

PHILIPPINE AMERICAN GENERAL INSURANCE CO., INC. AND TAGUM PLASTICS, INC., PETITIONERS, VS. SWEET LINES, INC., DAVAO VETERANS ARRASTRE AND PORT SERVICES, INC. AND HON. COURT OF A...

G.R. No. 87434. August 05, 1992

Ponente: REGALADO, J.

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REGALADO, J.:

A maritime suit[1] was commenced on May 12, 1978 by herein petitioner Philippine American General Insurance Co., Inc. (Philamgen) and Tagum Plastics, Inc. (TPI) against private respondents Sweet Lines, Inc. (SLI) and Davao Veterans Arrastre and Port Services, Inc. (DVAPSI), along with S.C.I. Line (The Shipping Corporation of India Limited) and F.E. Zuellig, Inc., as co-defendants in the court a quo, seeking recovery of the cost of lost or damaged shipment plus exemplary damages, attorney's fees and costs allegedly due to defendant's negligence, with the following factual backdrop yielded by the findings of the court below and adopted by respondent court:

"It would appear that in or about March 1977, the vessel SS 'VISHVA YASH' belonging to or operated by the foreign common carrier, took on board at Baton Rouge, LA, two (2) consignments of cargoes for shipment to Manila and later for transshipment to Davao City, consisting of 600 bags Low Density Polyethylene 631 and another 6,400 bags Low Density Polyethylene 647, both consigned to the order of Far East Bank and Trust Company of Manila, with arrival notice to Tagum Plastics, Inc., Madaum, Tagum, Davao City. Said cargoes were covered, respectively, by Bills of Lading Nos. 6 and 7 issued by the foreign common carrier (Exhs. E and F). The necessary packing or Weight List (Exhs. A and B), as well as the Commercial Invoices (Exhs. C and D) accompanied the shipment. The cargoes were likewise insured by the Tagum Plastics Inc. with plaintiff Philippine American General Insurance Co., Inc., (Exh. G).

"In the course of time, the said vessel arrived at Manila and discharged its cargoes in the Port of Manila for transshipment to Davao City. For this purpose, the foreign carrier awaited and made use of the services of the vessel called M/V 'Sweet Love' owned and operated by defendant interisland carrier.

"Subject cargoes were loaded in Holds Nos. 2 and 3 of the interisland carrier. These were commingled with similar cargoes belonging to Evergreen Plantation and also Standtilco.

"On May 15, 1977, the shipment(s) were discharged from the interisland carrier into the custody of the consignee. A later survey conducted on July 8, 1977, upon the instance of the plaintiff, shows the following:

"Of the cargo covered by Bill of Lading No. 25 or (2)6, supposed to contain 6,400 bags of Low Density Polyethylene 647 originally inside 160 pallets, there were delivered to the consignee 5,413 bags in good order condition. The survey shows shortages, damages and losses to be as follows:

Undelivered/Damaged, bags as tallied during discharge from vessel-173 bags; undelivered and damaged as noted and observed whilst stored at the pier-699 bags; and shortlanded-110 bags (Exhs. P and P-1).

"Of the 600 bags of Low Density Polyethylene 631, the survey conducted on the same day shows an actual

delivery to the consignee of only 507 bags in good order condition. Likewise noted were the following losses, damages and shortages, to wit:

Undelivered/damaged bags and tally sheets during discharge from vessel-17 bags. Undelivered and damaged as noted and observed whilst stored at the pier-66 bags; Shortlanded-10 bags.

Therefore, of said shipment totalling 7,000 bags, originally contained in 175 pallets, only a total of 5,820 bags were delivered to the consignee in good order condition, leaving a balance of 1,080 bags. Such loss from this particular shipment is what any or all defendants may be answerable to (sic).

"As already stated, some bags were either shortlanded or were missing, and some of the 1,080 bags were torn, the contents thereof partly spilled or were fully/partially emptied, but, worse, the contents thereof contaminated with foreign matters and therefore could no longer serve their intended purpose. The position taken by the consignee was that even those bags which still had some contents were considered as total losses as the remaining contents were contaminated with foreign matters and therefore did not (sic) longer serve the intended purpose of the material. Each bag was valued, taking into account the customs duties and other taxes paid as well as charges and the conversion value then of a dollar to the peso, at P110.28 per bag (see Exhs. L and L-1 M and O.)"[2]

Before trial, a compromise agreement was entered into between petitioners, as plaintiffs, and defendants S.C.I. Line and F.E. Zuellig, upon the latter's payment of P532.65 in settlement of the claim against them. Whereupon, the trial court in its order of August 12, 1981[3] granted plaintiffs motion to dismiss grounded on said amicable settlement and the case as to S.C.I. Line and F.E. Zuellig was consequently "dismissed with prejudice and without pronouncement as to costs."

