

FILIPINO MERCHANTS INSURANCE CO., INC., PETITIONER, VS. COURT OF APPEALS AND CHOA TIEK SENG, RESPONDENTS.

G.R. No. 85141. November 28, 1989

Ponente: REGALADO, J.

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REGALADO, J.:

This is a review of the decision of the Court of Appeals, promulgated on July 19, 1988, the dispositive part of which reads:

"WHEREFORE, the judgment appealed from is affirmed insofar as it orders defendant Filipino Merchants Insurance Company to pay the plaintiff the sum of P51,568.62 with interest at legal rate from the date of filing of the complaint, and is modified with respect to the third party complaint in that (1) third party defendant E. Razon, Inc. is ordered to reimburse third party plaintiff the sum of P25,471.80 with legal interest from the date of payment until the date of reimbursement, and (2) the third-party complaint against third party defendant Compagnie Maritime Des Chargeurs Reunis is dismissed." [1]

The facts as found by the trial court and adopted by the Court of Appeals are as follows:

"This is an action brought by the consignee of the shipment of fishmeal loaded on board the vessel SS Bougainville and unloaded at the Port of Manila on or about December 11, 1976 and seeks to recover from the defendant insurance company the amount of P51,568.62 representing damages to said shipment which has been insured by the defendant insurance company under Policy No. M-2678. The defendant brought a third party complaint against third party defendants Compagnie Maritime Des Chargeurs Reunis and/or E. Razon, Inc. seeking judgment against the third (sic) defendants in case judgment is rendered against the third party plaintiff. It appears from the evidence presented that in December 1976, plaintiff insured said shipment with defendant insurance company under said cargo Policy No. M-2678 for the sum of P267,653.59 for the goods described as 600 metric tons of fishmeal in new gunny bags of 90 kilos each from Bangkok, Thailand to Manila against all risks under warehouse to warehouse terms. Actually, what was imported was 59.940 metric tons not 600 tons at \$395.42 a ton CNF Manila. The fishmeal in 666 new gunny bags were unloaded from the ship on December 11, 1976 at Manila unto the arrastre contractor E. Razon, Inc. and defendant's surveyor ascertained and certified that in such discharge 105 bags were in bad order condition as jointly surveyed by the ship's agent and the arrastre contractor. The condition of the bad order was reflected in the turn over survey report of Bad Order cargoes Nos. 120320 to 120322, as Exhibit C-4 consisting of three (3) pages which are also Exhibits 4, 5 and 6-Razon. The cargo was also surveyed by the arrastre contractor before delivery of the cargo to the consignee and the condition of the cargo on such delivery was reflected in E. Razon's Bad Order Certificate No. 14859, 14863 and 14869 covering a total of 227 bags in bad order condition. Defendant's surveyor has conducted a final and detailed survey of the cargo in the warehouse for which he prepared a survey report Exhibit F with the findings on the extent of shortage or loss on the bad order bags totalling 227 bags amounting to 12,148 kilos, Exhibit F-1. Based on said computation the plaintiff made a formal claim against the defendant Filipino Merchants Insurance Company for P51,568.62 (Exhibit C) the computation of which claim is contained therein. A formal claim statement was also presented by the plaintiff against the vessel dated December 21, 1976, Exhibit B, but the defendant Filipino Merchants Insurance Company refused

to pay the claim. Consequently, the plaintiff brought an action against said defendant as adverted to above and defendant presented a third party complaint against the vessel and the arrastre contractor."[2]

The court below, after trial on the merits, rendered judgment in favor of private respondent, the decretal portion whereof reads:

"WHEREFORE, on the main complaint, judgment is hereby rendered in favor of the plaintiff and against the defendant Filipino Merchant's (sic) Insurance Co., ordering the defendants to pay the plaintiff the following amount:

"The sum of P51,568.62 with interest at legal rate from the date of the filing of the complaint;

"On the third party complaint, the third party defendant Compagnie Maritime Des Chargeurs Reunis and third party defendant E. Razon, Inc. are ordered to pay to the third party plaintiff jointly and severally reimbursement of the amounts paid by the third party plaintiff with legal interest from the date of such payment until the date of such reimbursement.

"Without pronouncement as to costs."[3]

On appeal, the respondent court affirmed the decision of the lower court insofar as the award on the complaint is concerned and modified the same with regard to the adjudication of the third-party complaint. A motion for reconsideration of the aforesaid decision was denied, hence this petition with the following assignment of errors:

"1. The Court of Appeals erred in its interpretation and application of the 'all risks' clause of the marine insurance policy when it held the petitioner liable to the private respondent for the partial loss of the cargo, notwithstanding the clear absence of proof of some fortuitous event, casualty, or accidental cause to which the loss is attributable, thereby contradicting the very precedents cited by it in its decision as well as a prior decision of the same Division of the said court (then composed of Justices Cacdac, Castro-Bartolome, and Pronove);

"2. The Court of Appeals erred in not holding that the private respondent had no insurable interest in the subject cargo, hence, the marine insurance policy taken out by private respondent is null and void;

"3. The Court of Appeals erred in not holding that the private respondent was guilty of fraud in not disclosing the fact, it being bound out of utmost good faith to do so, that it had no insurable interest in the subject cargo, which bars its recovery on the policy."[4]

On the first assignment of error, petitioner contends that an "all risks" marine policy has a technical meaning in insurance in that before a claim can be compensable it is essential that there must be "some fortuity," "casualty" or "accidental cause" to which the alleged loss is attributable and the failure of herein private respondent, upon whom lay the burden, to adduce evidence showing that the alleged loss to the cargo in question was due to a fortuitous event precludes his right to recover from the insurance policy. We find said contention untenable.

