7 Phil. 436

[G.R. No. 3086. February 07, 1907]

MITSUI BUSSAN KAISHA, PLAINTIFF AND APPELLANT, VS. THE GOVERNMENT OF THE PHILIPPINE ISLANDS, DEFENDANT AND APPELLEE.

D E C I S I O N

WILLARD, J.:

On April 28, 1903, the plaintiff, a Japanese company engaged in the mining and selling of coal, submitted to the Insular Government a proposition to furnish it 10,000 tons of coal for its Ice Plant at the rate of $5.95, United States currency, per ton, the delivery to begin on June 15, 1903. The proposition stated that the coal should "be piled in the coal yard of the Insular Ice Plant, subject to inspection and weighed under the supervision of the superintendent." This offer was accepted by the defendant on the 30th of May, 1903, the letter of acceptance saying "to be piled in the coal yard of the Insular Ice Plant subject to inspection and weighed under the supervision of the superintendent thereof."

Coal was delivered under this contract between the 12th day of June, 1903, and the 1st day of April, 1904, amounting to 9,384 tons and 457 pounds according to the defendant's weights. By mutual agreement between the parties that amount was reduced to 9,024.90 tons, which was accepted and paid for by the defendant. The defendant having called for additional coal to be furnished under the same arrangement, the plaintiff, between the 29th of April, 1904, and the 12th of May of the same year, delivered to the defendant at its Ice Plant coal which, according to the weights kept by the defendant, amounted to 2,247 tons and 5 pounds. For this coal the Government refused to pay and this action was brought against it by the plaintiff to recover the value of the said 2,247 tons. The suit was authorized by Act No. 1290 of the Commission.

The Government refused to pay for the last delivery of coal on the ground that mistakes had been made in weighing former deliveries and that it had already paid for a large amount of coal which it had never received. It, accordingly, in its answer alleged a counterclaim

against the plaintiff, declaring that the amount of coal actually delivered from June, 1903, to May 12, 1904, instead of being 11,206 tons, was, in fact, only 7,800 tons—that is, 3,400 tons less than that which the parties supposed had been delivered. It also alleged that it had already paid for such coal $53,323.38, United States currency, that it had overpaid the plaintiff the amount of $3,408.90, and asked judgment against it for that sum.

The court below found as to the deliveries made in April and May, 1904, that instead of having received 2,247 tons, the defendant, in fact, received only 2,155 tons and 2,208 pounds of coal, the value of which, $12,828.11, United States currency, had not been paid by the defendant.

As to the coal delivered prior to the month of April, 1904, the court below found that the defendant had paid for 549 tons and 824 pounds more than it had received; that this overpayment was made "by error through a mistake of facts," and that the defendant was entitled to an allowance on its counterclaim of $3,269. The court below deducted this last amount from the amount of $12,828.11 and ordered judgment in favor of the plaintiff for $9,559.11, United States currency, with interest. From this judgment the plaintiff appealed.

The coal was brought here from Japan in eight different steamers. It was unloaded from the steamers in the bay into cascos, was brought up the river to the Ice Plant, unloaded from the cascos in baskets, and deposited in the coal yard. The method of weighing the coal at the Ice Plant was the following: Among the employees of the defendant at the Ice Plant were two checkers, Anastasio Bautista and Marcos Fernandez, who checked and weighed the coal. As the men carrying the coal passed them, every fifth man was stopped, his basket weighed, and a memorandum made by the checkers in books which they kept for that purpose. Allowance was made for the weight of the baskets. The weights thus taken were reported by the checkers and the coal, with the exception of the last delivery in April and May, was paid for on the theory that such weights were correct.

The contention of the defendant is that these weights were incorrect, and in order to maintain this position, it must show not only that these checkers made mistakes in the weights which they took, but it must show with reasonable certainty what the mistakes were; in other words, it must show with reasonable certainty that a definite amount of coal was accepted as delivered when it was not so delivered.

In the first place it is to be noticed that no claim is made by the defendant that there was any fraud practiced by the checkers, or that there was any collusion between them and the

plaintiff company; in fact, it appears that these two checkers are still in the employ of the defendant and are engaged in the same work in which they were engaged at the time it is said that they made these mistakes. The then superintendent of the Ice Plant testified that they were honest men. Both of them testified at the trial as witnesses for the defendant, and from their testimony no conclusion can be drawn that any mistakes were made by them in the weights.

