373 Phil. 976

FIRST DIVISION

[G.R. No. 131621, September 28, 1999]

LOADSTAR SHIPPING CO., INC., PETITIONER, VS. COURT OF APPEALS AND THE MANILA INSURANCE CO., INC., RESPONDENTS.

D E C I S I O N

DAVIDE, JR., C.J.:

Petitioner Loadstar Shipping Co., Inc. (hereafter LOADSTAR), in this petition for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure, seeks to reverse and set aside the following: (a) the 30 January 1997 decision[1] of the Court of Appeals in CA-G.R. CV No. 36401, which affirmed the decision of 4 October 1991[2] of the Regional Trial Court of Manila, Branch 16, in Civil Case No. 85-29110, ordering LOADSTAR to pay private respondent Manila Insurance Co. (hereafter MIC) the amount of P6,067,178, with legal interest from the filing of the complaint until fully paid, P8,000 as attorney's fees, and the costs of the suit; and (b) its resolution of 19 November 1997,[3] denying LOADSTAR's motion for reconsideration of said decision.

The facts are undisputed.

On 19 November 1984, LOADSTAR received on board its M/V "Cherokee" (hereafter, the vessel) the following goods for shipment:

a) 705 bales of lawanit hardwood;
b) 27 boxes and crates of tilewood assemblies and others; and
c) 49 bundles of mouldings R & W (3) Apitong Bolidenized.

The goods, amounting to P6,067,178, were insured for the same amount with MIC against various risks including "TOTAL LOSS BY TOTAL LOSS OF THE VESSEL." The vessel, in turn, was insured by Prudential Guarantee & Assurance, Inc. (hereafter PGAI) for P4 million. On 20 November 1984, on its way to Manila from the port of Nasipit, Agusan del Norte, the vessel, along with its cargo, sank off Limasawa Island. As a result of the total loss of its shipment, the consignee made a claim with LOADSTAR which, however, ignored the same. As the insurer, MIC paid P6,075,000 to the insured in full settlement of its claim, and the latter executed a subrogation receipt therefor.

On 4 February 1985, MIC filed a complaint against LOADSTAR and PGAI, alleging that the sinking of the vessel was due to the fault and negligence of LOADSTAR and its employees. It also prayed that PGAI be ordered to pay the insurance proceeds from the loss of the vessel directly to MIC, said amount to be deducted from MIC's claim from LOADSTAR.

In its answer, LOADSTAR denied any liability for the loss of the shipper's goods and claimed that the sinking of its vessel was due to *force majeure*. PGAI, on the other hand, averred that MIC had no cause of action against it, LOADSTAR being the party insured. In any event, PGAI was later dropped as a party defendant after it paid the insurance proceeds to LOADSTAR.

As stated at the outset, the court *a quo* rendered judgment in favor of MIC, prompting LOADSTAR to elevate the matter to the Court of Appeals, which, however, agreed with the trial court and affirmed its decision *in toto.*

In dismissing LOADSTAR's appeal, the appellate court made the following observations:

1) LOADSTAR cannot be considered a private carrier on the sole ground that there was a single shipper on that fateful voyage. The court noted that the charter of the vessel was limited to the ship, but LOADSTAR retained control over its crew.[4]

2) As a common carrier, it is the Code of Commerce, not the Civil Code, which should be applied in determining the rights and liabilities of the parties.

3) The vessel was not seaworthy because it was undermanned on the day of the voyage. If it had been seaworthy, it could have withstood the "natural and inevitable action of the sea" on 20 November 1984, when the condition of the sea was moderate. The vessel sank, not because of *force majeure,* but because it was not seaworthy. LOADSTAR'S allegation that the sinking was probably due to the "convergence of the winds," as stated by a PAGASA expert, was not duly proven at the trial. The "limited liability" rule, therefore, is not applicable considering that, in this case, there was an actual finding of negligence on the part of the carrier.[5]

4) Between MIC and LOADSTAR, the provisions of the Bill of Lading do not apply because said provisions bind only the shipper/consignee and the carrier. When MIC paid the shipper for the goods insured, it was subrogated to the latter's rights as against the carrier, LOADSTAR.[6]

5) There was a clear breach of the contract of carriage when the shipper's goods never reached their destination. LOADSTAR's defense of "diligence of a good father of a family" in the training and selection of its crew is unavailing because this is not a proper or complete defense in *culpa contractual*.

6) "Art. 361 (of the Code of Commerce) has been judicially construed to mean that when goods are delivered on board a ship in good order and condition, and the shipowner delivers them to the shipper in bad order and condition, it then devolves upon the shipowner to both allege and prove that the goods were damaged by reason of some fact which legally exempts him from liability." Transportation of the merchandise at the risk and venture of the shipper means

> that the latter bears the risk of loss or deterioration of his goods arising from fortuitous events, *force majeure*, or the inherent nature and defects of the goods, but not those caused by the presumed negligence or fault of the carrier, unless otherwise proved.[7]

The errors assigned by LOADSTAR boil down to a determination of the following issues:

> (1) Is the M/V "Cherokee" a private or a common carrier?
> (2) Did LOADSTAR observe due and/or ordinary diligence in these premises?