The "all risks clause" of the Institute Cargo Clauses read 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."[5]

An "all risks policy" should be read literally as meaning all risks whatsoever and covering all losses by an accidental cause of any kind. The terms "accident" and "accidental", as used in insurance contracts, have not acquired any technical meaning. They are construed by the courts in their ordinary and common acceptance. Thus, the terms have been taken to mean that which happens by chance or fortuitously, without intention and design, and which is unexpected, unusual and unforeseen. An accident is an event that takes place without one's

foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of a known cause and, therefore, not expected.[6]

The very nature of the term "all risks" must be given a broad and comprehensive meaning as covering any loss other than a wilful and fraudulent act of the insured.[7] This is pursuant to the very purpose of an "all risks" insurance to give protection to the insured in those cases where difficulties of logical explanation or some mystery surround the loss or damage to property.[8] An "all risks" policy has been evolved to grant greater protection than that afforded by the "perils clause," in order to assure that no loss can happen through the incidence of a cause neither insured against nor creating liability in the ship; it is written against all losses, that is, attributable to external causes.[9]

The term "all risks" cannot be given a strained technical meaning, the language of the clause under the Institute Cargo Clauses being unequivocal and clear, to the effect that it extends to all damages/losses suffered by the insured cargo except (a) loss or damage or expense proximately caused by delay, and (b) loss or damage or expense proximately caused by the inherent vice or nature of the subject matter insured.

Generally, the burden of proof is upon the insured to show that a loss arose from a covered peril, but under an "all risks" policy the burden is not on the insured to prove the precise cause of loss or damage for which it seeks compensation. The insured under an "all risks insurance policy" has the initial burden of proving that the cargo was in good condition when the policy attached and that the cargo was damaged when unloaded from the vessel; thereafter, the burden then shifts to the insurer to show the exception to the coverage.[10] As we held in *Paris-Manila Perfumery Co. vs. Phoenix Assurance Co., Ltd.*[11] the basic rule is that the insurance company has the burden of proving that the loss is caused by the risks excepted and for want of such proof, the company is liable.

Coverage under an "all risks" provision of a marine insurance 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 the peril falling within the policy's coverage; the insurer can avoid coverage upon demonstrating that a specific provision expressly excludes the loss from coverage.[12] A marine insurance policy providing that the insurance was to be "against all risks" must be construed as creating a special insurance and extending to other risks than are usually contemplated, and covers all losses except such as arise from the fraud of the insured.[13] The burden of the insured, therefore, is to prove merely that the goods he transported have been lost, destroyed or deteriorated. Thereafter, the burden is shifted to the insurer to prove that the loss was due to excepted perils. To impose on the insured the burden of proving the precise cause of the loss or damage would be inconsistent with the broad protective purpose of "all risks" insurance.

In the present case, there being no showing that the loss was caused by any of the excepted perils, the insurer is liable under the policy. As aptly stated by the respondent Court of Appeals, upon due consideration of the authorities and jurisprudence it discussed -

"x x x it is believed that in the absence of any showing that the losses/damages were caused by an excepted peril, i.e. delay or the inherent vice or nature of the subject matter insured, and there is no such showing, the lower court did not err in holding that the loss was covered by the policy.

"There is no evidence presented to show that the condition of the gunny bags in which the fishmeal was packed was such that they could not hold their contents in the course of the necessary transit, much less any evidence that the bags of cargo had burst as the result of the weakness of the bags themselves. Had there been such a showing that spillage would have been a certainty, there may have been good reason to plead that there was no risk covered by the policy (See *Berk vs. Style* [1956] cited in *Marine Insurance Claims*, *ibid*, p. 125). Under an 'all risks' policy, it was sufficient to show that there was damage occasioned by some accidental cause of any

kind, and there is no necessity to point to any particular cause." [14]

Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy. The agreement has the force of law between the parties. The terms of the policy constitute the measure of the insurer's liability. If such terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense. [15]

Anent the issue of insurable interest, we uphold the ruling of the respondent court that private respondent, as consignee of the goods in transit under an invoice containing the terms under "C & F Manila," has insurable interest in said goods.

