Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

ASIAN TERMINALS, INC., Petitioner,	**G.R. No. 177116**
	Present:
- versus -	SERENO, *C.J.*, *Chairperson*, LEONARDO-DE CASTRO, BERSAMIN, ABAD,* and VILLARAMA, JR., *JJ.*
SIMON ENTERPRISES, INC., Respondent.	Promulgated: FEB 27 2013

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DECISION

VILLARAMA, JR., *J.*:

Before us is a petition for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure, as amended, assailing the Decision[1] dated November 27, 2006 and Resolution[2] dated March 23, 2007 of the Court of Appeals (CA) in CA-G.R. CV No. 71210.

The facts are as follows:

On October 25, 1995, Contiquincybunge Export Company loaded 6,843.700 metric tons of U.S. Soybean Meal in Bulk on board the vessel M/V "Sea Dream" at the Port of Darrow, Louisiana, U.S.A., for delivery to the Port of Manila to respondent Simon Enterprises, Inc., as consignee. When the vessel arrived at the South Harbor in Manila, the shipment was discharged to the receiving barges of petitioner Asian Terminals, Inc. (ATI),

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* Designated additional member per Raffle dated January 7, 2013 vice Associate Justice Bienvenido L. Reyes who recused himself from the case due to prior action in the Court of Appeals.

1 *Rollo*, pp. 35-52. Penned by Associate Justice Fernanda Lampas Peralta with Associate Justices Bienvenido L. Reyes (now a member of this Court) and Myrna Dimaranan-Vidal concurring.

2 Id. at 59.

the arrastre operator. Respondent later received the shipment but claimed having received only 6,825.144 metric tons of U.S. Soybean Meal, or short by 18.556 metric tons, which is estimated to be worth US$7,100.16 or ₱186,743.20.[3]

On November 25, 1995, Contiquincybunge Export Company made another shipment to respondent and allegedly loaded on board the vessel M/V "Tern" at the Port of Darrow, Louisiana, U.S.A. 3,300.000 metric tons of U.S. Soybean Meal in Bulk for delivery to respondent at the Port of Manila. The carrier issued its clean Berth Term Grain Bill of Lading.[4]

On January 25, 1996, the carrier docked at the inner Anchorage, South Harbor, Manila. The subject shipment was discharged to the receiving barges of petitioner ATI and received by respondent which, however, reported receiving only 3,100.137 metric tons instead of the manifested 3,300.000 metric tons of shipment. Respondent filed against petitioner ATI and the carrier a claim for the shortage of 199.863 metric tons, estimated to be worth US$79,848.86 or ₱2,100,025.00, but its claim was denied.

Thus, on December 3, 1996, respondent filed with the Regional Trial Court (RTC) of Manila an action for damages[5] against the unknown owner of the vessels M/V "Sea Dream" and M/V "Tern," its local agent Inter-Asia Marine Transport, Inc., and petitioner ATI alleging that it suffered the losses through the fault or negligence of the said defendants. Respondent sought to claim damages plus attorney's fees and costs of suit. Its claim against the unknown owner of the vessel M/V "Sea Dream," however, was later settled in a Release and Quitclaim[6] dated June 9, 1998, and only the claims against the unknown owner of the M/V "Tern," Inter-Asia Marine Transport, Inc., and petitioner ATI remained.

In their Answer,[7] the unknown owner of the vessel M/V "Tern" and its local agent Inter-Asia Marine Transport, Inc., prayed for the dismissal of the complaint essentially alleging lack of cause of action and prescription. They alleged as affirmative defenses the following: that the complaint does not state a cause of action; that plaintiff and/or defendants are not the real parties-in-interest; that the cause of action had already prescribed or laches had set in; that the claim should have been filed within three days from receipt of the cargo pursuant to the provisions of the Code of Commerce; that the defendant could no longer check the veracity of plaintiff's claim considering that the claim was filed eight months after the cargo was discharged from the vessel; that plaintiff hired its own barges to receive the cargo and hence, any damages or losses during the discharging operations were for plaintiff's account and responsibility; that the statement of facts bears no remarks on any short-landed cargo; that the draft survey report