The trial court thereafter rendered judgment in favor of herein petitioners on this dispositive portion:

"WHEREFORE, judgment is hereby rendered in favor of the plaintiff Philippine General American Insurance Company Inc. and against the remaining defendants, Sweet Lines Inc. and Davao Veterans Arrastre Inc. as follows:

Defendant Sweet Lines, Inc. is ordered to pay said plaintiff the sum of P34,902.00, with legal interest thereon from date of extrajudicial demand on April 28, 1978 (Exh. M) until fully paid;

Defendant Sweet Lines Inc. and Davao Veterans Arrastre and (Port) Services Inc. are directed to pay jointly and severally, the plaintiff the sum of P49,747.55, with legal interest thereon from April 28, 1978 until fully paid;

Each of said defendants are ordered to pay the plaintiffs the additional sum of P5,000 as reimbursable attorney's fees and other litigation expenses;

Each of said defendants shall pay one-fourth (1/4) costs."[4]

Due to the reversal on appeal by respondent court of the trial court's decision on the ground of prescription,[5] in effect dismissing the complaint of herein petitioners; and the denial of their motion for reconsideration,[6] petitioners filed the instant petition for review on certiorari, faulting respondent appellate court with the following errors: (1) in upholding, without proof, the existence of the so-called prescriptive period; (2) granting *arguendo* that the said prescriptive period does exist, in not finding the same to be null and void; and (3) assuming *arguendo* that the said prescriptive period is valid and legal, in failing to conclude that petitioners substantially complied therewith.[7]

Parenthetically, we observe that herein petitioners are jointly pursuing this case, considering their common interest in the shipment subject of the present controversy, to obviate any question as to who the real party in

interest is and to protect their respective rights as insurer and insured. In any case, there is no impediment to the legal standing of petitioner Philamgen, even if it alone were to sue herein private respondents in its own capacity as insurer, it having been subrogated to all rights of recovery for loss of or damage to the shipment insured under its Marine Risk Note No. 438734 dated March 31, 1977[8] in view of the full settlement of the claim thereunder as evidenced by the subrogation receipt[9] issued in its favor by Far East Bank and Trust Co., Davao Branch, for the account of petitioner TPI.

Upon payment of the loss covered by the policy, the insurer's entitlement to subrogation pro tanto, being of the highest equity, equips it with a cause of action against a third party in case of contractual breach.[10] Further, the insurer's subrogatory right to sue for recovery under the bill of lading in case of loss of or damage to the cargo is jurisprudentially upheld.[11] However, if an insurer, in the exercise of its subrogatory right, may proceed against the erring carrier and for all intents and purposes stands in the place and in substitution of the consignee, a fortiori such insurer is presumed to know and is just as bound by the contractual terms under the bill of lading as the insured.

On the first issue, petitioners contend that it was error for the Court of Appeals to reverse the appealed decision on the supposed ground of prescription when SLI failed to adduce any evidence in support thereof and that the bills of lading said to contain the shortened periods for filing a claim and for instituting a court action against the carrier were never offered in evidence. Considering that the existence and tenor of this stipulation on the aforesaid periods have allegedly not been established, petitioners maintain that it is inconceivable how they can possibly comply therewith.[12] In refutation, SLI avers that it is standard practice in its operations to issue bills of lading for shipments entrusted to it for carriage and that it in fact issued bills of lading numbered MD-25 and MD-26 therefore with proof of their existence manifest in the records of the case.[13] For its part, DVAPSI insists on the propriety of the dismissal of the complaint as to it due to petitioners' failure to prove its direct responsibility for the loss of and/or damage to the cargo.[14]

On this point, in denying petitioner's motion for reconsideration, the Court of Appeals resolved that although the bills of lading were not offered in evidence, the litigation obviously revolves on such bills of lading which are practically the documents or contracts sued upon, hence, they are inevitably involved and their provisions cannot be disregarded in the determination of the relative rights of the parties thereto.[15]

Respondent court correctly passed upon the matter of prescription, since that defense was so considered and controverted by the parties. This issue may accordingly be taken cognizance of by the court even if not inceptively raised as a defense so long as its existence is plainly apparent on the face of relevant pleadings.[16] In the case at bar, prescription as an affirmative defense was seasonably raised by SLI in its answer,[17] except that the bills of lading embodying the same were not formally offered in evidence, thus reducing the bone of contention to whether or not prescription can be maintained as such defense and, as in this case, consequently upheld on the strength of mere references thereto.

