**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal from the Judgement of the High Court of the Western Province sitting in Mount Lavinia.

S.C. Appeal No. 77/2016
SC/HCCA/LA No 683/2014
WP/HCCA/MT/67/2012 (F)
D.C. Mount Lavinia No. 6359/09/M

Freedom of High Seas (Pvt) Limited,
No.5, Soysa Mawatha,
Templers Road,
Mount Lavinia.

**Plaintiff**

**Vs**

Kardin International (Pvt) Limited,
No. 206, Attidiya Road,
Attidiya,
Dehiwala.

**Defendant**

**AND BETWEEN**

Kardin International (Pvt) Limited,
No. 206, Attidiya Road,
Attidiya,
Dehiwala.

**Defendant-Appellant**

**Vs**

Freedom of High Seas (Pvt) Limited,
No.5, Soysa Mawatha,
Templers Road,
Mount Lavinia.

**Plaintiff-Respondent**

**AND NOW BETWEEN**

Kardin International (Pvt.) Limited,
No. 206, Attidiya Road,
Attidiya,
Dehiwala.

**Defendant-Appellant-Petitioner/Appellant**

Freedom of High Seas (Pvt.) Limited,
No.5, Soysa Mawatha,
Templers Road,
Mount Lavinia.

**Plaintiff-Respondent-Respondent**

Before: Buwaneka Aluwihare, PC, J.
Murdu N.B.Fernando, PC, J. and
P.Padman Surasena, J.

Counsel: Dr. Kanag-Ishvaran PC with Nigel Bartholomeusz, Lakshmanan Jeyakumar and Aslesha Weerasekara for the Defendant-Appellant-Appellant

Chandaka Jayasundere PC with Rehan Almeida and Sayuri Liyanasuriya for the Plaintiff-Respondent-Respondent

Argued on: 01.07.2020, 14.07.2020, 29.07.2020 and 07.09.2020

Decided on: 20.05.2022

**Murdu N.B. Fernando, PC, J.**

This Appeal arises from the judgement of the High Court of the Western Province sitting in Mount Lavinia ("High Court") dated 17th November, 2014.

The High Court upheld the judgement of the District Court of Mount Lavinia delivered on 15th March, 2012 and dismissed the appeal filed therein by the aggrieved party, namely Kardin International (Pvt) Limited, the Defendant-Appellant-Appellant ("the defendant/appellant") before this Court.

Freedom of High Seas (Pvt) Limited, the Plaintiff-Respondent-Respondent ("the plaintiff/respondent") sued the defendant for a sum of US $ 10,000, being the outstanding costs incurred in the supply of fresh water to a ship in distress named "MV Marina One" ("Marina One") which was drifting off the South-East coast of Sri Lanka.

The position of the defendant was that at all times, it acted only as an agent of a principal whose identity was disclosed and hence had no liability towards the plaintiff for the sum sued.

The defendant is now before this Court, having obtained leave in March, 2016 on the following two questions of law, referred to in paragraph 28 (c) and (d) of the Petition.

(i) Has the High Court grievously misdirected itself in fact and in law in failing to consider that the Petitioner was acting as an agent only and not as principal to be visited with any liability at all?

(ii) Has the High Court completely misdirected itself in fact and in law in failing to consider that the learned District Judge has erred in answering Issue 2 raised by the Respondent in the affirmative?

> *Issue 2 raised by the plaintiff in the District Court, referred to in the 2nd question of law reads as follows:*
>
> *"2. On or about 08.10.2008, did the defendant enter into an agreement with the plaintiff for the supply of fresh water to the vessel 'MV Marina One' positioned in the high seas, east of Sri Lanka?"*

The docket bears out that this Court has also granted leave on two additional questions raised by the respondent. The said two questions [now numbered as (iii) and (iv)] are reflected below.

(iii) Is the questions as raised in paragraph 28 (c) and (d), on which leave has been granted by the Supreme Court, questions of fact and not questions of law?

(iv) If so, can the Supreme Court set aside the judgement of the Civil Appellate High Court and the District Court on questions of fact in accordance with the provisions of the High Court of the Provinces (Special Provisions) Amendment Act No 54 of 2006?

At the hearing of this appeal the respondent did not pursue the aforesaid two questions of law now numbered (iii) and (iv).

Hence, this Court would proceed to examine only the questions of law bearing number (i) and (ii) in this analysis.

Prior to considering the said two questions of law, I wish to briefly refer to the facts pertaining to this appeal, bearing in mind the paramount issue in this appeal, i.e., whether a contract came into existence between the litigating parties, on the relevant date.