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3 Records, pp. 2-3.
4 Id. at 7.
5 Id. at 1-5. Docketed as Civil Case No. 96-81101.
6 *Rollo*, pp. 74-75.
7 Records, pp. 28-35.

indicates that the cargo discharged was more than the figures appearing in the bill of lading; that because the bill of lading states that the goods are carried on a "shipper's weight, quantity and quality unknown" terms and on "all terms, conditions and exceptions as per charter party dated October 15, 1995," the vessel had no way of knowing the actual weight, quantity, and quality of the bulk cargo when loaded at the port of origin and the vessel had to rely on the shipper for such information; that the subject shipment was discharged in Manila in the same condition and quantity as when loaded at the port of loading; that defendants' responsibility ceased upon discharge from the ship's tackle; that the damage or loss was due to the inherent vice or defect of the goods or to the insufficiency of packing thereof or perils or dangers or accidents of the sea, pre-shipment damage or to improper handling of the goods by plaintiff or its representatives after discharge from the vessel, for which defendants cannot be made liable; that damage/loss occurred while the cargo was in the possession, custody or control of plaintiff or its representative, or due to plaintiff's own negligence and careless actuations in the handling of the cargo; that the loss is less than 0.75% of the entire cargo and assuming arguendo that the shortage exists, the figure is well within the accepted parameters when loading this type of bulk cargo; that defendants exercised the required diligence under the law in the performance of their duties; that the vessel was seaworthy in all respects; that the vessel went straight from the port of loading to Manila, without passing through any intermediate ports so there was no chance for any loss of the cargo; the plaintiff's claim is excessive, grossly overstated, unreasonable and a mere paper loss and is certainly unsubstantiated and without any basis; the terms and conditions of the relevant bill of lading and the charter party, as well as the provisions of the Carriage of Goods by Sea Act and existing laws, absolve the defendants from any liability; that the subject shipment was received in bulk and thus defendant carrier has no knowledge of the condition, quality and quantity of the cargo at the time of loading; that the complaint was not referred to the arbitrators pursuant to the bill of lading; that liability, if any, should not exceed the CIF value of the lost cargo, or the limits of liability set forth in the bill of lading and the charter party. As counterclaim, defendants prayed for the payment of attorney's fees in the amount of ₱220,000. By way of cross-claim, they ask for reimbursement from their co-defendant, petitioner ATI, in the event that they are held liable to plaintiff.

Petitioner ATI meanwhile alleged in its Answer[8] that it exercised the required diligence in handling the subject shipment. It moved for the dismissal of the complaint, and alleged by way of special and affirmative defense that plaintiff has no valid cause of action against petitioner ATI; that the cargo was completely discharged from the vessel M/V "Tern" to the receiving barges owned or hired by the plaintiff; and that petitioner ATI exercised the required diligence in handling the shipment. By way of counterclaim, petitioner ATI argued that plaintiff should shoulder its

[8] Id. at 23-26.

expenses for attorney's fees in the amount of ₱20,000 as petitioner ATI was constrained to engage the services of counsel to protect its interest.

On May 10, 2001, the RTC of Manila rendered a Decision[9] holding petitioner ATI and its co-defendants solidarily liable to respondent for damages arising from the shortage. The RTC held:

> WHEREFORE, premises considered, judgment is hereby rendered ordering defendants M/V "Tern" Inter-Asia Marine Transport, Inc. and Asian Terminal Inc. jointly and severally liable to pay plaintiff Simon Enterprises the sum of ₱2,286,259.20 with legal interest from the date the complaint was filed until fully satisfied, 10% of the amount due plaintiff as and for attorney's fees plus the costs of suit.
>
> Defendants' counterclaim and cross claim are hereby DISMISSED for lack of merit.
>
> SO ORDERED.[10]

The trial court found that respondent has established that the losses/shortages were incurred prior to its receipt of the goods. As such, the burden shifted to the carrier to prove that it exercised extraordinary diligence as required by law to prevent the loss, destruction or deterioration. However, the trial court held that the defendants failed to prove that they did so. The trial court gave credence to the testimony of Eduardo Ragudo, a super cargo of defendant Inter-Asia Marine Transport, Inc., who admitted that there were spillages or overflow down to the spillage saver. The trial court also noted that said witness also declared that respondent's representative was not allowed to sign the Master's Certificate. Such declaration, said the trial court, placed petitioner ATI in a bad light and weakened its stand.