Regarding the first issue, LOADSTAR submits that the vessel was a private carrier because it was not issued a certificate of public convenience, it did not have a regular trip or schedule nor a fixed route, and there was only "one shipper, one consignee for a special cargo."

In refutation, MIC argues that the issue as to the classification of the M/V "Cherokee" was not timely raised below; hence, it is barred by estoppel. While it is true that the vessel had on board only the cargo of wood products for delivery to one consignee, it was also carrying passengers as part of its regular business. Moreover, the bills of lading in this case made no mention of any charter party but only a statement that the vessel was a "general cargo carrier." Neither was there any "special arrangement" between LOADSTAR and the shipper regarding the shipment of the cargo. The singular fact that the vessel was carrying a particular type of cargo for one shipper is not sufficient to convert the vessel into a private carrier.

As regards the second error, LOADSTAR argues that as a private carrier, it cannot be presumed to have been negligent, and the burden of proving otherwise devolved upon MIC.[8]

LOADSTAR also maintains that the vessel was seaworthy. Before the fateful voyage on 19 November 1984, the vessel was allegedly dry docked at Keppel Philippines Shipyard and was duly inspected by the maritime safety engineers of the Philippine Coast Guard, who certified that the ship was fit to undertake a voyage. Its crew at the time was experienced, licensed and unquestionably competent. With all these precautions, there could be no other conclusion except that LOADSTAR exercised the diligence of a good father of a family in ensuring the vessel's seaworthiness.

LOADSTAR further claims that it was not responsible for the loss of the cargo, such loss being due to force majeure. It points out that when the vessel left Nasipit, Agusan del Norte, on 19 November 1984, the weather was fine until the next day when the vessel sank due to strong waves. MIC's witness, Gracelia Tapel, fully established the existence of two typhoons, "WELFRING" and "YOLING," inside the Philippine area of responsibility. In fact, on 20 November 1984, signal no. 1 was declared over Eastern Visayas, which includes Limasawa Island. Tapel also testified that the convergence of winds brought about by these two typhoons strengthened wind velocity in the area, naturally producing strong waves and winds, in turn, causing the vessel to list and eventually sink.

LOADSTAR goes on to argue that, being a private carrier, any agreement limiting its liability, such as what transpired in this case, is valid. Since the cargo was being shipped at "owner's risk," LOADSTAR was not liable for any loss or damage to the same. Therefore, the Court of Appeals erred in holding that the provisions of the bills of lading apply only to the shipper and the carrier, and not to the insurer of the goods, which conclusion runs counter to the Supreme Court's ruling in the case of *St. Paul Fire & Marine Insurance Co. v. Macondray & Co., Inc.,*[9] *and National Union Fire Insurance Company of Pittsburg v. Stolt-Nielsen Phils., Inc.*[10]

Finally, LOADSTAR avers that MIC's claim had already prescribed, the case having been instituted beyond the period stated in the bills of lading for instituting the same – suits based upon claims arising from shortage, damage, or non-delivery of shipment shall be instituted within sixty days from the accrual of the right of action. The vessel sank on 20 November 1984; yet, the case for recovery was filed only on 4 February 1985.

MIC, on the other hand, claims that LOADSTAR was liable, notwithstanding that the loss of the cargo was due to f*orce majeure*, because the same concurred with LOADSTAR's fault or negligence.

Secondly, LOADSTAR did not raise the issue of prescription in the court below; hence, the same must be deemed waived.

Thirdly, the "limited liability" theory is not applicable in the case at bar because LOADSTAR was at fault or negligent, and because it failed to maintain a seaworthy vessel. Authorizing the voyage notwithstanding its knowledge of a typhoon is tantamount to negligence.

We find no merit in this petition.

Anent the first assigned error, we hold that LOADSTAR is a common carrier. It is not necessary that the carrier be issued a certificate of public convenience, and this public character is not altered by the fact that the carriage of the goods in question was periodic, occasional, episodic or unscheduled.

In support of its position, LOADSTAR relied on the 1968 case of *Home Insurance Co. v. American Steamship Agencies, Inc.*,[11] where this Court held that a common carrier transporting special cargo or chartering the vessel to a special person becomes a private carrier that is not subject to the provisions of the Civil Code. Any stipulation in the charter party absolving the owner from liability for loss due to the negligence of its agent is void only if the strict policy governing common carriers is upheld. Such policy has no force where the public at large is not involved, as in the case of a ship totally chartered for the use of a single party. LOADSTAR also cited *Valenzuela Hardwood and Industrial Supply, Inc. v. Court of Appeals*[12] and *National Steel Corp. v. Court of Appeals*,[13] both of which upheld the Home Insurance doctrine.

These cases invoked by LOADSTAR are not applicable in the case at bar for simple reason that the factual settings are different. The records do not disclose that the M/V "Cherokee," on the date in question, undertook to carry a special cargo or was chartered to a special person only. There was no charter party. The bills of lading