Republic of the Philippines
Supreme Court
Manila

THIRD DIVISION

LOADSTAR SHIPPING COMPANY, INCORPORATED and LOADSTAR INTERNATIONAL SHIPPING COMPANY, INCORPORATED, Petitioners,	**G.R. No. 185565**
	Present:
	VELASCO, JR., *J.*, *Chairperson*, PERALTA, VILLARAMA, JR., REYES, and JARDELEZA, *JJ.*
- versus -	
MALAYAN INSURANCE COMPANY, INCORPORATED, Respondent.	Promulgated: November 26, 2014

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DECISION

REYES, *J*:

This is a Petition for Review on *Certiorari*[1] filed by Loadstar Shipping Company, Incorporated and Loadstar International Shipping Company, Incorporated (petitioners) against Malayan Insurance Company, Incorporated (Malayan) seeking to set aside the Decision[2] dated April 14, 2008 and Resolution[3] dated December 11, 2008 of the Court of Appeals (CA) in CA-G.R. CV No. 82758, which reversed and set aside the Decision[4] dated March 31, 2004 of the Regional Trial Court of Manila, Branch 34, in Civil Case No. 01-101885.

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1 *Rollo*, pp. 36-104.

2 Penned by Associate Justice Hakim S. Abdulwahid, with Associate Justices Rodrigo V. Cosico and Mariflor P. Punzalan Castillo, concurring; id. at 113-126.

3 Id. at 128-130.

4 Issued by Judge Romulo A. Lopez; id. at 184-202.

The facts as found by the CA, are as follows:

Loadstar International Shipping, Inc. (Loadstar Shipping) and Philippine Associated Smelting and Refining Corporation (PASAR) entered into a Contract of Affreightment for domestic bulk transport of the latter's copper concentrates for a period of one year from November 1, 1998 to October 31, 1999. The contract was extended up to the end of October 2000.

On September 10, 2000, 5,065.47 wet metric tons (WMT) of copper concentrates were loaded in Cargo Hold Nos. 1 and 2 of MV "Bobcat", a marine vessel owned by Loadstar International Shipping Co., Inc. (Loadstar International) and operated by Loadstar Shipping under a charter party agreement. The shipper and consignee under the Bill of Lading are Philex Mining Corporation (Philex) and PASAR, respectively. The cargo was insured with Malayan Insurance Company, Inc. (Malayan) under Open Policy No. M/OP/2000/001-582. P & I Association is the third party liability insurer of Loadstar Shipping.

On said date (September 10, 2000), MV "Bobcat" sailed from Poro Point, San Fernando, La Union bound for Isabel, Leyte. On September 12, 2000, while in the vicinity of Cresta de Gallo, the vessel's chief officer on routine inspection found a crack on starboard side of the main deck which caused seawater to enter and wet the cargo inside Cargo Hold No. 2 forward/aft. The cracks at the top deck starboard side of Cargo Hold No. 2, measuring 1.21 meters long x 0.39 meters wide, and at top deck aft section starboard side on other point, measuring 0.82 meters long x 0.32 meters wide, were welded.

Immediately after the vessel arrived at Isabel, Leyte anchorage area, on September 13, 2000, PASAR and Philex's representatives boarded and inspected the vessel and undertook sampling of the copper concentrates. In its preliminary report dated September 15, 2000, the Elite Adjusters and Surveyor, Inc. (Elite Surveyor) confirmed that samples of copper concentrates from Cargo Hold No. 2 were contaminated by seawater. Consequently, PASAR rejected 750 MT of the 2,300 MT cargo discharged from Cargo Hold No. 2.

On November 6, 2000, PASAR sent a formal notice of claim in the amount of [□]37,477,361.31 to Loadstar Shipping. In its final report dated November 16, 2000, Elite Surveyor recommended payment to the assured the amount of [□]32,351,102.32 as adjusted. On the basis of such recommendation, Malayan paid PASAR the amount of [□]32,351,102.32.