Not satisfied, the unknown owner of the vessel M/V "Tern," Inter-Asia Marine Transport, Inc. and petitioner ATI respectively filed appeals to the CA. In their petition, the unknown owner of the vessel M/V "Tern" and Inter-Asia Marine Transport, Inc. raised the question of whether the trial court erred in finding that they did not exercise extraordinary diligence in the handling of the goods.[11]

On the other hand, petitioner ATI alleged that:

> THE *COURT-A-QUO* COMMITTED SERIOUS AND REVERSIBLE ERROR IN HOLDING DEFENDANT[-]APPELLANT ATI SOLIDARILY LIABLE WITH CO-DEFENDANT APPELLANT INTER-ASIA MARINE TRANSPORT, INC. CONTRARY TO THE EVIDENCE PRESENTED.[12]

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9 *Rollo*, pp. 53-57. Penned by Judge Amor A. Reyes.
10 Id. at 57.
11 Id. at 40.
12 Id. at 143.

On November 27, 2006, the CA promulgated the assailed Decision, the decretal portion of which reads:

> **WHEREFORE**, the appealed Decision dated May 10, 2001 is affirmed, except the award of attorney's fees which is hereby deleted.
>
> **SO ORDERED**.[13]

In affirming the RTC Decision, the CA held that there is no justification to disturb the factual findings of the trial court which are entitled to respect on appeal as they were supported by substantial evidence. It agreed with the findings of the trial court that the unknown owner of the vessel M/V "Tern" and Inter-Asia Marine Transport, Inc. failed to establish that they exercised extraordinary diligence in transporting the goods or exercised due diligence to forestall or lessen the loss as provided in Article 1742[14] of the Civil Code. The CA also ruled that petitioner ATI, as the arrastre operator, should be held jointly and severally liable with the carrier considering that petitioner ATI's stevedores were under the direct supervision of the unknown owner of M/V "Tern" and that the spillages occurred when the cargoes were being unloaded by petitioner ATI's stevedores.

Petitioner ATI filed a motion for reconsideration,[15] but the CA denied its motion in a Resolution[16] dated March 23, 2007. The unknown owner of the vessel M/V "Tern" and Inter-Asia Marine Transport, Inc. for their part, appealed to this Court via a petition for review on certiorari, which was docketed as G.R. No. 177170. Its appeal, however, was denied by this Court on July 16, 2007 for failure to sufficiently show any reversible error committed by the CA in the challenged Decision and Resolution as to warrant the exercise of this Court's discretionary appellate jurisdiction. The unknown owner of M/V "Tern" and Inter-Asia Marine Transport, Inc. sought reconsideration of the denial but their motion was denied by the Court in a Resolution dated October 17, 2007.[17]

Meanwhile, on April 20, 2007, petitioner ATI filed the present petition raising the sole issue of whether the appellate court erred in affirming the decision of the trial court holding petitioner ATI solidarily liable with its co-defendants for the shortage incurred in the shipment of the goods to respondent.

Petitioner ATI argues that:

> 1. Respondent failed to prove that the subject shipment suffered actual loss/shortage as there was no competent evidence to prove that it actually weighed 3,300 metric tons at the port of origin.

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13 Id. at 51.

14 Art. 1742. Even if the loss, destruction, or deterioration of the goods should be caused by the character of the goods, or the faulty nature of the packing or of the containers, the common carrier must exercise due diligence to forestall or lessen the loss.

15 *Rollo*, pp. 168-184.

16 Id. at 59.

17 Id. at 191, 243.

> 2. Stipulations in the bill of lading that the cargo was carried on a "shipper's weight, quantity and quality unknown" is not contrary to public policy. Thus, herein petitioner cannot be bound by the quantity or weight of the cargo stated in the bill of lading.
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> 3. Shortage/loss, if any, may have been due to the inherent nature of the shipment and its insufficient packing considering that the subject cargo was shipped in bulk and had a moisture content of 12.5%.
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> 4. Respondent failed to substantiate its claim for damages as no competent evidence was presented to prove the same.
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> 5. Respondent has not presented any scintilla of evidence showing any fault/negligence on the part of herein petitioner.
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> 6. Petitioner ATI should be entitled to its counterclaim.[18]

Respondent, on the other hand, quotes extensively the CA decision and maintains its correctness.