Section 13 of the Insurance Code defines insurable interest in property as every interest in property, whether real or personal, or any relation thereto, or liability in respect thereof, of such nature that a contemplated peril might directly damnify the insured. In principle, anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction whether he has or has not any title in, or lien upon or possession of the property. [16] Insurable interest in property may consist in (a) an existing interest; (b) an inchoate interest founded on an existing interest; or (c) an expectancy, coupled with an existing interest in that out of which the expectancy arises. [17]

Herein private respondent, as vendee/consignee of the goods in transit has such existing interest therein as may be the subject of a valid contract of insurance. His interest over the goods is based on the perfected contract of sale. [18] The perfected contract of sale between him and the shipper of the goods operates to vest in him an equitable title even before delivery or before he performed the conditions of the sale. [19] The contract of shipment, whether under F.O.B., C.I.F., or C. & F. as in this case, is immaterial in the determination of whether the vendee has an insurable interest or not in the goods in transit. The perfected contract of sale even without delivery vests in the vendee an equitable title, an existing interest over the goods sufficient to be the subject of insurance.

Further, Article 1523 of the Civil Code provides that where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for, the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, the exceptions to said rule not obtaining in the present case. The Court has heretofore ruled that the delivery of the goods on board the carrying vessels partake of the nature of actual delivery since, from that time, the foreign buyers assumed the risks of loss of the goods and paid the insurance premium covering them. [20]

C & F contracts are shipment contracts. The term means that the price fixed includes in a lump sum the cost of the goods and freight to the named destination. [21] It simply means that the seller must pay the costs and freight necessary to bring the goods to the named destination but the risk of loss or damage to the goods is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment. [22]

Moreover, the issue of lack of insurable interest was not among the defenses averred in petitioner's answer. It was neither an issue agreed upon by the parties at the pre-trial conference nor was it raised during the trial in the court below. It is a settled rule that an issue which has not been raised in the court a quo cannot be raised for the first time on appeal as it would be offensive to the basic rules of fair play, justice and due process. [23] This is but a permuted restatement of the long settled rule that when a party deliberately adopts a certain theory, and the case is tried and decided upon that theory in the court below, he will not be permitted to change his theory on appeal because, to permit him to do so, would be unfair to the adverse party. [24]

If despite the fundamental doctrines just stated, we nevertheless decided to indite a disquisition on the issue of

insurable interest raised by petitioner, it was to put at rest all doubts on the matter under the facts in this case and also to dispose of petitioner's third assignment of error which consequently needs no further discussion.

WHEREFORE, the instant petition is DENIED and the assailed decision of the respondent Court of Appeals is AFFIRMED in toto.

SO ORDERED.

Paras, Padilla, and Sarmiento, JJ., concur.

Melencio-Herrera, J., (Chairman), on leave.

[1] Rollo, 41; Justice Gonzaga-Reyes, ponente, with Justices Serafin E. Camilon and Pedro A. Ramirez concurring.

[2] Rollo, 26-28.

[3] Ibid., 8-29.

[4] Ibid., 10-11.

[5] Original Record, Civil Case No. (112091) R-81-750, 26.

[6] 29A Am. Jur., 308-309.

[7] Phoenix Ins. Co. vs. Branch (Fla. App) 234 So 2d 396.

[8] Morrison Grain Co. vs. Utica Mut. Ins. Co. (1980, CA S Fla.) 632 F. 2d 424.

[9] Gilmore and Black, The Law of Admiralty, 68, 169.

[10] See Footnote 8, ante.

[11] 49 Phil. 753 (1926).

[12] Walker vs. Traveller's Indemnity Co., (La. App.) 289 So. 2nd 864, 869.

[13] Goix vs. Knox, 1 Johns, Cas. 337, cited in Words and Phrases, Permanent Ed., Vol. 3, (1953 ed.), 310.

[14] Rollo, 32.

[15] Pacific Banking Corp. vs. Court of Appeals, G.R. No. 41014, Nov. 28, 1988.

[16] 43 Am. Jur. 2d, 507-508.

[17] Sec. 14, Insurance Code.

[18] Original Record, Folder of Exhibits, Exh. C-2, 6.

[19] 43 Am. Jur. 2d, 522; Vance on Insurance, 164-168.

[20] Rattan Arts & Decorations, Inc. vs. Collector of Internal Revenue, et al., 13 SCRA 626 (1965).

[21] Business Law Principles and Cases by Harold Luck, Charles M. Hewitt, John D. Donnel, and A. James Barns, Second Uniform Commercial Code Edition, 751-752.

[22] Guide to INCO Terms, 1980 Ed., 48-50.

[23] De Los Santos vs. Court of Appeals, et al., 140 SCRA 44 (1985); Dulos Realty & Development Corp. vs. Court of Appeals, et al., 157 SCRA 425 (1988); Ramos, et al. vs. Intermediate Appellate Court, et. al., G.R. No. 78282, July 5, 1989.

[24] Molina vs. Somes, 24 Phil. 49 (1913); Agoncillo, et al. vs. Javier, 38 Phil. 424 (1918).

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