Meanwhile, on November 24, 2000, Malayan wrote Loadstar Shipping informing the latter of a prospective buyer for the damaged copper concentrates and the opportunity to nominate/refer other salvage buyers to PASAR. On November 29, 2000, Malayan wrote Loadstar Shipping informing the latter of the acceptance of PASAR's proposal to take the damaged copper concentrates at a residual value of US$90,000.00. On December 9, 2000, Loadstar Shipping wrote Malayan requesting for the reversal of its decision to accept PASAR's proposal and the conduct of a public bidding to allow Loadstar Shipping to match or top PASAR's bid by 10%.

On January 23, 2001, PASAR signed a subrogation receipt in favor of Malayan. To recover the amount paid and in the exercise of its right of subrogation, Malayan demanded reimbursement from Loadstar Shipping, which refused to comply. Consequently, on September 19, 2001, Malayan instituted with the RTC a complaint for damages. The complaint was later amended to include Loadstar International as party defendant.

In its amended complaint, Malayan mainly alleged that as a direct and natural consequence of the unseaworthiness of the vessel, PASAR suffered loss of the cargo. It prayed for the amount of [□]33,934,948.75, representing actual damages plus legal interest from date of filing of the complaint until fully paid, and attorney's fees in the amount of not less than [□]500,000.00. It also sought to declare the bill of lading as void since it violates the provisions of Articles 1734 and 1745 of the Civil Code.

On October 30, 2002, Loadstar Shipping and Loadstar International filed their answer with counterclaim, denying plaintiff-appellant's allegations and averring as follows: that they are not engaged in the business as common carriers but as private carriers; that the vessel was seaworthy and defendants-appellees exercised the required diligence under the law; that the entry of water into Cargo Hold No. 2 must have been caused by force *majeure* or heavy weather; that due to the inherent nature of the cargo and the use of water in its production process, the same cannot be considered damaged or contaminated; that defendants-appellees were denied reasonable opportunity to participate in the salvage sale; that the claim had prescribed in accordance with the bill of lading provisions and the Code of Commerce; that plaintiff-appellant's claim is excessive, grossly overstated, unreasonable and unsubstantiated; that their liability, if any, should not exceed the *CIF* value of the lost/damaged cargo as set forth in the bill of lading, charter party or customary rules of trade; and that the arbitration clause in the contract of affreightment should be followed.

After trial, and considering that the bill of lading, which was marked as Exhibit "B", is unreadable, the RTC issued on February 17, 2004 an order directing the counsel for Malayan to furnish it with a clearer copy of the same within three (3) days from receipt of the order. On February 23, 2004, Malayan filed a compliance attaching thereto copy of the bill of lading.

On March 31, 2004, the RTC rendered a judgment dismissing the complaint as well as the counterclaim. The RTC was convinced that the vessel was seaworthy at the time of loading and that the damage was attributable to the perils of the sea (natural disaster) and not due to the fault or negligence of Loadstar Shipping.

The RTC found that although contaminated by seawater, the copper concentrates can still be used. It gave credence to the testimony of Francisco Esguerra, defendants-appellees' expert witness, that despite high chlorine content, the copper concentrates remain intact and will not lose their value. The gold and silver remain with the grains/concentrates even if soaked with seawater and does not melt. The RTC observed that the purchase agreement between PASAR and Philex contains a penalty clause and has no rejection clause. Despite this agreement, the parties failed to sit down and assess the penalty.

> The RTC also found that defendants-appellees were not afforded the opportunity to object or participate or nominate a participant in the sale of the contaminated copper concentrates to lessen the damages to be paid. No record was presented to show that a public bidding was conducted. Malayan sold the contaminated copper concentrates to PASAR at a low price then paid PASAR the total value of the damaged concentrate without deducting anything from the claim.
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> Finally, the RTC denied the prayer to declare the Bill of Lading null and void for lack of basis because what was attached to Malayan's compliance was still an unreadable machine copy thereof.[5] (Citations omitted)

Ruling of the CA

On April 14, 2008, the CA rendered its Decision,[6] the dispositive portion of which reads:

> WHEREFORE, the appeal is **GRANTED**. The Decision dated March 31, 2004 of the RTC, Branch 34, Manila in Civil Case No. 01-101885, is **REVERSED and SET ASIDE**. In lieu thereof, a new judgment is entered, **ORDERING** defendants-appellees to pay plaintiff-appellant P33,934,948.75 as actual damages, plus legal interest at 6% annually from the date of the trial court's decision. Upon the finality of the decision, the total amount of the judgment shall earn annual interest at 12% until full payment.
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> **SO ORDERED**.[7]