Nor can the claim of the defendant be based upon the use of an erroneous system for determining the weights, since the present superintendent of the Ice Plant testified that that system was still in vogue, although it appears that the coal is now weighed again when it is burned. There is, therefore, no direct evidence in the case to show that these checkers made any mistakes in the weights which they reported.

The defendant, however, relies upon several indirect ways of proving that such mistakes must have been made. One of these tests it finds in the bills of lading. It appears that the plaintiff company owns the mines from which the coal was taken in Japan; that when the coal in question was loaded upon the steamers which brought it to Manila, it was not at that time weighed; and that bills of lading for the cargo of coal were then made out, not with reference to any actual weight, but with reference to the capacity of the steamer. The representative of the company testified that sometimes a ship would bring 300 tons more than that indicated in the bills of lading, and sometimes it would bring less. One of the ships in question was the *Claverburn*, which arrived in Manila on the 31st of January, 1904. In a communication made by the company to the Collector of Customs, apparently about that time, it is stated that this steamer discharged 286 tons more than the amount indicated by the bills of lading. The steamer *Petrarch* arrived on the 18th of July, 1903. On the 31st of August the company wrote a letter to the Collector of Customs stating the amount of coal which had been delivered to different persons from that steamer, from which it appeared that it brought 38 tons more than the amounts indicated by the bills of lading. All the bills of lading contained, after the number of tons, the following phrase: “More or less, all on board to be delivered.”

An examination of the evidence in the case shows that the amount of coal brought by the steamers according to the bills of lading and the amount actually delivered out of them hardly ever agreed, and in view of the fact that the amount stated in the bills of lading was not determined by any weight actually made, it is impossible to say that a discrepancy between such amounts and the amount determined by the checkers at the Ice Plant after actually weighing the coal shows that the latter made a mistake. Such facts have no

tendency to show that the checkers made a mistake, but rather that the bills of lading did not state with accuracy the amount of coal carried.

There is another point to be taken into consideration. The steamer *Petrarch* brought, according to its bills of lading, 1,930 tons, but there were actually landed from it 1,968 tons. Of this amount only 753 tons went to the Ice Plant, 1,209 tons were delivered to Japanese war vessels, and 6 tons were delivered to Mr. Sherman. How the excess of 38 tons was divided is, of course, impossible to know, and it is impossible to say that this excess of 38 tons proves that the checkers at the Ice Plant made a mistake to that amount in their weights.

No customs duties were paid upon the coal which was delivered to the Ice Plant for Government use, and the defendant claims that the inaccuracy of the weights taken by the checkers at the Ice Plant is shown by the permits which were given for the free entry of the coal. This test was adopted by the court below and the case was decided with reference thereto.

The first boat arriving was the *Ailsa Craig*. As to this shipment the court found that the amount checked at the Ice Plant was 1,678 tons, and that free entry was given for exactly that number of tons. He therefore concluded that no mistake was made by the checkers in this shipment. An examination of the record in reference thereto shows that according to the bills of lading it brought 4,980 tons; that the quartermaster of the Army received 2,203 tons; that permission was granted for the free entry of 1,000 tons for use in the Ice Plant; that the plaintiff company entered 1,600 tons for its own consumption and that it paid the duties thereon. The only free entry granted at the time for the Ice Plant, therefore, was a free entry for 1,000 tons, while the amount actually received according to the checkers was 1,678 tons.

The manager of the plaintiff company testified that it was their intention at first to deliver 1,000 tons to the Ice Plant but they found they could deliver more and made arrangements with Mr. Smith, the superintendent, to deliver up to 2,000 tons, and in fact delivered 1,678 tons; that having learned from the checkers at the Ice Plant that 1,678 tons had been actually received, he made application to the customs officers for the free entry of 678 tons, which was granted; and that with the previous free entry of 1,000 tons, this equaled the amount actually delivered to the Ice Plant according to the checkers. This is the only shipment in which the amount mentioned in the permits for free entry and the amount received as shown by the checkers, agree, and it is seen that they agree in this case for the

reason that the second permit was not taken out until it was known exactly how much coal had been delivered.