As petitioners are suing upon SLI's contractual obligation under the contract of carriage as contained in the bills of lading, such bills of lading can be categorized as actionable documents which under the Rules must be properly pleaded either as causes of action or defenses,[18] and the genuineness and due execution of which are deemed admitted unless specifically denied under oath by the adverse party.[19] The rules on actionable documents cover and apply to both a cause of action or defense based on said documents.[20]

In the present case and under the aforestated assumption that the time limit involved is a prescriptive period, respondent carrier duly raised prescription as an affirmative defense in its answer setting forth paragraph 5 of the pertinent bills of lading which comprised the stipulation thereon by parties, to wit:

"5. Claims for shortage, damage, must be made at the time of delivery to consignee or agent, if container shows exterior signs of damage or shortage. Claims for non-delivery, misdelivery, loss or damage must be filed within 30 days from accrual. Suits arising from shortage, damage or loss, non-delivery or misdelivery shall be instituted within 60 days from date of accrual of right of action. Failure to file claims or institute judicial proceedings as herein provided constitutes waiver of claim or right of action. In no case shall carrier be liable for any delay, non-delivery, misdelivery, loss of damage to cargo while cargo is not in actual custody of carrier." [21]

In their reply thereto, herein petitioners, by their own assertions that –

"2. In connection with Pars. 14 and 15 of defendant Sweet Lines, Inc.'s Answer, plaintiffs state that such agreements are what the Supreme Court considers as contracts of adhesion (see *Sweet Lines, Inc. vs. Hon. Bernardo Teves, et al.*, G.R. No. L-37750, May 19, 1978) and, consequently, the provisions therein which are contrary to law and public policy cannot be availed of by answering defendant as valid defenses." [22]

thereby failed to controvert the existence of the bills of lading and the aforequoted provisions therein, hence they impliedly admitted the same when they merely assailed the validity of subject stipulations.

Petitioner's failure to specifically deny the existence, much less the genuineness and due execution, of the instruments in question amounts to an admission. Judicial admissions, verbal or written, made by the parties in the pleadings or in the course of the trial or other proceedings in the same case are conclusive, no evidence being required to prove the same, and cannot be contradicted unless shown to have been made through palpable mistake or that no such admission was made. [23] Moreover, when the due execution and genuineness of an instrument are deemed admitted because of the adverse party's failure to make a specific verified denial thereof, the instrument need not be presented formally in evidence for it may be considered an admitted fact. [24]

Even granting that petitioners' averment in their reply amounts to a denial, it has the procedural earmarks of what in the law on pleadings is called a negative pregnant, that is, a denial pregnant with the admission of the substantial facts in the pleading responded to which are not squarely denied. It is in effect an admission of the averment it is directed to. [25] Thus, while petitioners objected to the validity of such agreement for being contrary to public policy, the existence of the bills of lading and said stipulations were nevertheless impliedly admitted by them.

We find merit in respondent court's comments that petitioners failed to touch on the matter of the non-presentation of the bills of lading in their brief and earlier on in the appellate proceedings in this case, hence it is too late in the day to now allow the litigation to be overturned on that score, for to do so would mean an over indulgence in technicalities. Hence, for the reasons already advanced, the non-inclusion of the controverted bills of lading in the formal offer of evidence cannot, under the facts of this particular case, be considered a fatal procedural lapse as would bar respondent carrier from raising the defense of prescription. Petitioner's feigned ignorance of the provisions of the bills of lading, particularly on the time limitations for filing a claim and for commencing a suit in court, as their excuse for non-compliance therewith does not deserve serious attention.