01. On 08-10-2008, Dinesh Hensman of the defendant company received a telephone inquiry from Captain Jeya of Silverline Maritime Sdn Bhd of Malaysia, Managers of the vessel Marina One ("the manager") for supply of fresh water to MV Marina One, which was in distress.

02. The defendant thereafter contacted the plaintiff company engaged in various maritime activities and obtained a quotation of US$ 11,600, for supply of 200 MT of fresh water to the ship Marina One.

03. The correspondence between all parties to this arrangement was by telephone, telegraph and e-mails and upon approval of the quotation by the Malaysian managers of the vessel, plaintiff supplied the fresh water to the ship and a sum of US$ 11,600 was paid to the plaintiff.

04. The contention of the plaintiff was that a further sum of US$ 10,000 was due from the defendant, whereas the position of the defendant was that the total sum agreed was paid to the plaintiff.

05. The plaintiff sued the defendant upon the basis that the defendant entered into this contract in its individual capacity and the defendant agreed to pay the plaintiff, a total sum US$ 21,600 being US$ 5000 per day for the hire of the barge and US$ 1,600 for the supply of fresh water and out of which only a part payment of US$ 11,600 was made leaving an outstanding sum of US$ 10,000 to be paid to the plaintiff by the defendant.

06. The defendant contended, that it entered into this contract only as an agent and for a lump sum payment of US$ 11,600 and there was no consensus or agreement with regard to a daily rate as alleged by the plaintiff and that the agreed lump sum was paid in full to the plaintiff.

07. At the trial, Captain Ranjith Weerasinghe of the plaintiff company gave evidence and marked in evidence a series of e-mails and an invoice. For the defense, Dinesh Hensman gave evidence and heavily relied upon the phraseology 'as agents only' in

the e-mail, wherein the quotation of the plaintiff was submitted to the manager by the defendant and strenuously argued before this Court, that the defendant acted only in the capacity of an agent of a divulged principal and not as the principal as contended by the plaintiff.

08. The District Judge gave judgement for the plaintiff. The defendant appealed to the High Court and the High Court endorsed the findings of the District Court.

Having referred to the background of this appeal, let me now consider the two Questions of Law for which answers are sought from this Court.

**(i) Has the High Court grievously misdirected itself in fact and in law in failing to consider that the Petitioner was acting as agent only and not as principal to be visited with any liability at all?**

**(ii) Has the High Court completely misdirected itself in fact and in law in failing to consider that the learned District Judge has erred in answering Issue 2 raised by the Respondent in the affirmative?**

I wish to refer to the 1st question in relation to the principal parties in this appeal, for the better understanding of this matter. *viz*.,

*Did the defendant Kardin International, the appellant before this Court, only act as an agent of a disclosed principal Silverline Maritime of Malaysia, when it entered into an agreement with the plaintiff Freedom of High Seas, the Respondent before this Court and thus, can the agent Kardin International be visited with any liability by the respondent Freedom of High Seas for the sum sued?*

The 2nd question raised before this Court, pertains to the veracity of the answer given to issue number two raised at the trial. By the said issue the plaintiff pointedly queried,

*Did the defendant enter into a contract with the plaintiff on or about **08-10-2008,** for the supply of fresh water to Marina One, positioned in the high seas?*

Thus, based upon the said Questions of Law, this Court would determine the correctness of the finding of the trial court, pertaining to the role of the defendant. Was the defendant 'an agent' as contended by the defendant? Or in the contrary, was the defendant an independent contractor, acting in the capacity of a principal himself, who entered into the impugned contract on 08-10-2008 as contended by the plaintiff?

In order to ascertain an answer to the said query, I wish to look at this matter from two perspectives, the factual aspect and the legal aspect.

*Firstly,* the factual aspect; The e-mails marked and produced at the trial by the plaintiff, through its only witness Captain Ranjith Weerasinghe. Three sets of e-mails bearing the date of dispatch 08th, 09th and 10th October, 2008 were marked and produced at the trial.

The 1st e-mail **P1A** is dated 08-10-2008 and is sent by the defendant, addressed to Captain Jeya of Silverline Maritime of Malaysia, the manager of Marina One. It is dispatched at 4.02 pm copied to the plaintiff and reads as follows:

*"Dear Capt Jeya,*

*Reference your telecom.*
*Understand vessel is located close to Great Basses about 200 miles south of Colombo.*
*Based on above we are quoting as follows:*

| | |
|---|---|
| *- 200 mt fresh water* | *- US$ 1600.00* |
| *- Delivery charges* | *- US$ 10000.00* |
| *- Handling charges* | *- US$ 1000.00* |
| *- Barge/ Tank Operator* | *- Freedom of High Seas* |
| *- Payment* | *- Tomorrow - 09/10/2008* |
| *- Delivery* | *-Vessel can sail from Colombo tonight/early morning hours and can be at Great Basses area around 09-10/10/2008 AGW basis you confirm in next 30 minutes.* |

*If you could give the exact location we will recalculate and advise if we can reduce delivery charges.*

*Pleased to hear,*
*Best Regards,*
*As Agents only."*

By **P1B**, the manager [Silverline] at 4.18 pm responds to the defendant with copy to the plaintiff and requests bank account number in order to pass it to its owner for payment and also the estimated time of arrival [ETM] assuming they confirm within next 30 minutes.