The next shipment arrived on the *Petrarch* in July. There were two bills of lading, one for 930 tons and one for 1,000 tons; the plaintiff obtained a permit for the free entry of 930 tons, and entered and paid the duties on 1,000 tons. Although the permission for free entry for the Ice Plant was 930 tons, the amount actually received there was 753 tons. In a letter directed to the Collector of Customs on the 31st of August, 1903, the plaintiff said: "It was our intention to deliver 1,000 tons to the Japanese men-of-war and 930 tons to the Insular Ice Plant and the customs entries were made out accordingly, but by a sudden request from the war vessels the quantity was increased to 1,209 tons, thereby causing the decrease in the quantity to be delivered to the Insular Government as stated above, namely, 730 tons." It also appeared in that letter that 6 tons were delivered to Mr. Sherman. The court below found that 209 tons delivered to the Japanese war vessels was the balance of the cargo, and deducting that 209 tons from the permission for free entry of 930 tons there remained 721 tons, and the checkers having reported the receipt of 753 tons, these facts show that they made a mistake in weighing to the amount of 32 tons. It is evident that the free entry of 930 tons was fixed at that amount for the reason that one of the bills of lading was for 930 tons. The steamer brought 38 tons more than the bills of lading called for. It appears that the permission for free entry in all cases was given before the coal was actually unloaded, and in this case that the amount actually delivered was 177 tons less than the amount called for by the permission for free entry. It is very evident that no basis for the court's finding is found in this evidence.

The *Prima* arrived on the 27th of November. A free entry for 1,400 tons was asked for, and 250 tons was entered for the payment of duties, the bill of lading indicating a cargo of 1,650 tons. It was proved that the superintendent of the Ice Plant asked for more coal, and the company told him they could deliver 250 tons more if necessary from their own stock which they had just landed from the same steamer. The amount actually received at the Ice Plant according to the checkers was 1,630 tons and 1,045 pounds.

There is nothing in this evidence to show that any mistake was made by the checkers in weighing the coal. In fact, it shows, as the other shipments show, that the amount for which free entry was at first asked and given could not in any way determine the amount which was actually received at the Ice Plant. In this particular case protest was made to the company as to the bad quality of the coal, and the company voluntarily reduced the shipment from 1,630 tons to 1,426 tons. The amount, therefore, which the court below

charged to the plaintiff was only 26 tons, but if this reduction had not been made, that court, following the theory upon which it decided the case, would have been compelled to charge the plaintiff with 230 tons, paid for and not delivered.

Among the deliveries made, according to the findings of the court below, was one of 413 tons from a *bodega*. The court states in its findings that this coal came from the *Prima*. The *Prima* arrived on the 27th of November, 1903. No permission for free entry was given until the 28th, and the coal was landed, according to the reports kept by the checkers, which were all offered in evidence, commencing with the 1st day of December. According to the court below and the brief of the appellee, the coal which was received from the *bodega* was received on the 27th of November, according to the testimony of Edmiston between the 21st of November and the 25th, and the answer alleges that it was received between those dates. Therefore it appears conclusively that this amount of coal did not come from the *Prima*.

The *Tetartos* arrived on the 27th of January with one bill of lading for 2,780 tons. A permit for the free entry of 300 tons was asked for and granted. The amount checked into the Ice Plant was 310 tons and 1,820 pounds. The remainder of this cargo, amounting to more than 2,400 tons, was sent to Iloilo.

The court below held that because the permit for free entry was 300 tons that that fact alone showed that the checkers, when they said they weighed 310 tons, made a mistake of 10 tons. That conclusion can not be supported.

The *Claverburn* arrived on the 31st of January. There were two bills of lading, one for 2,200 tons and the other for 3,911 tons. A permit was given for the free entry to the Ice Plant of 2,000 tons. According to the checkers the amount actually received at the Ice Plant from this ship was 2,180 tons. It has been already stated that this ship discharged 286 tons more than indicated in the bills of lading. A permit was given to the quartermaster for the free entry of 3,911 tons, the exact amount named in one of the bills of lading. It also appears that the company was afterwards permitted by the quartermaster to take 100 tons of this amount for the steamer *Victoria*.

The *Lena* arrived in Manila on the 9th of September, 1903, with one bill of lading for 1,900 tons. A permit was given for the free entry of 1,900 tons for the Ice Plant. The amount actually received there according to the Government checkers was 2,354 tons. This is a shipment where doubt exists. A record was kept of the amount of coal brought by the different cascoes into which each shipment was unloaded, and while in other shipments an

average of about 50 tons to a casco was shown, in this shipment there was an average of 73 tons for each casco. The amount of the shipment was, however, reduced voluntarily by the company from 2,354 tons to 2,200 tons, and that was the amount for which the Government paid. It is claimed by the defendant that this reduction was made on account of the bad character of the coal. The agent of the company, however, testified that when this claim for reduction was made they found that the ship could only carry 2,200 tons and they reduced it to that amount. But whatever may be the other evidence as to a mistake in regard to this shipment, it is apparent that such mistake is no more proven in this case by the amount of the free entry than it is in the other cases.