On December 11, 2008, the CA modified the above decision through a Resolution,[8] the *fallo* thereof states:

> **WHEREFORE**, the *Motion for Reconsideration* is **PARTLY GRANTED**. The decision of this Court dated April 14, 2008 is **PARTIALLY RECONSIDERED and MODIFIED**. Defendants-appellees are **ORDERED** to pay to plaintiff-appellant P33,934,948.74 as actual damages, less US$90,000.00, computed at the exchange rate prevailing on November 29, 2000, plus legal interest at 6% annually from the date of the trial court's decision. Upon the finality of the decision, the total amount of the judgment shall earn annual interest at 12% until full payment.
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> **SO ORDERED**.[9]

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5 Id. at 114-118.
6 Id. at 113-126.
7 Id. at 125.
8 Id. at 128-130.
9 Id. at 130.

The CA discussed that the amount of US$90,000.00 should have been deducted from Malayan's claim against the petitioners in order to prevent undue enrichment on the part of Malayan. Otherwise, Malayan would recover from the petitioners not merely the entire amount of □33,934,948.74 as actual damages, but would also end up unjustly enriching itself in the amount of US$90,000.00 – the residual value of the subject copper concentrates it sold to Philippine Associated Smelting and Refining Corporation (PASAR) on November 29, 2000.[10]

Issues

In sum, the grounds presented by the petitioners for the Court's consideration are the following:

I.

> THE [CA] HAS NO BASIS IN REVERSING THE DECISION OF THE TRIAL COURT. THERE IS NOTHING IN THE DECISION OF THE HONORABLE COURT THAT REVERSED THE FACTUAL FINDINGS AND CONCLUSIONS OF THE TRIAL COURT, THAT THERE WAS NO ACTUAL LOSS OR DAMAGE TO THE CARGO OF COPPER CONCENTRATES WHICH WOULD MAKE LOADSTAR AS THE SHIPOWNER LIABLE FOR A CARGO CLAIM. CONSEQUENTLY, THERE IS NO BASIS FOR THE COURT TO ORDER LOADSTAR TO PAY ACTUAL DAMAGES IN THE AMOUNT OF PHP33 MILLION.[11]

II.

> M/V BOBCAT IS A PRIVATE CARRIER, THE HONORABLE COURT HAD NO BASIS IN RULING THAT IT IS A COMMON CARRIER. THE DECISION OF THE TRIAL COURT IS BEREFT OF ANY CATEGORICAL FINDING THAT M/V BOBCAT IS A COMMON CARRIER.[12]

III.

> THE HONORABLE COURT OF APPEALS COMMITTED A REVERSIBLE ERROR IN RULING THAT RESPONDENT'S PAYMENT TO PASAR, ON THE BASIS OF THE LATTER'S FRAUDULENT CLAIM, ENTITLED RESPONDENT AUTOMATIC RIGHT OF RECOVERY BY VIRTUE OF SUBROGATION.[13]

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10 Id. at 130.
11 Id. at 48-49.
12 Id. at 50.
13 Id. at 51.

Ruling of the Court

I. Proof of actual damages

It is not disputed that the copper concentrates carried by M/V Bobcat from Poro Point, La Union to Isabel, Leyte were indeed contaminated with seawater. The issue lies on whether such contamination resulted to damage, and the costs thereof, if any, incurred by the insured PASAR.