By **P1C**, Captain Ranjith Weerasinghe of the plaintiff company responds direct to the manager and indicates it will take at least 24 steaming hours from Colombo to the position indicated in **P1A** and also the earliest, the plaintiff could move is day time, on 09-10-2008. This e-mail is dispatched at 5.45pm and copied to the defendant as well.

By **P1D**, the owners of the vessel responds to Captain Jeya [the manager] and the defendant, with copy to the plaintiff and confirms the offer. This e-mail dated 08-10-2008 is dispatched at 6.44 pm and states to arrange the supply ASAP [as soon as possible] and revert the vessel name and the contact vhf channel to inform master [of the distressed vessel]. It also hopes the charges can be reduced finally and that remittance will be arranged on 09-10-2008.

The aforesaid four e-mails, **P1A, P1B, P1C** and **P1D** dispatched on **08-10-2008**, *prima facie* appears to demonstrate that a contract was entered into between the parties referred to therein. Furthermore, the said e-mails point to the fact, that the contract was entered into on 08-10-2008, the material date referred to in issue two raised by the plaintiff at the trial.

The fundamental rudiments of a contract is 'meeting of minds' i.e., an 'offer' and an 'acceptance'.

Thus, from the said e-mails dispatched on 08-10-2008, it appears that **P1A** was the *offer* and **P1D** the *acceptance*. The offer or the quotation given was *'as agents only'* and was to supply fresh water for the consideration therein to a ship in distress and the confirmation was clear and specific and was unconditional.

**P1C** dispatched by the plaintiff indicates that the plaintiff was aware of the principal. It was a named and a disclosed principal and the plaintiff directly corresponded with the principal and informed the duration of the journey and the earliest time the plaintiff could leave. *i.e.,* 09-10-2008, day time [as opposed to 'early morning hours' referred to in **P1A** since the vessel was engaged in some work on the night of 08-10-2008]. This e-mail was followed by **P1D**, whereby the owner accepted the quotation. Thus, upon a plain reading of those e-mails, it is apparent that an offer was made and it was accepted on 08-10-2008, within 3 hours of the initial request.

But the question before this Court is to ascertain who were the parties to this transaction. Was it only the plaintiff and the defendant? Or were the manager and the owner of the distressed vessel also parties to this arrangement? If so, did the defendant only act as an agent or a conduit of the manager and the owner?

The next set of e-mails exchanged on **09-10-2008**, and marked in evidence as **P2A to P2G** sheds more light to this transaction.

The 1st intimation on 09-10-2008 is the e-mail **P2A** dispatched at 7.49am. It is by the manager. It directly addresses the plaintiff [as well as the defendant] as follows;

*"Dear Captain Ranjith,*

*As per telecom just now with Mr. Dinesh, he advised that you will be departing this morning from Colombo. Trust all is cleared up now and vessel can depart as scheduled. Meanwhile, please find as attached vessel particulars."*

The next e-mail **P2G** is also by the manager. It is dispatched at 9.24am and directly addresses the plaintiff. It is not addressed to the defendant. It gives the location of the vessel, that it's drifting north and that the vessel is upright.

The plaintiff follows up the said e-mails by dispatching **P2E** and **P2F** on **09-10-2008** at 10.08am and 11.08am addressed to the manager and copied to the defendant.

By **P2E** the 1st mail, Ranjith Weerasinghe [of the plaintiff company] responds, to the query in **P2A** in the following manner;

*"Dear Gentlemen,*

*Vessel is still busy with pre-arranged supplies at Colombo out harbor and has more promised supplies …. We are trying our best to do this amidst all other scheduled work…."*

By **P2F,** the plaintiff requests the current position of the distressed ship, whether it is at anchor or drifting and the weather conditions.