It is to be noted that the carriage of the cargo involved was effected pursuant to an "Application for Delivery of Cargoes without Original Bill of Lading" issued on May 20, 1977 in Davao City [26] with the notation therein that said application corresponds to and is subject to the terms of bills of lading MD-25 and MD-26. It would be a safe assessment to interpret this to mean that, sight unseen, petitioners acknowledged the existence of said bills of lading. By having the cargo shipped on respondent carrier's vessel and later making a claim for loss on the basis of the bills of lading, petitioners for all intents and purposes accepted said bills. Having done so they are bound by all stipulations contained therein. [27] Verily, as petitioners are suing for recovery on the contract, and in fact even went as far as assailing its validity by categorizing it as a contract of adhesion, then they necessarily admit that

there is such a contract, their knowledge of the existence of which with its attendant stipulations they cannot now be allowed to deny.

On the issue of the validity of the controverted paragraph 5 of the bills of lading above quoted which unequivocally prescribes a time frame of thirty (30) days for filing a claim with the carrier in case of loss of or damage to the cargo and sixty (60) days from accrual of the right of action for instituting an action in court, which periods must concur, petitioners posit that the alleged shorter prescriptive period which is in the nature of a limitation on petitioners' right of recovery is unreasonable and that SLI has the burden of proving otherwise, citing the earlier case of *Southern Lines, Inc. vs. Court of Appeals, et al.*,^[28] They postulate this on the theory that the bills of lading containing the same constitute contracts of adhesion and are, therefore, void for being contrary to public policy, supposedly pursuant to the dictum in *Sweet Lines, Inc. vs. Teves, et al.*^[29]

Furthermore, they contend, since the liability of private respondents has been clearly established, to bar petitioners' right of recovery on a mere technicality will pave the way for unjust enrichment.^[30] Contrarily, SLI asserts and defends the reasonableness of the time limitation within which claims should be filed with the carrier; the necessity for the same, as this condition for the carrier's liability is uniformly adopted by nearly all shipping companies if they are to survive the concomitant rigors and risks of the shipping industry; and the countervailing balance afforded by such stipulation to the legal presumption of negligence under which the carrier labors in the event of loss of or damage to the cargo.^[31]

It has long been held that Article 366 of the Code of Commerce applies not only to overland and river transportation but also to maritime transportation.^[32] Moreover, we agree that in this jurisdiction, as viewed from another angle, it is more accurate to state that the filing of a claim with the carrier within the time limitation therefor under Article 366 actually constitutes a condition precedent to the accrual of a right of action against a carrier for damages caused to the merchandise. The shipper or the consignee must allege and prove the fulfillment of the condition and if he omits such allegations and proof, no right of action against the carrier can accrue in his favor. As the requirements in Article 366, restated with a slight modification in the assailed paragraph 5 of the bills of lading, are reasonable conditions precedent, they are not limitations of action.^[33] Being conditions precedent, their performance must precede a suit for enforcement^[34] and the vesting of the right to file suit does not take place until the happening of these conditions.^[35]

Now, before an action can properly be commenced all the essential elements of the cause of action must be in existence, that is, the cause of action must be complete. All valid conditions precedent to the institution of the particular action, whether prescribed by statute, fixed by agreement of the parties or implied by law must be performed or complied with before commencing the action, unless the conduct of the adverse party has been such as to prevent or waive performance or excuse non-performance of the condition.^[36]

It bears restating that a right of action is the right to presently enforce a cause of action, while a cause of action consists of the operative facts which give rise to such right of action. The right of action does not arise until the performance of all conditions precedent to the action and may be taken away by the running of the statute of limitations, through estoppel, or by other circumstances which do not affect the cause of action.^[37] Performance or fulfillment of all conditions precedent upon which a right of action depends must be sufficiently alleged,^[38] considering that the burden of proof to show that a party has a right of action is upon the person initiating the suit.^[39]

More particularly, where the contract of shipment contains a reasonable requirement of giving notice of loss of or injury to the goods, the giving of such notice is a condition precedent to the action for loss or injury or the right to enforce the carrier's liability. Such requirement is not an empty formalism. The fundamental reason or purpose of

such a stipulation is not to relieve the carrier from just liability, but reasonably to inform it that the shipment has been damaged and that it is charged with liability therefor, and to give it an opportunity to examine the nature and extent of the injury. This protects the carrier by affording it an opportunity to make an investigation of a claim while the matter is fresh and easily investigated so as to safeguard itself from false and fraudulent claims.[40]

Stipulations in bills of lading or other contracts of shipment which require notice of claim for loss of or damage to goods shipped in order to impose liability on the carrier operate to prevent the enforcement of the contract when not complied with, that is, notice is a condition precedent and the carrier is not liable if notice is not given in accordance with the stipulation,[41] as the failure to comply with such a stipulation in a contract of carriage with respect to notice of loss or claim for damage bars recovery for the loss or damage suffered.[42]