The petitioners argued that the copper concentrates, despite being dampened with seawater, is neither subject to penalty nor rejection. Under the Philex Mining Corporation (Philex)-PASAR Purchase Contract Agreement, there is no rejection clause. Instead, there is a pre-agreed formula for the imposition of penalty in case other elements exceeding the provided minimum level would be found on the concentrates.[14] Since the chlorine content on the copper concentrates is still below the minimum level provided under the Philex-PASAR purchase contract, no penalty may be imposed against the petitioners.[15]

Malayan opposed the petitioners' invocation of the Philex-PASAR purchase agreement, stating that the contract involved in this case is a contract of affreightment between the petitioners and PASAR, not the agreement between Philex and PASAR, which was a contract for the sale of copper concentrates.[16]

On this score, the Court agrees with Malayan that contrary to the trial court's disquisition, the petitioners cannot validly invoke the penalty clause under the Philex-PASAR purchase agreement, where penalties are to be imposed by the buyer PASAR against the seller Philex if some elements exceeding the agreed limitations are found on the copper concentrates upon delivery. The petitioners are not privy to the contract of sale of the copper concentrates. The contract between PASAR and the petitioners is a contract of carriage of goods and not a contract of sale. Therefore, the petitioners and PASAR are bound by the laws on transportation of goods and their contract of affreightment. Since the Contract of Affreightment[17] between the petitioners and PASAR is silent as regards the computation of damages, whereas the bill of lading presented before the trial court is undecipherable, the New Civil Code and the Code of Commerce shall govern the contract between the parties.

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14 Id. at 54-55.
15 Id. at 59.
16 Id. at 503.
17 Id. at 406-411.

Malayan paid PASAR the amount of □32,351,102.32 covering the latter's claim of damage to the cargo.[18] This is based on the recommendation of Elite Adjustors and Surveyors, Inc. (Elite) which both Malayan and PASAR agreed to. The computation of Elite is presented as follows:

> **Computation of Loss Payable.** We computed for the insured value of the loss and loss payable, based on the following pertinent data:
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> 1) Total quantity shipped and at risk (Risk Note and B/L) - 5,065.47 wet metric tons or 4,568.907 dry metric tons
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> 2) Total sum insured (Risk Note and Endorsement) - [□]212,032,203.77
>
> 3) Quantity damaged: 777.290 wet metric tons or (Pasar Laboratory Cert. & discharge & sampling Cert. dated September 21, 2000) 696.336 dry metric tons
>
> **Computation:**
>
> Total sum insured / Total Qty. in DMT x Qty. damaged (DMT) = Insured value of damage (DMT)
>
> [□] 212,032,203.77 / 4,568.907 DMT x 696.336 DMT = [□]32,315,312.32
>
> Insured value of damage = [₱] 32,315,312.32[19]

Based on the preceding computation, the sum of □32,315,312.32 represents damages for the total loss of that portion of the cargo which were contaminated with seawater and not merely the depreciation in its value. Strangely though, after claiming damages for the total loss of that portion, PASAR bought back the contaminated copper concentrates from Malayan at the price of US$90,000.00. The fact of repurchase is enough to conclude that the contamination of the copper concentrates cannot be considered as total loss on the part of PASAR.

The following provisions of the Code of Commerce state how damages on goods delivered by the carrier should be appraised:

> Article 361. The merchandise shall be transported at the risk and venture of the shipper, if the contrary has not been expressly stipulated. As a consequence, all the losses and deteriorations which the goods may suffer

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18 Id. at 502.
19 Id. at 434.

> during the transportation by reason of fortuitous event, force majeure, or the inherent nature and defect of the goods, shall be for the account and risk of the shipper. Proof of these accidents is incumbent upon the carrier.
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> Article 362. Nevertheless, the carrier shall be liable for the losses and damages resulting from the causes mentioned in the preceding article if it is proved, as against him, that they arose through his negligence or by reason of his having failed to take the precautions which usage has established among careful persons, unless the shipper has committed fraud in the bill of lading, representing the goods to be of a kind or quality different from what they really were.
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> If, notwithstanding the precautions referred to in this article, the goods transported run the risk of being lost, on account of their nature or by reason of unavoidable accident, there being no time for their owners to dispose of them, the carrier may proceed to sell them, placing them for this purpose at the disposal of the judicial authority or of the officials designated by special provisions.
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> x x x x
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> Article 364. If the effect of the damage referred to in Article 361 is merely a diminution in the value of the goods, the obligation of the carrier shall be reduced to the payment of the amount which, in the judgment of experts, constitutes such difference in value.
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> Article 365. If, in consequence of the damage, the goods are rendered useless for sale and consumption for the purposes for which they are properly destined, the consignee shall not be bound to receive them, and he may have them in the hands of the carrier, demanding of the latter their value at the current price on that day.
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> If among the damaged goods there should be some pieces in good condition and without any defect, the foregoing provision shall be applicable with respect to those damaged and the consignee shall receive those which are sound, this segregation to be made by distinct and separate pieces and without dividing a single object, unless the consignee proves the impossibility of conveniently making use of them in this form.
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> The same rule shall be applied to merchandise in bales or packages, separating those parcels which appear sound.