The defendant also responds to the manager's mail **P2A,** by **P2B.** It is dispatched at 8.19am and reads;

*"Dear Captain Jeya,*

*May I confirm again that the barge will be departing Colombo by noon today. Will keep you updated.*

*Captain Weerasinghe meant was in spite of his busy schedule he will do the job."*

This is followed by **P2C**. It is from Captain Jeya [manager] addressed to the defendant and the plaintiff and reads *"Thanks Mr. Dinesh appreciate efforts. Await bank details."*

The aforesaid e-mails exchanged on **09-10-2008**, indicate the correspondence between the manager, the plaintiff and the defendant and that the plaintiff company was doing its best to perform the task given, at its earliest. The said correspondence also reveal that the plaintiff's barge

could not leave Colombo on 08th night or 09th early morning as per the quote marked **P1A**, in view of pre-arranged work.

The plaintiff fortified its case by producing two more mails dispatched on **10-10-2008**, **P3A** and **P3B.** They were also marked through the plaintiff's sole witness in examination in chief.

**P3A** is a significant e-mail. It has a notation 'Urgent'. It is sent by the plaintiff to the manager and the defendant at 2.41 pm on 10-10-2008 indicating that the plaintiff's vessel, High Sea Challenge, [the barge with fresh water] left Colombo at 22.30 on 09-10-2008.

It further states, '*the plaintiff now learns the vessel has drifted further'* and the estimated time of arrival at the distressed ship would be greater. The e-mail **P3A** goes onto read as follows;

> *"As said in our message to Mr. Dinesh copied below here, as we had no fixed position of the drifting vessel our offer was a day rate of US$ 5000 based Colombo/ Colombo (initially thought to be 2 days). We received no confirmation although we have dispatched the vessel last night.*
>
> *We would appreciate if **you could send us** immediate confirmation of the said payment terms of US$ 5000 per day rate for the supply vessel for the delivery of water to **your** vessel Marina One*" (emphasis added)

It is observed that this e-mail has been dispatched by the plaintiff on 10-10-2008 at 2.41pm, 16 hours after the barge with fresh water left the Colombo port and was in the high seas. It specifically **requests the manager** to confirm the new payment terms for delivery of water to the vessel, Marina One, belonging to the owner, Silver Line Maritime Ltd.

The next mail **P3B,** dispatched on **10-10-2008** at 3.12pm appears to be the bone of contention between the parties. This mail is sent by the defendant to the plaintiff pursuant to **P3A** and 17 hours after the plaintiff's barge with fresh water left the Colombo port.

It reads as follows;

> *"Dear Captain,*
>
> *Many thanks your e-mail last. As discussed, we will compensate additional payment"*

The only other documents marked by Captain Ranjith Weerasinghe, [the plaintiff's sole witness in his examination in chief] were **P4** the location map of the distressed ship, **P5** the invoice sent on 13-10-2008 for *job no Marina, performed on 11-10-2008, wherein the customer's name is given as Master/Owner/Charterer/Agent of MV Marina or c/o Kardin International,* for a total

payable sum of US$ 21,600 [being charges for high seas delivery of fresh water US$ 20,000 plus cost of fresh water US$ 1,600] and **P6** the letter of demand.

The plaintiff relied on the above e-mails and the evidence of Captain Ranjith Weerasinghe [the plaintiff's sole witness] to establish the plaintiff's case presented before the trial court, i.e., the defendant's liability based upon the contract the defendant was alleged to have entered with the plaintiff on 08-10-2008, as articulated in issue two raised before the trial court and which forms the foundation of the 2nd question of law raised before this Court.

When Captain Ranjith Weerasinghe was cross-examined [vide district court proceedings dated 21st March, 2011] another e-mail dispatched by the plaintiff to the defendant was marked in evidence as **P3C**. It reads as follows;

> *"Dear Dinesh,*
>
> *Position of the vessel noted. As you can see her drift is 40 odd miles a day.* ***High Sea Challenge was doing only 7Kts this morning*** *due to coastal current. At 7Kts it takes 30 hrs to the initial position. Now with such a drift it may take longer to reach Marina One.*
>
> *We kindly request your clear confirmation that the payment is based on a day rate of US$ 5000* ***as we cannot stick to a lump sum rate*** *for voyage to catch a drifting vessel*." (emphasis added)

This e-mail marked in cross-examination denotes that upon undertaking the voyage and sailing, and whilst in the high seas [doing 7kts in the morning] the plaintiff is seeking a variation of the terms of the contract for the reason that the journey may take longer time than expected to reach the vessel in distress. The mail further states **we cannot stick to a lump sum rate** and requests confirmation that the payment is based on a daily rate of US$ 5000.