We grant the petition.

The CA erred in affirming the decision of the trial court holding petitioner ATI solidarily liable with its co-defendants for the shortage incurred in the shipment of the goods to respondent.

We note that the matters raised by petitioner ATI involve questions of fact which are generally not reviewable in a petition for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure, as amended, as the Court is not a trier of facts. Section 1 thereof provides that "[t]he petition x x x shall raise only questions of law, which must be distinctly set forth."

A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witnesses, the existence and relevancy of specific surrounding circumstances as well as their relation to each other and to the whole, and the probability of the situation.[19]

The well-entrenched rule in our jurisdiction is that only questions of law may be entertained by this Court in a petition for review on certiorari. This rule, however, is not ironclad and admits certain exceptions, such as when (1) the conclusion is grounded on speculations, surmises or conjectures; (2) the inference is manifestly mistaken, absurd or impossible; (3) there is grave abuse of discretion; (4) the judgment is based on a

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[18] Id. at 222–237.

[19] *Santos v. Committee on Claims Settlement*, G.R. No. 158071, April 2, 2009, 583 SCRA 152, 159-160.

misapprehension of facts; (5) the findings of fact are conflicting; (6) there is no citation of specific evidence on which the factual findings are based; (7) the findings of absence of facts are contradicted by the presence of evidence on record; (8) the findings of the Court of Appeals are contrary to those of the trial court; (9) the Court of Appeals manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion; (10) the findings of the Court of Appeals are beyond the issues of the case; and (11) such findings are contrary to the admissions of both parties.[20]

After a careful review of the records, we find justification to warrant the application of the fourth exception. The CA misapprehended the following facts.

First, petitioner ATI is correct in arguing that the respondent failed to prove that the subject shipment suffered actual shortage, as there was no competent evidence to prove that it actually weighed 3,300 metric tons at the port of origin.

Though it is true that common carriers are presumed to have been at fault or to have acted negligently if the goods transported by them are lost, destroyed, or deteriorated, and that the common carrier must prove that it exercised extraordinary diligence in order to overcome the presumption,[21] the plaintiff must still, before the burden is shifted to the defendant, prove that the subject shipment suffered actual shortage. This can only be done if the weight of the shipment at the port of origin and its subsequent weight at the port of arrival have been proven by a preponderance of evidence, and it can be seen that the former weight is considerably greater than the latter weight, taking into consideration the exceptions provided in Article 1734[22] of the Civil Code.

In this case, respondent failed to prove that the subject shipment suffered shortage, for it was not able to establish that the subject shipment was weighed at the port of origin at Darrow, Louisiana, U.S.A. and that the actual weight of the said shipment was 3,300 metric tons.

The Berth Term Grain Bill of Lading[23] (Exhibit "A"), the Proforma Invoice[24] (Exhibit "B"), and the Packing List[25] (Exhibit "C"), being used by

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[20] See *The Insular Life Assurance Company, Ltd. v. Court of Appeals*, G.R. No. 126850, April 28, 2004, 428 SCRA 79, 86.

[21] *DSR-Senator Lines v. Federal Phoenix Assurance Co., Inc.*, 459 Phil. 322, 329 (2003).

[22] Art. 1734. Common carriers are responsible for the loss, destruction, or deterioration of the goods, unless the same is due to any of the following causes only:
(1) Flood, storm, earthquake, lightning, or other natural disaster or calamity;
(2) Act of the public enemy in war, whether international or civil;
(3) Act or omission of the shipper or owner of the goods;
(4) The character of the goods or defects in the packing or in the containers;
(5) Order or act of competent public authority.

[23] Records, p. 173.

[24] Id. at 174.

[25] Id. at 175.

respondent to prove that the subject shipment weighed 3,300 metric tons, do not, in fact, help its cause.