From the above-cited provisions, if the goods are delivered but arrived at the destination in damaged condition, the remedies to be pursued by the consignee depend on the extent of damage on the goods.

If the goods are rendered useless for sale, consumption or for the intended purpose, the consignee may reject the goods and demand the payment of such goods at their market price on that day pursuant to Article 365. In case the damaged portion of the goods can be segregated from those delivered in good condition, the consignee may reject those in damaged condition and accept merely those which are in good condition. But if the

consignee is able to prove that it is impossible to use those goods which were delivered in good condition without the others, then the entire shipment may be rejected. To reiterate, under Article 365, the nature of damage must be such that the goods are rendered useless for sale, consumption or intended purpose for the consignee to be able to validly reject them.

If the effect of damage on the goods consisted merely of diminution in value, the carrier is bound to pay only the difference between its price on that day and its depreciated value as provided under Article 364.

Malayan, as the insurer of PASAR, neither stated nor proved that the goods are rendered useless or unfit for the purpose intended by PASAR due to contamination with seawater. Hence, there is no basis for the goods' rejection under Article 365 of the Code of Commerce. Clearly, it is erroneous for Malayan to reimburse PASAR as though the latter suffered from total loss of goods in the absence of proof that PASAR sustained such kind of loss. Otherwise, there will be no difference in the indemnification of goods which were not delivered at all; or delivered but rendered useless, compared against those which were delivered albeit, there is diminution in value.

Malayan also failed to establish the legal basis of its decision to sell back the rejected copper concentrates to PASAR. It cannot be ascertained how and when Malayan deemed itself as the owner of the rejected copper concentrates to have these validly disposed of. If the goods were rejected, it only means there was no acceptance on the part of PASAR from the carrier. Furthermore, PASAR and Malayan simply agreed on the purchase price of US$90,000.00 without any allegation or proof that the said price was the depreciated value based on the appraisal of experts as provided under Article 364 of the Code of Commerce.

II. Subrogation of Malayan to the rights of PASAR

Malayan's claim against the petitioners is based on subrogation to the rights possessed by PASAR as consignee of the allegedly damaged goods. The right of subrogation stems from Article 2207 of the New Civil Code which states:

> Art. 2207. If the plaintiff's property has been insured, and he has received indemnity from the insurance company for the injury or loss arising out of the wrong or breach of contract complained of, the insurance company shall be subrogated to the rights of the insured against the wrongdoer or the person who has violated the contract. If the amount paid by the insurance company does not fully cover the injury or loss, the aggrieved party shall be entitled to recover the deficiency from the person causing

the loss or injury.

"The right of subrogation is not dependent upon, nor does it grow out of, any privity of contract or upon written assignment of claim. It accrues simply upon payment of the insurance claim by the insurer."[20] The right of subrogation is however, not absolute. "There are a few recognized exceptions to this rule. For instance, if the assured by his own act releases the wrongdoer or third party liable for the loss or damage, from liability, the insurer's right of subrogation is defeated. x x x Similarly, where the insurer pays the assured the value of the lost goods without notifying the carrier who has in good faith settled the assured's claim for loss, the settlement is binding on both the assured and the insurer, and the latter cannot bring an action against the carrier on his right of subrogation. x x x And where the insurer pays the assured for a loss which is not a risk covered by the policy, thereby effecting 'voluntary payment,' the former has no right of subrogation against the third party liable for the loss x x x."[21]

The rights of a subrogee cannot be superior to the rights possessed by a subrogor. "Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right, so that he who is substituted succeeds to the rights of the other in relation to a debt or claim, including its remedies or securities. The rights to which the subrogee succeeds are the same as, but not greater than, those of the person for whom he is substituted, that is, he cannot acquire any claim, security or remedy the subrogor did not have. In other words, a subrogee cannot succeed to a right not possessed by the subrogor. A subrogee in effect steps into the shoes of the insured and can recover only if the insured likewise could have recovered."[22]

