6] Exhibits F to F-2; pages 14 to 15, Rollo.

[7] TSN, October 8, 1981, pages 10 to 13; pages 15 to 17, Rollo.

[8] Page 18, Rollo.

[9] See paragraph 4, Article IV of the management contract signed by the Bureau of Custom and Arrastre Operator (Exh. 5); pages 38-39, Rollo.

[10] Page 19, Rollo.

[11] Pages 39 to 40, Rollo.

[12] 65 O. G. 3392; see also 45 C.J.S. 941.

[13] Exh. B; page 23, rollo.

[14] Walker vs. Traveller's Indemnity Co., La. App. 289, So. Ind. 864, 869.

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