With reference to the deliveries made by the two steamers *Minas de Batan* and *Perla* between the 29th of April and the 12th of May, 1904, the court below applied a test different from that applied in the other cases, and did not base its findings as to the mistake made by the checkers upon the amount of coal for which a free entry was given. But an examination of the papers relating to that shipment will show, as is shown by those relating to the other shipments, that the amount of coal mentioned in the permits for free entry was not determined with reference to any quantity actually weighed. For the *Perla* there was only one bill of lading for 1,785 tons, and the permission for free entry was given to the quartermaster for exactly that amount. Afterwards, the quartermaster saying that he had no objection to allowing the delivery of 700 tons to the Ice Plant, a permit for the entry of that amount was given.

With the *Minas de Batan* came two bills of lading, one for 1,000 tons and the other for 700 tons, and a permit for the free entry of 1,700 tons, the exact amount of the two bills of lading, was granted. According to these permits, the amount which should have been received at the Ice Plant was 2,400 tons, but as a matter of fact, the checkers' returns showed only the receipt of 2,247 tons.

We are satisfied that the court below erred in adopting as a basis for its decision the amounts named in these permits. The coal was weighed by the plaintiff when it left the ship, the custom being to weigh every morning the first 20 baskets and upon this basis estimate the amount discharged. Whether or not the customs officials weighed coal admitted free of duties is not made clear by the evidence. In any event no proof was presented of the weights taken on the ship either by the plaintiff or the customs officials, and the court below based its conclusions not upon any difference in the weights of the same coal taken in two different places but upon the fact that the weights actually taken at the Ice Plant differed from the amount which was at the custom-house written into the permits asked for by the

Insular Purchasing Agent. How the amount to be thus inserted was determined appears from the testimony of one of the custom-house clerks, a witness for the defendants. He said:

> "Q. Is it not a fact that upon the arrival of the vessel with bulk cargo which it is proposed to admit under a free entry, that in issuing the permit for the discharge and landing of that cargo that the amount of the cargo is taken directly from the bill of lading; that you rely upon the amount stated in the bill of lading as being the amount of the cargo?—A. Yes, sir."

That this is correct is shown by comparing the bills of lading with the permits given for the different cargoes, as they appear in the foregoing statement.

As to the shipments by the *Perla* and *Minas de Batan*, the court found that after the delivery an investigation was made which showed "that 424 tons and 250 pounds, as checked in, had been placed in the coal elevator, and that subsequently 1,604 tons and 1,715 pounds, as checked in, had been delivered to the coal bin, and 218 tons and 280 pounds, as checked, were piled outside of the bin. The first amount checked into the coal elevator was weighed again and found to be only 417 tons and 736 pounds, making an apparent shortage of 6 tons and 1,754 pounds; the second lot in the bin was weighed again and found to be only 1,520 tons and 1,192 pounds, making an apparent shortage of 84 tons and 523 pounds; the other 218 tons and 280 pounds, which was piled outside of the bin, was not weighed again, and that weight must therefore be found to be correct." And the court charged the plaintiff with 90 tons which they had not delivered.

This coal was landed before the 12th of May, 1904. This second weighing took place when the coal was actually used in the furnaces, and it commenced on the 13th of June and terminated on the 21st day of September, 1904. The persons who made the second weighing did not testify as witnesses, nor did anyone who saw it weighed. It seems that some record of such weighing was kept and those records furnished the evidence upon which the judge based his finding as to the mistake in weights. The then superintendent of the Ice Plant and other witnesses testified that there was a loss of 1 per cent in handling. This might explain away 22 tons of the difference. It was proved also that coal was taken from this pile during that time for a launch used by the Ice Plant, and that this launch consumed from 6 to 8 tons a month. Between the 30th of April and the 21st of September there would have been a consumption of about 28 tons for this purpose. It was also proved that a cook who was employed in the Ice Plant took what coal he needed from the same source, amounting to

about a ton a month. During the time aforesaid this would imply a use of 4 or 5 tons. Whether this coal was stored in a yard or in a building does not definitely appear, but we infer that it was stored in the open air.