This **P3C** intimation by the plaintiff to the defendant does not give a date or a time but clearly indicates it is dispatched when the plaintiff's barge, High Sea Challenger was at sea on its way to the distressed vessel. There is no doubt that High Sea Challenger, the plaintiff's barge with fresh water left the Colombo port at 22.30 hours on 09-10-2008. (vide **P3A**)

The plaintiff's two mails **P3A [**addressed to the manager and the defendant] and **P3C** demonstrate that the plaintiff is seeking a variation of the terms of contract, after undertaking the journey and whilst on the high seas on its way to the distressed vessel. *i.e.,* on 10-10-2008 to be specific.

The issue number two raised before the trial court and the 2nd question of law raised before this Court, refers to a contract entered into on or about 08-10-2008, between the plaintiff and the

defendant. Hence, it is apparent from the above two mails [**P3A** and **P3C**] that the plaintiff is seeking a variation to the terms of contract entered into on 08-10-2008. The words '*we cannot stick to a lump sum rate* 'in **P3C,** to me clearly indicates the intention of the parties as at the time the contract was initially entered into on 08-10-2008.

Thus, the question before this Court is twofold. Can the plaintiff move to vary its terms of contract after undertaking the contract? If so, from whom should the plaintiff seek variation of the terms of the contract?

Whilst, the 1st question is purely a matter of law, the 2nd question is not. It is wound around the facts of the instant appeal *i.e.,* Is the plaintiff seeking the variation from the defendant company in his individual capacity? Or is it from the defendant company acting as an agent of the principal *viz*., the manager/owner of the distressed vessel Marina One?

Prior to considering the said question in greater detail, I wish to refer to a few more e-mails marked in evidence at the trial.

The District Court proceedings reveal that in addition to the e-mail **P3C** marked in cross-examination discussed above, certain other threads of e-mails [annexed to the plaint] were also marked in cross-examination through the plaintiff's witness. Those e-mails were marked as **P7, P8** and **P9** and have been dispatched in December 2008 two months after the matter in issue *i.e.,* delivery of water to Marina One took place. They refer to the correspondence between the manager of the distressed vessel, the plaintiff and the defendant to resolve this issue, prior to the plaintiff resorting to legal action. All of the said e-mails (**P3C, P7, P8** and **P9**) marked in cross-examination together with the other e-mails and documents marked in examination in chief (**P1** to **P6**) were led in evidence when the plaintiff closed his case.

However, there is one other e-mail to which the attention of this Court was constantly drawn to at the hearing of this appeal. It's marked **P10.** It was not produced through the plaintiff's sole witness, either in evidence in chief or cross examination. It was not led in evidence when the plaintiff closed his case [only **P1** to **P9** were led] or at the conclusion of the trial.

The District Court proceedings denote that the said **P10** mail was produced by the counsel for the plaintiff, when the defendant's only witness Dinesh Hensman was cross-examined. *i.e*., at the tail end of the trial. **P10** is from the plaintiff to the defendant. It is dated 09-10-2008 and dispatched at 1.14pm, said to be the time, the barge entered the Colombo port after its previous engagement and was prior to sailing with fresh water for the distressed vessel, the undertaken voyage.

It reads as follows;

*"Dear Dinesh,*

> *This is to keep you informed that our vessel is just entering port….We* ***cannot keep to a fixed price****. Our offer was a day rate of US$ 5000/= per day. At that time we presumed the steaming time was 24 hrs considering the rough position of basses. It is a moving target. So please discuss* ***with owners and confirm that the price was US$ 5000 per day…."*** (emphasis added)

Thus, relying upon this e-mail the respondent vigorously argued before this Court, that the variation of the terms of contract was sought not when the barge was at sea, but prior to sailing from the Colombo port. Whilst appreciating the above submission of the respondent, this Court is mindful of the fact that the proceedings before the District Court does not disclose that the said mail **P10** was either marked, produced or led in evidence at the trial, though tendered to the trial court together with the other documents. Nevertheless, this Court is aware of the Order made by the district judge, at the time the said document was first shown to the defendant when he was cross examined by the counsel for the plaintiff.

This Court is further conscious of the fact, that by this mail the plaintiff requests the defendant to **discuss with owners** and confirm the per day rate, for the reason that the plaintiff cannot keep to a fixed price. This mail is followed by the mails **P3C, P3A** and **P3B** in chronological order and in my view should be read together and not in isolation, to understand the relationship between the parties to this transaction.

Having referred to the evidence led before the trial court, let me now move onto consider the nexus between the plaintiff and the defendant. Did the defendant act as an agent of the owner/manager or did the defendant independently enter into a contract with the plaintiff?

Corollary, did the defendant having entered into an agreement with the owner/manager, sub-contract with the plaintiff to perform the functions, which the defendant undertook to provide to the owner/manager?