The Berth Term Grain Bill of Lading states that the subject shipment was carried with the qualification "Shipper's weight, quantity and quality unknown," meaning that it was transported with the carrier having been oblivious of the weight, quantity, and quality of the cargo. This interpretation of the quoted qualification is supported by *Wallem Philippines Shipping, Inc. v. Prudential Guarantee & Assurance, Inc.*,[26] a case involving an analogous stipulation in a bill of lading, wherein the Supreme Court held that:

> Indeed, as the bill of lading indicated that the contract of carriage was under a "said to weigh" clause, **the shipper is solely responsible for the loading while the carrier is oblivious of the contents of the shipment.** (Emphasis supplied)

Similarly, *International Container Terminal Services, Inc. v. Prudential Guarantee & Assurance Co., Inc.*,[27] explains the meaning of clauses analogous to "Shipper's weight, quantity and quality unknown" in this manner:

> This means that **the shipper was solely responsible for the loading of the container, while the carrier was oblivious to the contents of the shipment** x x x. The arrastre operator was, like any ordinary depositary, duty-bound to take good care of the goods received from the vessel and to turn the same over to the party entitled to their possession, ***subject to such qualifications as may have validly been imposed in the contract between the parties.*** **The arrastre operator was not required to verify the contents of the container received and to compare them with those declared by the shipper because, as earlier stated, the cargo was at the shipper's load and count** x x x. (Italics in the original; emphasis supplied)

Also, *Bankers & Manufacturers Assurance Corporation v. Court of Appeals*[28] elucidates thus:

> **[T]he recital of the bill of lading** for goods thus transported [i.e., transported in sealed containers or "containerized"] ordinarily would declare "Said to Contain", **"Shipper's Load and Count"**, "Full Container Load", and the amount or quantity of goods in the container in a particular package **is only *prima facie* evidence of the amount or quantity** x x x.
>
> **A shipment under this arrangement is not inspected or inventoried by the carrier whose duty is only to transport and deliver the containers in the same condition as when the carrier received and accepted the containers for transport** x x x. (Emphasis supplied)

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[26] 445 Phil. 136, 153 (2003).
[27] 377 Phil. 1082, 1093-1094 (1999).
[28] G.R. No. 80256, October 2, 1992, 214 SCRA 433, 435.

Hence, as can be culled from the above-mentioned cases, the weight of the shipment as indicated in the bill of lading is not conclusive as to the actual weight of the goods. Consequently, the respondent must still prove the actual weight of the subject shipment at the time it was loaded at the port of origin so that a conclusion may be made as to whether there was indeed a shortage for which petitioner must be liable. This, the respondent failed to do.

The Proforma Invoice militates against respondent's claim that the subject shipment weighed 3,300 metric tons. The pertinent portion of the testimony of Mr. Jose Sarmiento, respondent's Claims Manager, is narrated below:

> Atty. Rebano: You also identified a while ago, Mr. Witness Exhibit B, the invoice. **Why does it state as description of the cargo three thousand metric tons and not three thousand three hundred**?
>
> A: Usually there is a contract between the supplier and our company that embodied [sic] in the letter credit [sic] that **they have the option to ship the cargo plus or minus ten percent of the quantity.**
>
> x x x x
>
> Q: **So, it is possible for the shipper to ship less than ten percent in [sic] the quantity stated in the invoice and it will still be a valid shipment.** Is it [sic] correct?
>
> A**:** **It [sic] is correct** but we must be properly advised and the commercial invoice should indicate how much they sent to us.[29] (Emphasis supplied)

The quoted part of Mr. Sarmiento's testimony not only shows uncertainty as to the actual weight of the shipment, it also shows that assuming respondent did order 3,300 metric tons of U.S. Soybean Meal from Contiquincybunge Export Company, and also assuming that it only received 3,100.137 metric tons, such volume would still be a valid shipment because it is well within the 10% allowable shortage. Note that Mr. Sarmiento himself mentioned that the supplier has the option to "ship the cargo plus or minus ten percent of the quantity."[30]

Notably also, the genuineness and the due execution of the Packing List, the Berth Term Grain Bill of Lading, and the Proforma Invoice, were not established.

Wallem Philippines Shipping, Inc.,[31] is instructive on this matter:

> We find that the Court of Appeals erred in finding that a shortage had taken place**. Josephine Suarez, Prudential's claims processor, merely identified the papers submitted to her** in connection with

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29 TSN, June 8, 1999, pp. 16-17.
30 Id. at 16.
31 Supra note 26 at 150-151.

