IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA

CORAM: ADINYIRA (MRS) JSC PRESIDING

YEBOAH JSC

GBADEGBE JSC

BAMFO (MRS) JSC

AKAMBA JSC

CIVIL APPEAL

NO.J4/15/2013

15TH JANUARY 2014

BOATENG ASANTE **PLAINTIFF/RESPONDENT /APPELLANT**

VRS.

SCANSHIP GHANA LIMITED **DEFENDANT/APPELLANT /RESPONDENT**

JUDGMENT

ANIN YEBOAH JSC;

On the 15th of January, 2014, we dismissed the appeal from the judgment of the Court of Appeal and reserved our reasons. We now proceed to offer our reasons for the dismissal of the appeal.

The appellant herein has appealed against the unanimous judgment of the Court of Appeal, Accra, which set aside the judgment of the trial High Court, Accra. The facts of this appeal appear to be devoid of any serious controversy. The appellant herein commenced an action at the High Court, Accra (Financial Division).

He is a Ghanaian citizen who had lived in Germany for about twenty-eight years. When he decided to come home to stay permanently he gave instructions to his wife who was in Germany to ship his personal belongings to him in Ghana. In compliance with his wishes the goods were entrusted to Messrs Schenger and Company, Tubengen, Stuggar who were forwarding agents for the shipment to the plaintiff in Ghana.

According to the appellant he waited for several months and did not receive the goods and therefore wrote to his solicitor in Germany to instruct them to take action on the matter. His solicitors in reply informed the appellant that the goods had indeed arrived in Ghana on or about the 11th of November 1990.

The appellant thereupon contacted the respondent and he was informed that it had long ago posted Arrival Notice to the appellant herein to inform him of the arrival of

goods and as the respondent failed to clear the goods, sent the goods to the State's warehouse to be auctioned as unclaimed goods as required by the laws of Ghana.

The appellant at the State Warehouse saw the containers in which his goods were shipped but bore his corny name and postal address as Boateng Asante P.O.Box 5926, Accra. According to the appellant upon his demand to be shown the Arrival Notice the respondent showed him an Arrival Notice with different particulars as follows; Boateng Acanle, c/o Mr. Agyekum P.O.Box 5296, Accra which appeared to be contrary to and inconsistent with the other particulars above.

The appellant resorted to legal action and pleaded breach of contract, negligence and/or carelessness against the respondent herein. The learned trial High Court judge after hearing, entered judgment for the appellant and granted the appellant the reliefs sought. The respondent lodged an appeal at the Court of Appeal, Accra, which reversed the judgment of the trial High Court on several grounds. This appeal is before this court from the unanimous decision of the Court of Appeal, Accra.

The appeal has been argued on three main grounds, namely:

a. The Court of Appeal erred in holding that the defendant/appellant/respondent was not negligent nor did contribute to the negligence in handling the appellant's cargo and therefore not liable to the respondent.

b. The Court of Appeal erred in holding that the defendant/appellant/respondent cannot be held for the negligence of its principal, a foreign company with no address in Ghana.

c. The Court of Appeal erred in refusing to consider the damages aspect of the respondent's appeal.

The first ground of appeal was seriously argued in detail by learned counsel for the appellant. According to counsel, the evidence on record on negligence and which was accepted by the learned trial judge was erroneously set aside by the Court of Appeal. He sought to crticise the judgment of the Court of Appeal that it had no right to reject the findings of fact made by the learned trial judge and supported his submissions with the cases of BENMAX v AUSTIN MOTOR CO. LTD [1952] 2 WLR 418, MORRIS v WEST HARTLEPOOL STEAM NAVIGATION CO LTD [1956] IWLR 177 and TONAZZI v BRUNNET [1953] 14 WACA 403.