The answer to the above queries in my view, would rest entirely on the understanding and the interpretation of the term 'agent'. Thus, the pivotal issue to be examined in this analysis, is who is an agent? What are the duties and functions of an agent in a contractual relationship, especially when it pertains to a shipping transaction?

At the hearing the learned President's Counsel for the appellant drew the attention of Court to a number of judicial authorities to substantiate his assertion that an agent is not personally liable, when he enters into a contract on behalf of a principal.

Mr. Kanang-Iswaran PC. particularity drew the attention of the Court to the case of **Gadd v. Houghton and another 1876 (1) Ex Div. 357** and to the observations of James L.J. at page 359, wherein it was observed;

> *"When a man says he is making a contract **on account of** someone else…, he uses the very strongest terms of the English language affords to shew that he is not binding himself but is binding his principal."*

The attention of this Court was also drawn to Bankes L.J.'s statement, in the case of **Ariadne Steamship and Co v. James and Co. 1922 (1) KB 518 Law Journal 408 at page 412,** wherein it was observed;

> *"I think it is in the interests of the commercial community that a signature **as agents** should have a generally accepted meaning as a deliberate expression of intention to exclude any personal liability of the signatory…"*

In the aforesaid case, Atkin L.J. at page 416 agreeing with Bankes L.J. observed;

> *"…. The defendants in this case, who were conceded below to have signed **as agents** […….] to be in the form plural and not singular, were not personally liable on the contract…"*

The House of Lord's decision in **Universal Steam Navigation Company Limited v. James Mckelvie and Co. 1923 AC 492** was another authority relied upon by the appellant to justify his contention. In the said case [pertaining to a charter party] Viscount Cave L.J. at page 495 observed;

> *"If the respondent had signed the charterparty without qualification, they would of course have been personally liable to the ship owners, but by adding to their signature the words **as agents** they indicated clearly that they were signing only as agents for others and had no intention of being personally bound as principals. I can imagine no other purpose for which these words could have been added; and unless they had that meaning, they appear to me to have no meaning at all."*

Similarly, Lord Shaw in the aforesaid case at page 499 observed thus;

> *"But I desire to say that in my opinion, the appending of the word **agents** to the signature of the party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal and agent… the appending of the word*

***agent*** *to the signature is conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party."*

Responding to the aforesaid submissions, Mr. Chandaka Jayasndere P.C for the respondent relied on **Sealy and Hooley on Commercial Law- Text, Cases and Materials** [3rd ed] and drew the attention of Court to page 163, wherein it states;

*firstly,* that the liability of an agent depends on the objective intention of the parties and it is axiomatic to say that each case turns on the construction in its own context and having regard to the whole of its terms; and *secondly,* that generalization as to the effect of particular words and phrases is dangerous and therefore, certain general guidelines should be followed.

The respondent quoting **Sealy and Hooley** chapter and verse, went onto submit, that if an agent signs the contract in his own name he will be deemed to contract personally unless he can rely upon any term of the contract which plainly shows he was contracting as an agent and that the signature is merely a description and not a qualification of his personal liability, unless a contrary intention can be established from the whole of the contract or from the surrounding circumstances.

The learned counsel also relied upon the below mentioned observations of Brandon J. in **Bridges and Salmon Ltd v. The Swan (Owner) 'The Swan' [1968] 1 Lloyds Rep 5** to buttress his contention, that in the instant appeal the defendant is personally liable for the sum sued.

The said observation is as follows;

*"…Where, as in the present case, the contract is partly oral and partly in writing the intention depends on the true effect, having regard again to the nature of the contract and the surrounding circumstances of the oral and written terms taken together"* [vide page 12]

On the other hand, the learned counsel for the appellant whilst vigorously relying upon the House of Lord's observations in the **Universal Steam Navigation Co.,** and other decisions referred to earlier drew the attention of this Court to the basic principles of agency with regard to contracts by agents, as explained in **Friedman's Law of Agency** [5th ed] at page 187, which reads thus;

*"A 'named' principal is one whose name has been revealed to the third party by the agent. In such circumstances the third party knows that the agent is contracting as an agent, and knows also the person for whom the agent is acting.*

*A 'disclosed' principal is one whose existence has been revealed to the third party by the agent, but whose exact identity remains unknown. The third party knows that the agent is contracting as an agent, but he is unaware of the name of the principal.*

*In both the foregoing instances the third party knows that he is not contracting with the agent personally, but with another person through the agent…"*

Countering the aforesaid submissions, the counsel for the respondent drew the attention of this Court to **Cheshire, Fifoot and Furmstons Law of Contract** [15th ed] at page 602, which states,