On the other hand, the validity of a contractual limitation of time for filing the suit itself against a carrier shorter than the statutory period therefor has generally been upheld as such stipulation merely affects the shipper's remedy and does not affect the liability of the carrier. In the absence of any statutory limitation and subject only to the requirement on the reasonableness of the stipulated limitation period, the parties to a contract of carriage may fix by agreement a shorter time for the bringing of suit on a claim for the loss of or damage to the shipment than that provided by the statute of limitations. Such limitation is not contrary to public policy for it does not in any way defeat the complete vestiture of the right to recover, but merely requires the assertion of that right by action at an earlier period than would be necessary to defeat it through the operation of the ordinary statute of limitations.[43]

In the case at bar, there is neither any showing of compliance by petitioners with the requirement for the filing of a notice of claim within the prescribed period nor any allegation to that effect. It may then be said that while petitioners may possibly have a cause of action, for failure to comply with the above condition precedent they lost whatever right of action they may have in their favor or, taken in another sense, that remedial right or right to relief had prescribed.[44]

The shipment in question was discharged into the custody of the consignee on May 15, 1977, and it was from this date that petitioners' cause of action accrued, with thirty (30) days therefrom within which to file a claim with the carrier for any loss or damage which may have been suffered by the cargo and thereby perfect their right of action. The findings of respondent court as supported by petitioners' formal offer of evidence in the court below show that the claim was filed with SLI only on April 28, 1978, way beyond the period provided in the bills of lading[45] and violative of the contractual provision, the inevitable consequence of which is the loss of petitioners' remedy or right to sue. Even the filing of the complaint on May 12, 1978 is of no remedial or practical consequence, since the time limits for the filing thereof, whether viewed as a condition precedent or as a prescriptive period, would in this case be productive of the same result, that is, that petitioners had no right of action to begin with or, at any rate, their claim was time-barred.

What the court finds rather odd is the fact that petitioner TPI filed a provisional claim with DVAPSI as early as June 14, 1977[46] and, as found by the trial court, a survey fixing the extent of loss of and/or damage to the cargo was conducted on July 8, 1977 at the instance of petitioners.[47] If petitioners had the opportunity and awareness to file such provisional claim and to cause a survey to be conducted soon after the discharge of the cargo, then they could very easily have filed the necessary formal, or even a provisional, claim with SLI itself[48] within the stipulated period therefor, instead of doing so only on April 28, 1978 despite the vessel's arrival at the port of destination on May 15, 1977. Their failure to timely act brings us to no inference other than the fact that petitioners slept on their rights and they must now face the consequences of such inaction.

The ratiocination of the Court of Appeals on this aspect is worth reproducing:

x x x

"It must be noted, at this juncture, that the aforesated time limitation in the presentation of claim for loss or damage, is but a restatement of the rule prescribed under Art. 366 of the Code of Commerce which reads as follows:

'Art. 366. Within the twenty-four hours following the receipt of the merchandise, the claim against the carrier for damage or average which may be found therein upon opening the packages, may be made, provided that the indications of the damage or average which gives rise to the claim cannot be ascertained from the outside part of the packages, in which case the claims shall be admitted only at the time of the receipt.

'After the periods mentioned have elapsed, or the transportation charges have been paid, no claim shall be admitted against the carrier with regard to the condition in which the goods transported were delivered.'

Gleanable therefrom is the fact that subject stipulation even lengthened the period for presentation of claims thereunder. Such modification has been sanctioned by the Supreme Court. In the case of *Ong Yet (M)ua Hardware Co., Inc. vs. Mitsui Steamship Co., Ltd., et al.*, 59 O.G. No. 17, p. 2764, it ruled that Art. 366 of the Code of Commerce can be modified by a bill of lading prescribing the period of 90 days after arrival of the ship, for filing of written claim with the carrier or agent, instead of the 24-hour time limit after delivery provided in the aforesaid legal provision.

"Tested, too, under paragraph 5 of said Bill of Lading, it is crystal clear that the commencement of the instant suit on May 12, 1978 was indeed fatally late. In view of the express provision that 'suits arising from x x x damage or loss shall be instituted within 60 days from date of accrual of right of action,' the present action necessarily fails on ground of prescription.