> GMC's claim (Bill of Lading BEDI/1 (Exh. "B"), Commercial Invoice No. 1401 issued by Toepfer International Asia Pte, Ltd. (Exh. "C"), SGS Certificate of Quality (Exh. "F-1"), and SGS Certificate of Weight (Exh. "F-3")). **Ms. Suarez had no personal knowledge of the contents of the said documents and could only surmise as to the actual weight of the cargo loaded** on M/V *Gao Yang* x x x.
>
> x x x x
>
> **Ms. Suarez's testimony regarding the contents of the documents is thus hearsay, based as it is on the knowledge of another person not presented on the witness stand.**
>
> **Nor has the genuineness and due execution of these documents been established. In the absence of clear, convincing, and competent evidence to prove that the shipment indeed weighed 4,415.35 metric tons at the port of origin when it was loaded on the M/V *Gao Yang*, it cannot be determined whether there was a shortage** of the shipment upon its arrival in Batangas. (Emphasis supplied)

As in the present case, Mr. Sarmiento merely identified the three above-mentioned exhibits, but he had no personal knowledge of the weight of the subject shipment when it was loaded onto the M/V "Tern" at the port of origin. His testimony as regards the weight of the subject shipment as described in Exhibits "A," "B," and "C" must then be considered as hearsay,[32] for it was based on the knowledge of a person who was not presented during the trial in the RTC.

The presumption that the Berth Term Grain Bill of Lading serves as *prima facie* evidence of the weight of the cargo has been rebutted, there being doubt as to the weight of the cargo at the time it was loaded at the port of origin. Further, the fact that the cargo was shipped with the arrangement "Shipper's weight, quantity and quality unknown," indeed means that the weight of the cargo could not be determined using as basis the figures written on the Berth Term Grain Bill of Lading. This is in line with *Malayan Insurance Co., Inc. v. Jardine Davies Transport Services, Inc.*,[33] where we said:

> **The presumption that the bill of lading,** which petitioner relies upon to support its claim for restitution, **constitutes *prima facie* evidence of the goods** therein described was correctly deemed by the appellate court to **have been rebutted in light of abundant evidence casting doubts on its veracity**.
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> That *MV Hoegh* undertook, under the bill of lading, to transport 6,599.23 MT of yellow crude sulphur on a "said to weigh" basis is not disputed. Under such clause, the shipper is solely responsible for the loading of the cargo while the carrier is oblivious of the contents of the shipment. Nobody really knows the *actual* weight of the cargo inasmuch

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[32] RULES OF COURT, Rule 130, Section 36.

SEC. 36. *Testimony generally confined to personal knowledge*; *hearsay excluded*. — A witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception, except as otherwise provided in these Rules.

[33] G.R. No. 181300, September 18, 2009, 600 SCRA 706, 716-717.

> as what is written on the bill of lading, as well as on the manifest, is based solely on the shipper's declaration.
>
> **The bill of lading carried an added clause – the shipment's weight, measure, quantity, quality, condition, contents and value unknown. Evidently, the weight of the cargo could not be gauged from the bill of lading.** (Italics in the original; emphasis supplied)

The respondent having failed to present evidence to prove the actual weight of the subject shipment when it was loaded onto the M/V "Tern," its cause of action must then fail because it cannot prove the shortage that it was alleging. Indeed, if the claimant cannot definitively establish the weight of the subject shipment at the point of origin, the fact of shortage or loss cannot be ascertained. The claimant then has no basis for claiming damages resulting from an alleged shortage. Again, *Malayan Insurance Co., Inc.*,[34] provides jurisprudential basis:

> **In the absence of clear, convincing and competent evidence to prove that the cargo indeed weighed,** albeit the Bill of Lading qualified it by the phrase "said to weigh," **6,599.23 MT at the port of origin when it was loaded** onto the *MV Hoegh*, **the fact of loss** or shortage in the cargo upon its arrival in Manila **cannot be definitively established. The legal basis for attributing liability to either of the respondents is thus sorely wanting.** (Emphasis supplied)

Second, as correctly asserted by petitioner ATI, the shortage, if any, may have been due to the inherent nature of the subject shipment or its packaging since the subject cargo was shipped in bulk and had a moisture content of 12.5%.