*"The question some time arises whether a man has acted as an agent or as an independent contractor in his own interest. The latter is a person who is his own master in the sense that he is employed to bring about a given result in his own manner and not according to orders given to him from time to time"*

The learned counsel in his submission also referred to **Commercial Law by Roy Goode** [3rd ed] and drew the attention of Court to a foot note in page 176 which states;

*"But it is difficult to be dogmatic about any particular form of words, for so much depends on the context and on the commercial understanding of the words used. So 'as agent' has sometimes been held sufficient to indicate a representative capacity and sometimes not."*

The said net conclusion in the text book, the counsel argued, is based on the authority of **Universal Steam Navigation Co**., the House of Lord's decision the appellant is heavily relying upon to put forward the contention, which he submitted enhances the situation such as the instant appeal, where the agreement is created by way of written as well as oral communication.

Therefore, the respondent contended, merely because the appellant used the word "an agent" in **P1A**, that itself does not establish that the defendant was an agent. Thus, the respondent narrowed down its argument to focus on **P3B** and to pin down the responsibility on the defendant. The counsel further contend since the plaintiff was not privy to **P1A,** and it originated from the defendant, that the said contract is independent and made subsequent to the initial contract, which was not in writing. He went onto argue, that the said oral agreement the defendant contracted with the plaintiff, was in its personal capacity and entered into independent to the principal and therefore emphasised profusely that the defendant did not act as an agent as contended by the appellant.

However, upon perusal of the documents tendered to the trial court, especially the e-mails, **P1A, P1B, P1C, P1D, P2A, P2B, P2C, P2E, P2F, P2G, P3A, P3B, P3C, P10** and the surrounding circumstances, the contention put forward by the respondent does not stand to reason or merit and to my mind seems improbable and unacceptable.

The case presented by the plaintiff before the trial court begins with **P1A**, which contrary to the assertion by the respondent before this Court, the plaintiff was privy to, as well as to the rest of the e-mails, which were either originated or addressed to or were copied to the plaintiff.

It is observed by this Court that by **P1C, P2E, P2F and P3A,** the plaintiff directly communicates with the manager and by **P2A** and **P2G,** Captain Jeya of Silverline [the manager] communicates and directly writes to the plaintiff. In fact, **P2G** is only addressed to the plaintiff and not even copied to the defendant.

Further, this Court observes that by **P3C** and **P10,** two mails which the plaintiff did not mark and produce in examination in chief, the plaintiff unequivocally informs that ***'it cannot stick to a lump sum rate'*** and moreover, in **P10** pleads with the defendant, to ***'discuss with the owners and confirm'*** that the price was US$ 5000 per day, for the reason that the plaintiff cannot now keep to a fixed rate.

Another noteworthy factor that this Court observes is that the invoice **P5**, issued by the plaintiff on 13-10-2008 to the defendant, denotes the '*client as master/owner/charterer/agent of MV Marina*.' This notation by the plaintiff gives credence to the fact that the principal was very much known and disclosed and that the plaintiff was aware that the defendant acted as an agent.

The judgement of the district court does not refer to or analyze the e-mails **P1A** to **P1D, P2A** to **P2G, P7** to **P9** referred to above, except to observe that the plaintiff's sole witness Captain Ranjith Weerasinghe in his evidence stated that **P1A** never originated from him. The district judge went on to observe that since the mail **P3B** dispatched on 10-10-2008, which read '*we will compensate additional payment'*, follows **P10, P3C** and **P3A,** that the plaintiff and the defendant were the only parties privy to the contract of supplying fresh water and went onto conclude *'that the defendant has taken the contract from the managers of Marina and entered into a different contract with Captain Weerasinghe which the defendant has not honored as promised'.* In my view, this finding of the district court is conjecture and is based upon surmises and does not stem from the issues raised nor founded on any evidence led at the trial and for that reason and that reason alone is devoid of merit and reasoning.

Furthermore, the judgement of the district court does not analyze or examine the significance of the date of the contract 08-10-2008, referred to in issue two raised before the trial court. This is the day on which the e-mail **P1A** was dispatched, referring to the quotation of the plaintiff.

As discussed earlier, by **P1D** dated 08-10-2008, the owners of Marina One accepted the said quotation, wherein the delivery charge was US$ 10,000 and the delivery date was 9th/10th October 2008. The plaintiff was privy to both **P1A** and **P1D** dated 08-10-2008 and did not raise any concerns with regard to the matters stated therein, especially the fact that the 'delivery charges was US$ 10,000 or that the delivery charges were erroneously stated and or ought to be a daily rate and not a fixed sum as stated in **P1A**.