'In the absence of constitutional or statutory prohibition, it is usually held or recognized that it is competent for the parties to a contract of shipment to agree on a limitation of time shorter than the statutory period, within which action for breach of the contract shall be brought, and such limitation will be enforced if reasonable...' (13 C.J.S. 496-497)

A perusal of the pertinent provisions of law on the matter would disclose that there is no constitutional or statutory prohibition infirming paragraph 5 of subject Bill of Lading. The stipulated period of 60 days is reasonable enough for appellees to ascertain the facts and thereafter to sue, if need be, and the 60-day period agreed upon by the parties which shortened the statutory period within which to bring action for breach of contract is valid and binding. x x x." (Emphasis in the original text.)[49]

As explained above, the shortened period for filing suit is not unreasonable and has in fact been generally recognized to be a valid business practice in the shipping industry. Petitioners' advertence to the Court's holding in the *Southern Lines* case, *supra*, is futile as what was involved was a claim for refund of excess payment. We ruled therein that non-compliance with the requirement of filing a notice of claim under Article 366 of the Code of Commerce does not affect the consignee's right of action against the carrier because said requirement applies only to cases for recovery of damages on account of loss of or damage to cargo, not to an action for refund of overpayment, and on the further consideration that neither the Code of Commerce nor the bills of lading therein provided any time limitation for suing for refund of money paid in excess, except only that it be filed within a reasonable time.

The ruling in *Sweet Lines* categorizing the stipulated limitation on venue of action provided in the subject bill of lading as a contract of adhesion and, under the circumstances therein, void for being contrary to public policy is evidently likewise unavailing in view of the discrete environmental facts involved and the fact that the restriction therein was unreasonable. In any case, *Ong Yiu vs. Court of Appeals, et al.*, [50] instructs us that "contracts of

adhesion wherein one party imposes a ready-made form of contract on the other x x x are contracts not entirely prohibited. The one who adheres to the contract is in reality free to reject it entirely; if he adheres he gives his consent." In the present case, not even an allegation of ignorance of a party excuses non-compliance with the contractual stipulations since the responsibility for ensuring full comprehension of the provisions of a contract of carriage devolves not on the carrier but on the owner, shipper, or consignee as the case may be.

While it is true that substantial compliance with provisions on filing of claim for loss of or damage to cargo may sometimes suffice, the invocation of such an assumption must be viewed vis-a-vis the object or purpose which such a provision seeks to attain and that is to afford the carrier a reasonable opportunity to determine the merits and validity of the claim and to protect itself against unfounded impositions.[51] Petitioners' would nevertheless adopt an adamant posture hinged on the issuance by SLI of a "Report on Losses and Damages," dated May 15, 1977,[52] from which petitioners theorize that this charges private respondents with actual knowledge of the loss and damage involved in the present case as would obviate the need for or render superfluous the filing of a claim within the stipulated period.

Withal, it has merely to be pointed out that the aforementioned report bears this notation at the lower part thereof: "Damaged by Mla. labor upon unloading; B/L noted at port of origin," as an explanation for the cause of loss of and/or damage to the cargo, together with an iterative note stating that "(t)his Copy should be submitted together with your claim invoice or receipt within 30 days from date of issue otherwise your claim will not be honored."

Moreover, knowledge on the part of the carrier of the loss of or damage to the goods deducible from the issuance of said report is not equivalent to nor does it approximate the legal purpose served by the filing of the requisite claim, that is, to promptly apprise the carrier about a consignee's intention to file a claim and thus cause the prompt investigation of the veracity and merit thereof for its protection. It would be an unfair imposition to require the carrier, upon discovery in the process of preparing the report on losses or damages of any and all such loss or damage, to presume the existence of a claim against it when at that time the carrier is expectedly concerned merely with accounting for each and every shipment and assessing its condition. Unless and until a notice of claim is therewith timely filed, the carrier cannot be expected to presume that for every loss or damage tallied, a corresponding claim therefor has been filed or is already in existence as would alert it to the urgency for an immediate investigation of the soundness of the claim. The report on losses and damages is not the claim referred to and required by the bills of lading for it does not fix responsibility for the loss or damage, but merely states the condition of the goods shipped. The claim contemplated herein, in whatever form, must be something more than a notice that the goods have been lost or damaged; it must contain a claim for compensation or indicate an intent to claim.[53]

Thus, to put the legal effect of respondent carrier's report on losses or damages, the preparation of which is standard procedure upon unloading of cargo at the port of destination, on the same level as that of a notice of claim by imploring substantial compliance is definitely far-fetched. Besides, the cited notation on the carrier's report itself makes it clear that the filing of a notice of claim in any case is imperative if carrier is to be held liable at all for the loss of or damage to cargo.