The principle deducible from the above cases is that an appellate court ought not to disturb the findings of facts made by the trial court unless those findings are not supported by the evidence on record. In this appeal it would appear that the evidence on record was not based on demeanour. It was also not the case that there were any serious conflicts in the evidence of both parties before the trial court. The evidence was clearly devoid of controversy. According to the evidence of the appellant the respondent did not correctly spell his name and also did not give the right address of the appellant for the correspondence to reach him on time when the goods arrived at the Tema Port. He had on the pleadings charged the respondent of negligence and carelessness and pleaded the particulars of negligence in his amended statement of claim as follows:

PARTICULARS OF NEGLIGENCE AND/OR CARELESSNESS

a. Writing wrongly the name BOATENG ACANLE instead of BOATENG ASANTE
b. Writing wrongly the postal address c/o MR. AGYEKUM, P.O.BOX 5296 instead of P.O.BOX 5926
c. Failing or refusing to notify the plaintiff the arrival of the goods
d. Failing or refusing to take any or sufficient measures to ensure that the plaintiff received the notification before transferring the goods to the State Warehouse
e. Transferring the plaintiff's goods to the State Warehouse as unclaimed when no notice of the arrival of the goods had been sent to the plaintiff.

The above particulars of negligence and/or carelessness were stoutly denied in the amended Statement of Defence. Basic rules of evidence required that the appellant who pleaded negligence or carelessness against the respondent upon denial by the respondent assumed the onus of proof. This court, per its the worthy president in the recent often-quoted case of ACKAH v PERGAH TRANSPORT LTD & ORS [2010] SCGLR 728 stated the law lucidly after referring to sections 10 and 11 of the Evidence Act 1975 NRCD [323] as follows at page 736:

> "It is a basic principle of the law of evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quantity of credibility short of which his claim may fail"

The evidence led by the appellant sufficiently established that his name and address were in a manner which was contrary to and inconsistent with the one given to his

agent in Germany where the goods were shipped. The appellant's attempt to prove the particulars of negligence against the respondent found favour with the learned trial judge. However, the appellate court reversed the findings on negligence. The Court of Appeal found as follows;

> "The conduct of the defendant's principal by providing an address different from the one given to him by the shipper amounts to negligence. The onus of negligence on the part of the defendant's principal in Germany has been proved on the preponderance of probabilities. It is in consonance with section 11(4) and 12 of the Evidence Act NRCD 23"

It must be made clear that the particulars of negligence were pleaded against the respondent who was the only party to the suit as defendant. The appellant from the evidence which appeared to be documentary, never made up a case of negligence against the respondent who was the only party sued to answer the allegations pleaded in the particulars. In the judgment by the Court of Appeal, Dennis Adjei, JA found as follows:

> " I find as a fact that the defendant was not negligent when he reproduced the name and address of the plaintiff as BOATENG AKANLE, c/l MR. AGYEKUM, P.O.BOX 5296, ACCRA NORTH because it was the actual information on the manifest. I would like to state that in the Shipping Industry, Arrival Notice is just a complimentary as all the relevant information concerning the goods are on the bills of lading. The inordinate delay on the part of the plaintiff to clear the goods from the port would have been addressed if the carrier was a party to the suit"

We cannot fault the Court of Appeal in anyway on the above findings of facts exonerating the respondent from negligence. As the facts appeared not to be in dispute, the Court of Appeal was clearly within its powers when it drew the necessary inferences from the undisputed facts. This is supported by a long line of authorities since the case of ASHITTEY & OR v DODOO [1969] CC 157 CA was decided by the Full Bench when it held as follows:

> "where the facts upon which a judgment is based are inferences drawn from primary facts an appellate court is in just as good a position as the trial court to draw these inferences, and where a court of Appeal is of the considered view that wrong inferences have been drawn by the trial court, it (Appellate Court) can properly substitute its own findings for those of the trial court"

In our respectful opinion, the Court of Appeal rightfully drew the necessary inferences from the undisputed facts on record. It was therefore the duty of learned counsel for the appellant to have demonstrated before this court where the Court of Appeal went wrong, and the miscarriage of any injustice resulting therefrom. As the inferences drawn by the Court of Appeal were clearly supported by the undisputed and the documentary evidence on record we will not disturb the findings based on the recent decisions of this court in TEMA OIL REFINERY v AFRICAN AUTOMOBILE LTD [2011] 2 Schlr 907 and AMOAH v LOKKO & ALFRED QUARTEY (substituted by) GLORIA QUATEY [2011] 1 SCGLR 505.