It should be noted that the shortage being claimed by the respondent is minimal, and is an indication that it could be due to consolidation or settlement of the subject shipment, as accurately observed by the petitioner. A Kansas State University study on the handling and storage of soybeans and soybean meal[35] is instructive on this matter. Pertinent portions of the study reads:

> Soybean meal is difficult to handle because of poor flow ability and bridging characteristics. **Soybean meal tends to settle or consolidate over time.** This phenomenon occurs in most granular materials and becomes more severe with increased moisture, time and small particle size x x x.
>
> x x x x
>
> Moisture is perhaps the most important single factor affecting storage of soybeans and soybean meal. **Soybeans contain moisture ranging from 12% to 15%** (wet basis) at harvest time x x x.

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[34] Id. at 718.

[35] Acasio, Dr. Ulysses A., *Handling and Storage of Soybeans and Soybean Meal*, Department of Grain Science and Industry, Kansas State University, U.S.A. Retrieved from <ftp://asaim-europe.org/Backup/pdf/handlingsb.pdf.> (Visited December 27, 2012).

x x x x

> **Soybeans and soybean meal are hygroscopic materials and will either lose (desorb) or gain (adsorb) moisture from the surrounding air.** The moisture level reached by a product at a given constant temperature and equilibrium relative humidity (ERH) is its equilibrium moisture content (EMC) x x x. (Emphasis supplied)

As indicated in the Proforma Invoice mentioned above, the moisture content of the subject shipment was 12.5%. Taking into consideration the phenomena of desorption, the change in temperature surrounding the Soybean Meal from the time it left wintertime Darrow, Louisiana, U.S.A. and the time it arrived in Manila, and the fact that the voyage of the subject cargo from the point of loading to the point of unloading was 36 days, the shipment could have definitely lost weight, corresponding to the amount of moisture it lost during transit.

The conclusion that the subject shipment lost weight in transit is bolstered by the testimony of Mr. Fernando Perez, a Cargo Surveyor of L.J. Del Pan. The services of Mr. Perez were requested by respondent.[36] Mr. Perez testified that it was possible for the subject shipment to have lost weight during the 36-day voyage, as it was wintertime when M/V "Tern" left the United States and the climate was warmer when it reached the Philippines; hence the moisture level of the Soybean Meal could have changed.[37] Moreover, Mr. Perez himself confirmed, by answering a question propounded by the RTC, that loss of weight of the subject cargo cannot be avoided because of the shift in temperature from the colder United States weather to the warmer Philippine climate.[38]

More importantly, the 199.863 metric-ton shortage that respondent alleges is a minimal 6.05% of the weight of the entire Soy Bean Meal shipment. Taking into consideration the previously mentioned option of the shipper to ship 10% more or less than the contracted shipment, and the fact that the alleged shortage is only 6.05% of the total quantity of 3,300 metric tons, the alleged percentage loss clearly does not exceed the allowable 10% allowance for loss, as correctly argued by petitioner. The alleged loss, if any, not having exceeded the allowable percentage of shortage, the respondent then has no cause of action to claim for shortages.

Third, we agree with the petitioner ATI that respondent has not proven any negligence on the part of the former.

As petitioner ATI pointed out, a reading of the Survey Report of Del Pan Surveyors[39] (Exhibits "D" to "D-4" of respondent) would not show any untoward incident or negligence on the part of petitioner ATI during the discharging operations.

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36 TSN, August 19, 1999, p. 3.
37 Id. at 12-13.
38 Id. at 13.
39 Records, pp. 176-179.

Also, a reading of Exhibits "D", "D-1", and "D-2" would show that the methods used in determining whether there was a shortage are not accurate.

Respondent relied on the Survey Reports of Del Pan Surveyors to prove that the subject shipment suffered loss. The conclusion that there was a shortage arose from an evaluation of the weight of the cargo using the barge displacement method. This is a type of draught survey, which is a method of cargo weight determination by ship's displacement calculations.[40] The basic principle upon which the draught survey methodology is based is the Principle of Archimedes, *i.e.*, a vessel when floating in water, will displace a weight of water equal to its own weight.[41] It then follows that if a weight of cargo is loaded on (or unloaded from) a vessel freely floating in water, then the vessel will sink (or float) into the water until the total weight of water displaced is equal to the original weight of the vessel, plus (or minus) the cargo which has been loaded (or unloaded) and plus (or minus) density variation of the water between the starting survey (first measurement) and the finishing survey (second measurement).[42] It can be seen that this method does not entail the weighing of the cargo itself, but as correctly stated by the petitioner, the weight of the shipment is being measured by mere estimation of the water displaced by the barges before and after the cargo is unloaded from the said barges.