Turning now to respondent DVAPSI and considering that whatever right of action petitioners may have against respondent carrier was lost due to their failure to seasonably file the requisite claim, it would be awkward, to say the least, that by some convenient process of elimination DVAPSI should proverbially be left holding the bag, and it would be pure speculation to assume that DVAPSI is probably responsible for the loss of or damage to cargo. Unlike a common carrier, an arrastre operator does not labor under a presumption of negligence in case of loss, destruction, or deterioration of goods discharged into its custody. In other words, to hold an arrastre operator liable for loss of and/or damage to goods entrusted to it there must be preponderant evidence that it did not

exercise due diligence in the handling and care of the goods.

Petitioners failed to pinpoint liability on any of the original defendants and in this seemingly wild goose-chase, they cannot quite put their finger down on when, where, how and under whose responsibility the loss or damage probably occurred, or as stated in paragraph 8 of their basic complaint filed in the court below, whether "(u)pon discharge of the cargoes from the original carrying vessel, the SS 'VISHVA YASH,' and/or upon discharge of the cargoes from the interisland vessel the MV 'SWEET LOVE,' in Davao City and later while in the custody of defendant arrastre operator." [54]

The testimony of petitioners' own witness, Roberto Cabato, Jr., Marine and Aviation Claims Manager of petitioner Philamgen, was definitely inconclusive and the responsibility for the loss or damage could still not be ascertained therefrom:

"Q In other words, Mr. Cabato, you only computed the loss on the basis of the figures submitted to you and based on the documents like the survey certificate and the certificate of the arrastre?

A Yes, sir.

Q Therefore, Mr. Cabato, you have no idea how or where these losses were incurred?

A No, sir.

x x x

Q Mr. Witness, you said that you processed and investigated the claim involving the shipment in question. Is it not a fact that in your processing and investigation you considered how the shipment was transported? Where the losses could have occurred and what is the extent of the respective responsibilities of the bailees and/or carriers involved?

x x x

A With respect to the shipment being transported, we have of course to get into it in order to check whether the shipment coming in to this port is in accordance with the policy condition, like in this particular case, the shipment was transported to Manila and transhipped through an interisland vessel in accordance with the policy. With respect to the losses, we have a general view where losses could have occurred. Of course we will have to consider the different bailees wherein the shipment must have passed through, like the ocean vessel, the interisland vessel and the arrastre, but definitely at that point and time we cannot determine the extent of each liability. We are only interested at that point and time in the liability as regards the underwriter in accordance with the policy that we issued.

x x x

Q. Mr. Witness, from the documents, namely, the survey of Manila Adjusters and Surveyors Company, the survey of Davao Arrastre contractor and the bills of lading issued by the defendant Sweet Lines, will you be able to tell the respective liabilities of the bailees and/or carriers concerned?

A No, sir." (Underscoring ours.) [55]

Neither did nor could the trial court, much less the Court of Appeals, precisely establish the stage in the course of the shipment when the goods were lost, destroyed or damaged. What can only be inferred from the factual findings of the trial court is that by the time the cargo was discharged to DVAPSI, loss or damage had already occurred and that the same could not have possibly occurred while the same was in the custody of DVAPSI, as demonstrated by the observations of the trial court quoted at the start of this opinion.

ACCORDINGLY, on the foregoing premises, the instant petition is DENIED and the dismissal of the complaint in the court a quo as decreed by respondent Court of Appeals in its challenged judgment is hereby AFFIRMED.

SO ORDERED.

Narvasa, C.J., (Chairman), Padilla, and Nocon, JJ., concur.

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- [1] Civil Case No. 115376, Regional Trial Court of Manila, Branch II.
- [2] Annex F, Petition; Rollo, 47-49.
- [3] Original Record, 88.
- [4] Annex E, Petition; Rollo, 40; Judge Rosalio A. De Leon, presiding.
- [5] C.A.-G.R. CV No. 04620; Per Justice Fidel P. Purisima, with Justices Segundino Chua and Nicolas P. Lapeña, Jr., concurring; Annex F, Petition; Rollo, 41-55.
- [6] Annex I, Petition; Rollo, 66-70.
- [7] Rollo, 10.
- [8] Exhibit G; Original Record, 176.
- [9] Exhibit R; Ibid., 197.
- [10] Fireman's Fund Insurance Company, Inc., et al., vs. Jamila & Company, Inc., et al., 70 SCRA 323 (1976).
- [11] National Development Company vs. Court of Appeals, et al., 164 SCRA 593 (1988).
- [12] Rollo, 11.
- [13] Comment of SLI; Rollo, 4-5.
- [14] Comment of DVAPSI; Ibid., 148-149.
- [15] Annex I, Petition; Rollo, 68.
- [16] Vda. de Portugal, et al. vs. Intermediate Appellate Court, et al., 159 SCRA 178 (1988).
- [17] Original Record, 31; Annex B, Petition; Rollo, 23.
- [18] Sec. 7, Rule 8, Rules of Court.
- [19] Sec. 8, id., Ibid.
- [20] Toribio, et al. vs. Bidin, et al., 134 SCRA 162 (1985).
- [21] Original Record, 31; Annex B, Petition; Rollo, 26.
- [22] Ibid., 44; Annex C, id.; Ibid., 29.
- [23] See Sec. 4, Rule 129, Rules of Court; Sta. Ana vs. Maliwat, et al., 24 SCRA 1018 (1968); Solivio vs. Court of Appeals, et al., 182 SCRA 119 (1990).
- [24] Asia Banking Corporation vs. Olsen, 48 Phil. 529 (1925).
- [25] 61A Am. Jur. 2d, Pleadings 172-173; Galofa vs. Nee Bon Sing, 22 SCRA 48 (1968); Tamayo vs. Callejo, et

al., 46 SCRA 27 (1972).

[26] Exhibits H and I; Original Record, 177-178.

[27] Sea-Land Service, Inc. vs. Intermediate Appellate Court, et al., 153 SCRA 552 (1987).

[28] 4 SCRA 258 (1962).

[29] 83 SCRA 361 (1978).

[30] Rollo, 11-13.

[31] Comment of SLI; Rollo, 102-103.

[32] Government of the Philippine Islands vs. Inchausti & Co., 24 Phil. 315 (1913), citing Cordoba vs. Warner, Barnes & Co., 1 Phil. 7 (1901).

[33] Id.; Triton Insurance Company, Ltd. vs. Jose, 33 Phil. 194 (1916).

[34] Dikowski vs. Metropolitan Life Ins. Co., 24 A. 2d 173, 175, 128 N.J.L. 124.

[35] Newark Gas & Fuel Co. vs. City of Newark, 8 Ohio Dec. 418, 421, 7 Ohio N.P. 76.

[36] 1 Am. Jur. 2d, Actions 608.

[37] Ibid., id., 541.

[38] 61A Am. Jur. 2d, Pleading 89.

[39] 13 C.J.S., Carriers 537.

[40] Ibid., 463, 508; 14 Am. Jur. 2d, Carriers 97; Cf. Roldan vs. Lim Ponzo & Co., 37 Phil. 285 (1917); Consunji vs. Manila Port Service, et al., 110 Phil 231 (1960).

[41] Ibid., 462.

[42] 14 Am. Jur. 2d, Carriers 104-105.

[43] Ibid., id., 98, 117; Ang, et al. vs. Fulton Fire Insurance Co., et al., 2 SCRA 945 (1961).

[44] There can be no right of action without a cause of action being first established (see Español vs. The Chairman, etc. of the Philippine Veterans Administration, (137 SCRA 314 [1985])). On the other hand, the cause of action is distinct from the remedy (Tonn vs. Inner Shoe Tire Co., Tex. Civ. App., 260 S.W. 1078, 1080) and the cause of action may exist though the remedy does not (Chandler vs. Horne, 23 Ohio App. 1, 154 N.E. 748, 750.)

[45] Annex F, Petition; Rollo, 52; Exhibit M, Original Record, 184.

[46] Exhibit N; Original Record, 186.

[47] Annex F, Petition; Rollo, 48.

[48] See Esso Standard Eastern, Inc. vs. Manila Railroad Co., 93 SCRA 307 (1979).

[49] Rollo, 52-54.

[50] 91 SCRA 223 (1979).

[51] 14 Am. Jur. 2d, Carriers 104-105.

[52] Exhibit J; Original Record, 180.

[53] 14 Am. Jur. 2d, Carriers 106.

[54] Annex A, Petition; Rollo, 18-19.

[55] TSN, June 26, 1981, 16-19, 22.

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