Consequently, an insurer indemnifies the insured based on the loss or injury the latter actually suffered from. If there is no loss or injury, then there is no obligation on the part of the insurer to indemnify the insured. Should the insurer pay the insured and it turns out that indemnification is not due, or if due, the amount paid is excessive, the insurer takes the risk of not being able to seek recompense from the alleged wrongdoer. This is because the supposed subrogor did not possess the right to be indemnified and therefore, no right to collect is passed on to the subrogee.

As regards the determination of actual damages, "[i]t is axiomatic that actual damages must be proved with reasonable degree of certainty and a party is entitled only to such compensation for the pecuniary loss that was

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20 *Pan Malayan Insurance Corp. v. Court of Appeals*, 262 Phil. 919, 923 (1990).

21 Id. at 924.

22 *Sulpicio Lines, Inc. v. First Lepanto-Taisho Insurance Corporation*, 500 Phil. 514, 525 (2005), citing *Lorenzo Shipping Corp. v. Chubb and Sons, Inc.*, G.R. No. 147724, June 8, 2004, 431 SCRA 266, 275.

duly proven."[23] Article 2199 of the New Civil Code speaks of how actual damages are awarded:

> Art. 2199. Except as provided by law or by stipulation, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved. Such compensation is referred to as actual or compensatory damages.

Whereas the CA modified its Decision dated April 14, 2008 by deducting the amount of US$90,000.00 from the award, the same is still iniquitous for the petitioners because PASAR and Malayan never proved the actual damages sustained by PASAR. It is a flawed notion to merely accept that the salvage value of the goods is US$90,000.00, since the price was arbitrarily fixed between PASAR and Malayan. Actual damages to PASAR, for example, could include the diminution in value as appraised by experts or the expenses which PASAR incurred for the restoration of the copper concentrates to its former condition, if there is damage and rectification is still possible.

It is also noteworthy that when the expert witness for the petitioners, Engineer Francisco Esguerra (Esguerra), testified as regards the lack of any adverse effect of seawater on copper concentrates, Malayan never presented evidence of its own in refutation to Esguerra's testimony. And, even if the Court will disregard the entirety of his testimony, the effect on Malayan's cause of action is nil. As Malayan is claiming for actual damages, it bears the burden of proof to substantiate its claim.

"The burden of proof is on the party who would be defeated if no evidence would be presented on either side. The burden is to establish one's case by a preponderance of evidence which means that the evidence, as a whole, adduced by one side, is superior to that of the other. Actual damages are not presumed. The claimant must prove the actual amount of loss with a reasonable degree of certainty premised upon competent proof and on the best evidence obtainable. Specific facts that could afford a basis for measuring whatever compensatory or actual damages are borne must be pointed out. Actual damages cannot be anchored on mere surmises, speculations or conjectures."[24]

Having ruled that Malayan did not adduce proof of pecuniary loss to PASAR for which the latter was questionably indemnified, there is no necessity to expound further on the other issues raised by the petitioners and Malayan in this case.

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[23] *Mamaril v. The Boy Scout of the Philippines*, G.R. No. 179382, January 14, 2013, 688 SCRA 437, 453.

[24] *Marikina Auto Line Transport Corp. v. People,* 520 Phil. 809, 825 (2006).

WHEREFORE, the petition is **GRANTED**. The Decision dated April 14, 2008 and Resolution dated December 11, 2008 of the Court of Appeals in CA-G.R. CV No. 82758 are hereby **REVERSED** and **SET ASIDE**. The Decision dated March 31, 2004 of the Regional Trial Court of Manila, Branch 34 in Civil Case No. 01-101885 is **REINSTATED**.

SO ORDERED.

BIENVENIDO L. REYES
Associate Justice

WE CONCUR:

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

DIOSDADO M. PERALTA
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

FRANCIS H. JARDELEZA
Associate Justice

ATTESTATION

I attest 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.

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson, Third Division

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, 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