In view of the facts thus appearing, we do not think it can be said that the checkers when they reported 2,247 tons as weighed in from this shipment committed a mistake as to any definite number of tons. Error is not shown by this subsequent weighing made at the time and in the manner stated and proved by records made by persons who were not presented as witnesses.

The defendant relies to a large extent upon another test, and that is the amount of coal which the Ice Plant ought to have consumed during that time. A large amount of evidence was introduced relating to tests which were actually made, records of which were kept, and which were presented as proof. Edmiston, who was the principal witness for the defendant, was at the time of the trial the superintendent of the Ice Plant, but at the time these transactions took place he was the disbursing officer and knew nothing about them as they occurred, and his testimony was based entirely upon what appeared from the records in his office. He stated that if the amount of coal which the checkers reported as received had been received, the Plant would have consumed coal at the rate of 28 tons a day, and that the tests made show that it should not have consumed more than from 19 to 22 tons a day. The testimony of O'Donovan, however, a witness for the defendant, shows that the Plant might use 36 tons a day if care was not taken in feeding the furnaces. It also appears from evidence furnished by the defendant itself that the machinery was in very bad condition during this time and that the amount of coal consumed depends a good deal upon the skill of the firemen and of the engineer. As to the actual tests made, it can be said that those made after the time in question, and under the present management, are not entitled to any considerable weight because it is very apparent that after the departure of the former superintendent and the coming of the present superintendent, a great reform was instituted in the matter of coal consumption and the firemen were held to a strict account for all the coal that was burned, and if more was burned in a given day than the superintendent thought ought to have been burned, explanations were required.

Evidence, however, was introduced to show certain tests of this kind made in the year 1903, and as to which Edmiston testified. Mitchell, who was at the time chief engineer of the Plant, in a letter dated May 23, 1904, directed to Mr. Smith, the then superintendent, speaks of three tests, one made in February, 1903, and another made in June, 1903, and another made in July. He adds: "There were some later tests made, but they were made

while experimenting with the underfeed stokers and are of no value in determining an average coal consumption throughout the year." All the tests as to which Edmiston testified except one were made after July, 1903, and were therefore, according to the testimony of the then engineer in chief, of no value.

In examining this case we are compelled to start with the fact that the defendant received and itself weighed the coal, accepted, paid for—excepting the last delivery, according to its own weights—and burned it, and when it now says that it made a mistake in those weights, the burden is on it to show by competent and satisfactory evidence not only that there were errors committed by its employees in the weighing, but also the extent of such errors. The evidence presented in the case does not satisfactorily show that any mistake was made. At most it furnishes no more than a suspicion that some errors may have crept in. The case as to which the suspicion is the strongest is, as we have said, the case of the *Lena*, but in that case it must be considered that after the amount had been reduced, the excess of the deliveries over the amount named in the bills of lading and the permission of free entry was not more according to the testimony than frequently appeared in cases of delivery to other persons. And besides all this, even assuming that more coal was paid for on account of that delivery than was actually received, there is no possible way of telling how much. Any estimate of such excess would, upon the evidence before us, be the merest guess and the case can not be determined upon that basis. In the case of Campbell *vs*. Behn, Meyer & Co.[1] (2 Off. Gaz., 469) the court said:

> "The parties first actually measured the sand and earth and the amount was paid for according to actual measurement; but now the defendants, by their experts, have guessed that they did not receive as much as the defendants' former measurement shows, and they want a return of money on the ground that the guess is more reliable than the measurement."

In our opinion the Government has not shown that any mistake to a definite amount was made in the weights kept by its employees, and the judgment of the court below so far as it holds to the contrary can not be sustained. That judgment is accordingly modified and judgment is ordered for the plaintiff for $13,369.65, money of the United States, equivalent to P26,739.30, Philippine currency, with interest thereon at the rate of 6 per cent per annum from the 31st day of January, 1905, and the costs of the first instance. No costs will be allowed to either party in this court. After expiration of twenty days let judgment be

entered in accordance herewith and ten days thereafter the record remanded to the court from whence it came for proper action. So ordered.

Arellano, C. J., Torres, Mapa, and *Carson, JJ.,* concur.

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[1] 3 Phil. Rep., 590.

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