We think that the facts of the case required that the appellant ought not to have been the sole defendant to answer a claim of this nature. The proper parties were not before the court to have answered the particulars of negligence pleaded against only the respondent herein. The basic principle of common law of cardinal importance

regulating joinder of parties is that the misjoinder or non-joinder of any party shall not operate to defeat any cause or matter and the court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. It therefore behoves litigants to pursue their claims against the right parties in every cause or matter.

This proposition of the common law is statutorily supported by Order 4 rule 5 (1) of the High Court (Civil Procedure) Rules, CI 47 of 2004. If the forwarding agents residing in Germany had been made parties to this case, the appellant could (based on the undisputed oral and documentary evidence) probably have made a case against them. For a name which is mispelt may have far-reaching consequences in law. See THE REP v ATTORNEY-GENERAL; EX PARTE QUAYE-MENSAH & OR [1979] GLR 429 CA. From the facts a duty of care was imposed on them to have given the correct name and address of the appellant for the correspondence to reach him on time. There was therefore a clear breach of duty which in law is the basis of any claim in negligence. Negligence generally results from a breach of legal duty to take care which results in damage to a person. But it is stated in WINFIELD & JIROWICZ, TORT 18th Edition at pate 151 as follows:

> " It is not for every careless act that a person may be held responsible in tort law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care. [Emphasis ours]

We are of the opinion that there was no legal duty imposed on the respondent herein, the claim against the respondent based on negligence or carelessness obviously fails. However, learned counsel for the appellant argued this ground by referring to several

cases on the law of agency which we think we owe a duty to him to address in this appeal.

The Court of Appeal was of the view that the evidence did not disclose that the respondent herein was to be held liable for acts or omissions of his principal who was residing outside the jurisdiction. It proceeded to cite one of the leading cases on agency, which is J.S.HOH & MOSELEY (LONDON) LTD v SIR CHARLES CUNNINGHAM & PARTNERS [1950] 83 LL R 141 in which the House of Lords held inter alia that there is no longer any presumption that an agent acting for a principal who is outside the jurisdiction would be held personally liable for acts or omissions of the principal. Quite apart from the fact that the evidence could not disclose that the respondent was to be held liable for acts or omissions of the principal living outside, the Court of Appeal was of the opinion that the respondent throughout the transaction did not exhibit any conduct to assume responsibilities of his principal living outside the jurisdiction. In support of this findings the Court of Appeal cited UNIVERSAL STEAM NAVIGATION CO. LTD v JAMES MACKENIE [1923] 129 LT 395 in which the House of Lords, held that where an agent shows himself as an agent of a principal he cannot be held personally liable for acts or omissions of his principal unless by his conduct covertly or overtly he assumed the responsibilities of his principal. We think that the inferences drawn from the uncontroverted facts support this basic proposition of law and we need not disturb it.

The other grounds of appeal which were argued covered the issue of damages which were ignored by the Court of Appeal. In its judgment the Court of Appeal was of the view that the issue of damages ought not to be considered after it had allowed the appeal based on the fact and law that the respondent did not owe any legal duty

towards the appellant. Of course damages would certainly flow after finding of liability against a tortfeasor. In this appeal we have endorsed the finding that the respondent did not owe any legal duty toward the appellant. In our opinion, like the Court of Appeal, it would not therefore be necessary to consider any issue of general or special damages as pressed on us by counsel of the appellant. We therefore dismiss the appeal.

These are our reasons for affirming the judgment of the Court of Appeal.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

V. AKOTO-BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

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