Therefore such a request cannot be granted. There will be no order as to costs.

Order accordingly.

HASHIM *v.* S.C.O.A.

SUPREME COURT (Beoku-Betts, J.): April 1st, 1952
(Civil Case No. 143/50)

[1] **Agency—authority of agent—limits of authority—agent presumed to have no authority to pledge credit of foreign principal even if named—presumption rebutted if privity of contract between principal and third party or by evidence of contrary intention:** An agent of a foreign principal is presumed to have no authority to pledge the credit of his principal so as to establish privity of contract between the principal and a third party, and the agent is presumed to contract personally even if he discloses the name of his principal; but the agent is not personally liable where the foreign principal is in fact brought into privity of contract with the third party, or there is evidence of a contrary intention in the contract itself or in the surrounding circumstances (page 221, line 39—page 222, line 8).

[2] **Agency—duties and liabilities of agent—liability in contract—agent signing contract in own name prima facie personally liable—circumstances in which agent exonerated:** *Prima facie*, an agent is personally liable on a contract if he puts his unqualified signature to it, and can be exonerated from liability only where the contract as a whole shows that he contracted as agent only and did not undertake any personal liability; but an agent who claims he is contracting only as an agent will not be exonerated if the contract clearly involves his personal liability, or he is shown to be the real principal, or the principal named by him is non-existent or is incapable of making the contract in question (page 221, lines 9–19; page 222, lines 9–12).

[3] **Agency—duties and liabilities of agent—liability in tort—agent liable to third party for wrongful act in course of employment whether or not act expressly authorised or ratified:** An agent who commits a wrongful act in the course of his employment is personally liable to a third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorised or ratified by the principal (page 223, lines 16–29).

[4] **Evidence — presumptions — presumptions of fact — agent of foreign principal presumed to contract personally even if principal named—presumption rebutted if privity of contract between principal and third party or by evidence of contrary intention:** See [1] above.

The plaintiff brought an action against the defendants to recover damages for negligence.

The defendants, who were general agents for a foreign company not registered in Sierra Leone, received a consignment of kola nuts from the plaintiff for shipment to Bathurst, Gambia. The defendants kept the kola nuts in a lighter and three days later transferred them to the hatch of a ship owned by their principals, ignoring the advice of the plaintiff to store them as deck cargo. On delivery in Bathurst, the nuts were found to be burnt and damaged, and unfit for sale and consumption. The plaintiff instituted the present action against the defendants claiming damages for their loss.

He contended that even though the defendants held themselves out as agents for the owners of the ship, the latter were a foreign company not registered in Sierra Leone, a fact which made them legally non-existent, and therefore the defendants, who had made all the transport arrangements, were personally liable to the plaintiff.

The defendants contended that they were agents, were used as such, and therefore were not personally liable.

Cases referred to:

(1) *Bankole Bright* v. *Royal Exch. Assur. Co. Ltd.*, Supreme Court, Civil Case No. 349/49, unreported.

(2) *Whitfield* v. *Le Despencer* (1778), 2 Cowp. 754; 98 E.R. 1344.

R.B. Marke for the plaintiff;
Miss Wright for the defendants.

BEOKU-BETTS, J.:

The first question which I have to consider in this case is as to the liability of the defendants. The plaintiff sues the defendants as agents for the West African Coast Farrell Lines Incorporated ("the principals") for alleged damage to goods which were in the vessel the "African Guide" on a voyage from Freetown to Bathurst, Gambia.

The case for the plaintiff is that the "African Guide" is owned by the principals, a foreign corporation not registered in Sierra Leone; that the defendants are the general agents of the principals; that the goods were delivered to the defendants for transport, and all the arrangements for the delivery and transport of the goods were made with the defendants.

On behalf of the defendants it was submitted that they are

agents and were used as such and are therefore not liable. The question of the liability or not of the defendants is therefore of importance if the cause of action is in contract, which I must first consider.

Learned counsel for the defendants referred to *Bowstead on Agency*, 10th ed., at 235–236, art. 116 (1944), on the question of non-liability of an agent, and 1 *Halsbury's Laws of England*, 2nd ed., at 297. In *Halsbury* quoted above is the following:

> "*Primâ facie* a party is personally liable on a contract if he put his unqualified signature to it. In order, therefore, to exonerate the agent from liability, the contract must show, when construed as a whole, that he contracted as agent only, and did not undertake any personal liability. It is not sufficient that he should have described himself in the contract as an agent. But if he states in the contract, or indicates by an addition to his signature, that he is contracting as agent only on behalf of a principal, he is not liable, unless the rest of the contract clearly involves his personal liability, or unless he is shown to be the real principal."

The contention on behalf of the plaintiff is that the defendants held themselves out as agents; that the principals are a foreign company not registered under s.290 of the Companies Ordinance (*cap.* 39); that as the principals are not a registered company they are non-existent in the eyes of the law and therefore the person who contracts with third persons becomes personally liable.

The law as stated in *Halsbury* is that, *prima facie*, a person who acts as agent and describes himself as such is not liable unless the contract involves his personal liability or he is the real principal. On this point, the only question to be considered is whether the contract involves the personal liability of the defendants. As the bills of lading are not in evidence nor is there any written evidence of any contract, the whole relationship of the parties is to be gathered from the oral evidence and any document which may help in elucidating the position. It will therefore be necessary to consider the points made by the plaintiff that the defendants are agents of a foreign corporation, not registered by law, who have held themselves out as personally liable. The law, as I understand it, is that stated in 1 *Halsbury's Laws of England*, 2nd ed., at 299:

> ". . . [W]hen an agent makes a contract on behalf of a foreign principal, there is a presumption based upon the custom of merchants that the agent has no authority to pledge the credit

of the foreign principal so as to establish privity of contract between the foreign principal and the third party, and that the agent, although he discloses the name of the principal, contracts personally, unless a contrary intention appears from the contract itself or from the surrounding circumstances. But where the foreign principal is brought into privity of contract the presumption does not operate so as to render the agent liable as well as the principal.

Further, the agent is personally liable on the contract if it is shown that he is the real principal, or that the principal named by him is non-existent or incapable of making the contract in question."

I acted on this principle of the law in the case of *Bankole Bright* v. *Royal Exch. Assur. Co. Ltd.* (1), cited by counsel for the plaintiff. But it will be found in that case that I found that privity of contract was in fact established between the third party and the principals, and so the agents could not be successfully sued.

On the contentions in this case, I have to determine whether the principals are a foreign company; whether the defendants contracted for a foreign principal; whether the defendants could not be liable personally; and what is the effect of non-registration of the principals in Sierra Leone, as alleged by counsel for the plaintiff.

I do not think the defendants can be regarded as agents for a non-existing company. Those words mean a company not in existence, not a company which probably has not complied with the law by registration. As I have said before, no bills of lading which might have been evidence of the contract of shipment were produced. The defendants attempted to put in evidence eight documents, but these were not received as they were not proved to have been documents admissible in evidence. They are copies alleged to be bills of lading. They are different in head from those mentioned in the case. No attempt was made to produce the original documents, if they exist, or to get copies after satisfactory proof that the originals could not be produced, and so far as the evidence goes no proof was given of a written contract of transport or carriage.

There is no doubt that the principals are a foreign company, not proved to be registered in Sierra Leone. Unless, therefore, privity of contract can be proved to have existed between them and the plaintiff, the defendants, as agents of the foreign company, remain personally liable for any breach of contract.

There is no proof of privity of contract between the plaintiff

and the principals. In fact, all dealing between the plaintiff and any other person was with the defendants as their agents. The defendants would therefore be liable as the person who entered into the alleged contract, if the case is based on contract. It is important however to note that the allegations in this case and the claim are based not on a breach of contract but on negligence.

In the pleadings the plaintiff alleges that the goods were delivered to the defendants; that the defendants kept the kola nuts in a closed lighter in Freetown harbour, and then the kola nuts were put in the hatch in the "African Guide," and as a result of the way they were kept in the hatch they were burnt, suffered damage and became unfit for sale and consumption. This being a claim for negligence, it is a claim in tort, and in tort the defendants would be liable if damage results from their acts. The law as stated in *Bowstead on Agency*, 10th ed., at 266–267 (1944), is:

> "Where loss or injury is caused to any third person, or any penalty is incurred, by any wrongful act or omission of an agent while acting on behalf of the principal, the agent is personally liable therefor, whether he be acting with the authority of the principal or not, unless the authority of the principal justify the wrong . . . ."

In 1 *Halsbury's Laws of England*, 2nd ed., at 304–305, para. 491, it is stated:

> ". . . [A]ny agent, . . . who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorised or ratified by the principal . . . ."

In *Whitfield* v. *Le Despencer* (2), it was held that whoever does an act by which another suffers is liable.

In this case it has to be determined whether the defendants by their acts caused the damage complained of, and, if they could be liable, whether they were acting as agents or not. The whole case resolves itself into a consideration of the question as to the nature of the damage complained of, and how far it was caused by the acts of the defendants. It is wrong, in my opinion, to consider the case as in contract. It is based on alleged negligence, which is a tort. The plaintiff's evidence is that they delivered the kola nuts into the lighter of the defendants on June 3rd. The kola nuts were kept closed up in a lighter from June 3rd–9th. On June 9th, they were put in the hatch of the "African Guide" by the defendants. The plaintiff said he drew the attention of the defendants to the

fact that kola nuts should be deck cargo, that is, not in a hatch. He gave evidence that he told a Mr. Aushet of the defendants that if kola nuts were kept in the hatch they would suffer from excessive heat and get burnt. Aushet said he could not put the kola nuts on the deck as there were many passengers. The plaintiff then asked that the kola nuts should be taken ashore but Aushet said he could do nothing as the boat was about to sail. Evidence was given that the kola nuts left in good condition but that they arrived at their destination, Bathurst, in bad condition. Certificates were received of the condition they arrived in Bathurst. The plaintiff's second witness, Pratt, a customs clerk, gave evidence that he went on board the "African Guide" on duty. He saw several bags of kola nuts stacked with indigo in the hatch. Later the indigo was removed but the kola nuts remained in the hatch. This witness said he has never known of any case where kola nuts were stacked in the hatch of a ship.

The third witness for the plaintiff, Toufic Isaac, gave evidence that he has been trading in kola nuts since 1923, and stated that kola nuts are always stacked on deck and never in the hatch of a ship. He said he saw the kola nuts packed in the hatch with some indigo dyes. He said the plaintiff spoke to Aushet, the representative of the defendants, and told him that if the kola nuts were left in the hatch they would get burnt during the voyage.

The first witness for the defendants, Demack, in charge of the shipping of the defendants, stated that U.A.C. Ltd. were their freighters. As this witness was not present when the "African Guide" arrived in Freetown on this voyage, he could not give evidence as to what happened.

The second witness for the defendants, Brown, stated that he had been with the defendants for about five years. He recollected the shipment in question. He said the kola nuts were placed in an open lighter and later placed in an open hatch. This was in June 1949. He stated in cross-examination that kola nuts would burn if they had too much heat.

On the whole of the evidence, I have come to the conclusion that the defendants received the kola nuts for shipment. They placed them first in lighters and, when the "African Guide" came, they were then kept in the hatch of that vessel with some indigo dyes. Later, the indigo dyes were removed but the kola nuts were left in the hatch. On behalf of the defendants, one witness gave evidence that the hatch was kept open. On the plaintiff's side, evidence

was given that the hatch was locked before the boat left Freetown. I do not know whether it is reasonable to expect that hatches in a boat would be kept open on a voyage in June during the rainy season. By the evidence given, I have come to the conclusion that kola nuts should never be kept in a hatch owing to their tendency to cause excessive heat. In so placing kola nuts in a hatch, after they were warned about the risk and damage, the defendants acted in a manner which amounted to negligence and so caused the damage to the kola nuts. The result is that a great quantity of the kola nuts became burnt or damaged.

The defendants allege in the defence that the kola nuts sustained damage because, owing to their bad condition and the perils of the sea, the "African Guide" arrived in Freetown three days late and the defendants kept them in a lighter for protection. There is no evidence that the kola nuts were bad, but the contrary, or that the condition of the kola nuts in Gambia was due to the three days' delay of the "African Guide." Nor is there evidence which satisfies me that the damage to the cargo was due to the perils of the sea.

As I stated, the bills of lading were not proved for the excepted period to be considered, and para. 5 of the defence, about notice by the plaintiff, does not arise.

As regards damages, the plaintiff has proved that the total number of kola nuts damaged was 187 blies at £5 10s. 0d. each. This makes £1,208. 10s. 0d. which the plaintiff is entitled to recover. There is also a claim for damages, but there is no evidence as to how this is to be assessed. Unless therefore the parties can agree as to this, I will order the Master to hold an enquiry and report to me as to this before final judgment is given. Interlocutory judgment for £1,028. 10s. 0d.

Order accordingly.