In addition, the fact that the measurements were done by Del Pan Surveyors in prevailing slight to slightly rough sea condition[43] supports the conclusion that the resulting measurement may not be accurate. A United Nations study on draught surveys[44] in fact states that the accuracy of draught surveys will be dependent upon several factors, one of which is the weather and seas condition in the harbor.

Also, it can be seen in respondent's own Exhibit "D-1" that the actual weight of the cargo was established by weighing 20% of the cargo. Though we recognize the practicality of establishing cargo weight through random sampling, we note the discrepancy in the weights used in the determination of the alleged shortage.

Exhibit "D-1" of respondent states that the average weight of each bag is 52 kilos. A total of 63,391 bags[45] were discharged from the barges, and the tare weight[46] was established at 0.0950 kilos.[47] Therefore, if one

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40 United Nations Economic and Social Council, *Code of Uniform Standards and Procedures for the Performance of Draught Surveys of Coal Cargoes.* Retrieved from <http://www.unece.org/fileadmin/DAM/ie/se/pdfs/dce.pdf.> (Visited December 27, 2012).

41 Id.

42 Id.

43 Exhibit "D-1" of respondent, records, p. 177.

44 Supra note 40.

45 Supra note 43.

46 The officially accepted weight of an empty car, vehicle, or container that when subtracted from gross weight yields the net weight of cargo or shipment upon which charges can be calculated. Merriam-Webster Dictionary Online, <http://www.merriam-webster.com/dictionary/tareweight> (Visited January 2, 2013).

47 Exhibit "D-2", records, p. 178.

were to multiply 52 kilos per bag by 63,391 bags and deduct the tare weight of 0.0950 kilos multiplied by 63,391 bags, the result would be 3,290,309.65 kilos, or 3,290.310 metric tons. This would mean that the shortage was only 9.69 metric tons, if we suppose that respondent was able to establish that the shipment actually weighed 3,300 metric tons at the port of loading.

However, the computation in Exhibit "D-2" would show that Del Pan Surveyors inexplicably used 49 kilos as the weight per bag, instead of 52 kilos, therefore resulting in the total net weight of 3,100,137 kilos or 3,100.137 metric tons. This was the figure used as basis for respondent's conclusion that there is a shortage of 199.863 metric tons.[48]

These discrepancies only lend credence to petitioner ATI's assertion that the weighing methods respondent used as bases are unreliable and should not be completely relied upon.

Considering that respondent was not able to establish conclusively that the subject shipment weighed 3,300 metric tons at the port of loading, and that it cannot therefore be concluded that there was a shortage for which petitioner should be responsible; bearing in mind that the subject shipment most likely lost weight in transit due to the inherent nature of Soya Bean Meal; assuming that the shipment lost weight in transit due to desorption, the shortage of 199.863 metric tons that respondent alleges is a minimal 6.05% of the weight of the entire shipment, which is within the allowable 10% allowance for loss; and noting that the respondent was not able to show negligence on the part of the petitioner and that the weighing methods which respondent relied upon to establish the shortage it alleges is inaccurate, respondent cannot fairly claim damages against petitioner for the subject shipment's alleged shortage.

WHEREFORE, the petition for review on certiorari is **GRANTED.** The Decision dated November 27, 2006 and Resolution dated March 23, 2007 of the Court of Appeals in CA-G.R. CV No. 71210 are **REVERSED AND SET ASIDE** insofar as petitioner Asian Terminals, Inc. is concerned. Needless to add, the complaint against petitioner docketed as RTC Manila Civil Case No. 96-81101 is ordered **DISMISSED**.

No pronouncement as to costs.

SO ORDERED.

MARTIN S. VILLARAMA, JR.
Associate Justice

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[48] Id.

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice
Chairperson

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

ROBERTO A. ABAD
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice