1959 *Present :* **K. D. de Silva, J., and H. N. G. Fernando, J.**

HOLLAND COLOMBO LTD. OF COLOMBO, Appellant, *and* V. SUBRAMANIAM, Respondent

S. C. 129—D. C. Colombo, 34211/M

Principal and agent—Agent appointed to buy goods—Defective quality of goods bought—Is agent liable to pay damages ?

Semble : Where an agent is appointed for the purpose of purchasing goods, the contract of agency cannot be treated as one of sale for the purpose of casting upon the agent the liability to pay damages, *qua* vendor, for the defective quality of goods purchased by him on behalf of his principal.

[1] *(1935) 14 C. L. Rec. 91.*

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, with *S. J. Kadirgamar*, for the defendant-appellant.

E. B. Wikramanayake, Q.C., with *G. B. Kumarakulasinghe*, for the plaintiff-respondent.

Cur. adv. vult.

August 3, 1959. H. N. G. FERNANDO, J.—

This case turns on the proper construction to be given to an indent dated 5th October 1953 placed by the plaintiff with the defendant Company for five tons of New Crop Siam Dry Chillies of Fair Average Quality at a price of £220 per ton c.i.f. Colombo. According to the plaint, the plaintiff by this indent " requested the defendant to import the chillies for the plaintiff ", and the plaintiff subsequently took delivery of five tons of Siam Chillies, payment for the consignment having been previously made at the rate specified in the indent. The plaint further states that the chillies were not of the " new crop ", but of inferior quality, that the plaintiff in consequence suffered damages estimated at about Rs. 4,160, and that a cause of action has accrued to the plaintiff to sue the defendant for that amount, and for a further Rs. 52/50 being survey fees. Neither in the plaint nor in the issues framed at the trial was any question raised as to whether the indent constituted a contract of purchase and sale as between the plaintiff and the defendant. Nevertheless that question was the principal one dealt with in the arguments of counsel, and the learned District Judge, having decided that the contract was one of sale, gave judgment for the plaintiff on that basis.

In reaching this conclusion the learned District Judge relied heavily on the decision of this Court in *Hayley and Kenny v. Kudhoos*[1] which purported to follow a principle laid down by Blackburn, J., (afterwards Lord Blackburn) in the case of *Ireland v. Livingston*[2]. The observations of Blackburn, J. were generally to the effect that there can be superadded to a contract of agency obligations as between vendor and vendee, and they do support the view that such obligations arise upon a contract of the description dealt with in the case of *Hayley and Kenny v. Kudhoos*[1] or a contract of the description with which I am presently dealing. But this Court in the last-mentioned case apparently lost sight of two important features of the *Ireland v. Livingston*[2] case, firstly that Blackburn, J. was only rendering an *advisory* opinion in the House of Lords, and secondly that he himself, as well as the Law Lords who delivered their opinions, gave judgment for the plaintiff on the basis that he had fulfilled his obligation *as the agent of the defendant* in shipping a consignment of goods, and that the defendant had wrongfully refused to take delivery

[1] *(1922) 24 N. L. R. 267.*

[2] *L. R. 1871-72, 5 H. L. 395.*

of the consignment. All that Lord Chelmsford (who delivered the principal opinion) remarked concerning the question whether the plaintiff was a vendor was as follows :—

> " I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent, though the Plaintiffs might in some respects be looked upon as vendors to the Defendants, so as to give them a right of stoppage *in transitu*. But the transaction began as a contract of agency, and in that light I am disposed to consider it. "

The whole matter is admirably dealt with in the judgment of Jayewardene, D.J. (as he then was) in the Ceylon case of *Darley, Butler & Co. v. Saheed* [1], and it is for that reason superfluous to reproduce here the observations of Blackburn, J. and the comments on those observations which were made in subsequent English and Indian cases. It is sufficient to cite the comment of Lord Esher (then Brett M.R.) in *Cassaboglou v. Gibb* [2] :—

> " Mr. Pollard cited, however, in support of his contention, the authority of Lord Blackburn in his work on Sales, and the case of *Ireland v. Livingston*, and on a question relating to agency he could not have cited a higher authority, but Lord Blackburn has not said that as long as the contract of principal and agent is executory, the principal can sue the agent and make him pay as though the contract were that of vendor and purchaser. He has considered the point with reference to two matters, one with regard to the theory of passing the property in the goods, and the other as to the power of stopping the goods *in transitu*, and as to those two matters, he has said with reference to the first of them, that if the foreign commission agent has purchased the goods which he was ordered to purchase and has put them on board consigned to his principal, by that appropriation the property in the goods passed from the commission agent to the principal as if such agent were a vendor. Then, as regards the power to stop *in transitu* Lord Blackburn has said that if the commission agent abroad is bound to pay for the goods to the foreign seller of whom he bought them and, if after he has shipped them to his principal such agent has not been paid, and his principal is insolvent, so that the foreign seller could only have the agent to look to for payment, the Courts have held that such agent may stop the goods *in transitu* as if he were a vendor, or in the position of a vendor."

It was I think with this comment in mind that Ennis A.C.J. in *Darley Butler's* case expressed himself as follows :—

> " The later cases all seem to indicate that the proposition in *Ireland v. Livingston* has but a limited application, and that a contract of agency remains throughout a contract of agency, but that for certain purposes it is assimilated to a contract of sale ". An agent has been held to be in

[1] *(1923) 25 N. L. R. 353.*

[2] *1882 L. R. 9 Q. B. D. 220.*

the position of a vendor, for his own protection, in order to be entitled to exercise the right of stoppage *in transitu* and also, for the benefit of his principal, in order to pass the property in the goods. This latter was the substantial position in which the agent was placed by the decision in *Hayley and Kenny v. Kudhoos* [1] which held that the agent was bound to produce to his principal a contract of insurance covering the goods. But no decision has been cited to us where a contract which commences as one of agency is treated as one of sale for the purpose of casting upon the agent the liability to pay damages, *qua* vendor, for the defective quality of goods purchased by him on behalf of his principal. It is therefore, at the least, doubtful whether it would be correct to construe what purports to be a transaction of agency as being one of sale in a case where no question arises of the need either for a stoppage *in transitu* or for the passing of property in the goods.

In any event, there are other grounds upon which this action must fail. The contract provides very clearly that the goods were to be shipped on the account and at the risk of the plaintiff, that he would bear the costs of landing, warehousing and import dues, that insurance was to be effected for the benefit of and at the cost of the plaintiff, that the defendant was not to be responsible for late delivery, non-delivery or short delivery, and that in certain events the defendant would have the right to dispose of the goods at the plaintiff's risk. There is no provision which imposes on the defendant any liability for the wrongful execution of the order, or for any defect in the quality of the goods delivered. On the contrary, clause 20 of the Indent contains the following provision :—

> " 20. I/We do not hold you responsible for any claim regarding the execution hereof but it is agreed that if any claim is presented to you in writing within the time specified in clause 13 you will act on my/our behalf to endeavour to obtain a satisfactory settlement for me/us from the manufacturers or suppliers. "

This duty to negotiate with manufacturers or suppliers abroad in the event of wrongful execution is the only obligation imposed by the contract in anticipation of an event of the description which has in fact arisen. The learned District Judge thought, in view of clause 5, that the provision in clause 20 was to apply only if the goods were supplied by a named manufacturer or supplier. But if that be the case, it would follow that even the obligation specified in clause 20 would not arise, and the plaintiff would be in an even worse position than he would be if he can have recourse to clause 20. In the absence of any clear provision rendering the defendant liable for defects in quality, it is unreasonable to hold that such a liability arises by implication. The plaintiff sues on the contract and can only rely on rights which flow from it. The only right given by the contract is a right to " an allowance for proved inferiority in the value of the goods, such allowance to be settled by arbitrators ", but there was no claim in the plaint for any such allowance. It was argued

[1] *(1922) 24 N. L. R. 267.*

that if the defendant was relying on the arbitration clause, he should have expressly pleaded the failure to go to arbitration. This argument must fail for two reasons—*firstly* (as stated already) the defendant is liable, if at all, only under the arbitration clause; *secondly* the issue " whether the plaintiff is entitled to recover the damages, *in terms of the contract between the parties contained in the indent*, adequately raises the question whether anything is recoverable which has not been " allowed " by arbitrators.

For these reasons, I would allow this appeal and dismiss the plaintiff's action with costs in both Courts.

DE SILVA, J.—I agree.

Appeal allowed.