More over the district judge failed to examine and comprehend the effect of the e-mails **P2A** to **P2G** produced by the plaintiff wherein the plaintiff [upon being informed by the manager of the location of Marina One, that its upright and drifting] by **P2E,** clearly indicated that although the vessel is busy with pre-arranged work, '*we are trying our best to do this amidst all other scheduled work'*. Even at this stage, the plaintiff did not raise any query or issue with the manager and or the defendant, with regard to the delivery charges or that its quotation was only for a day rate and not a fixed or a lump sum rate, as was contended before the trial court.

It is also observed that the trial judge not only failed to see the significance of the date 08-10-2008 in **P1A, P1B, P1C** and **P1D** but also failed to see the significance of the said date *viz-a-viz*, 10-10-2008 the date referred to in the e-mails **P10, P3C** and **P3A** by which the plaintiff sought a variation of the terms of contract.

Similarly, the trial judge failed to examine and consider the following factors referred to in the mails. Firstly, the importance of plaintiff's request in **P10**. i.e., *'we cannot keep to a fixed rate…. so please discuss with owners and confirm that the price was US$ 5000 per day'*. Secondly in **P3A** the plaintiff's statement, *'our offer was a day rate (initially thought to be two days)'* and thirdly in **P3C,** the plaintiff's pleading, '*we cannot stick to a lump sum rate'*.

Clearly, the said e-mails **P10, P3C** and **P3A** were dispatched not on 08-10-2008 the date specified in issue two raised before the trial court, but thereafter *i.e.,* on 10-10-2008. By the said e-mails a **variation of the initial terms of contract** was sought. The trial judge failed to see the significance of the variation sought on 10-10-2008 *viz-a-viz* 08-10-2008 the date referred to in issue two raised before the trial court. Moreover, the trial judge failed to consider the request or the variation, the plaintiff sought of the initial terms of contract, when in simple language the plaintiff pleaded with the defendant to **discuss with the owners** and confirm the new rate.

Hence, to overlook and or disregard the significance of the date of the initial contract and the date on which the variation of terms of contract was sought, as well as the failure to consider the party from whom the concurrence was requested, namely the 'owner' and thereafter to conclude that the defendant and not the owner is solely liable for the additional payment, in my view is a wrong inference arrived by the trial judge. The said finding is thus devoid of merit, misconceived and amounts to a complete misdirection of the law.

The high court, upheld the district court judgement. In the impugned high court judgment reference is only made to the e-mails referred to in the judgement of the district court itself. It does not consider nor evaluate the evidence led at the trial. It does not independently examine the numerous documents marked by the plaintiff itself at the trial, in order to establish its case that the *defendant is solely liable* for the additional payment and not the owners of the ship in distress.

In a very short judgement, the judges of the high court come to the conclusion that since **P3B** '*does not state, he* [i.e., the writer] *is agreeing on behalf of the owner or agreeing to make additional payment as agent',* that the '*defendant acted as an independent contractor'* and that *'the plaintiff's communication with the owner or manager of the vessel is no relevance to prove that the defendant was acting as an agent'*. This reasoning too, in my view is devoid of merit. The high court appears to view **P3B** out of context and through a narrow lens, without looking at the bigger picture i.e., **P1** to **P10** which is the case presented by the plaintiff itself at the trial. The high court also failed to see the significance of the wording, especially the term **we** in plural form, in **P3B**, i.e., *'As discussed,* ***we*** *will compensate additional payment.'*

Moreover, it is observed that the district court and the high court failed to analyze the legal consequences that flow from the documents marked in the instant matter, especially the rudiments of a contract, *i.e.,* the offer and the acceptance, date of the contract, consideration, variation of the terms of a contract and specifically the significance of an agent and the law governing agency relationship *et al* but makes a sweeping statement, that the matter in issue is an 'independent contract' between the plaintiff and the defendant.

Similarly, the trial judge failed to see the significance of the two e-mails **P3C** and **P10,** which for reasons best known to the plaintiff, were neither referred, marked nor produced through the plaintiff's sole witness in examination in chief. Whilst **P3C** was marked in cross examination of the plaintiffs only witness, **P10** was marked when the defendant was cross examined. By the said two mails the plaintiff specifically informs that it '***cannot stick to a lump sum rate*** *and to* ***discuss with the owners*** *and confirm that the price was a day rate, because it cannot now keep to a fixed rate.'* It is ironic that the district judge and the judges of the high court thought it fit to completely ignore the said evidence and failed to consider, examine or evaluate same, when coming to its finding and conclusion.

The aforesaid words in **P3C** and **P10** in my view, and especially the words '**discuss with the owners'** clearly denotes that the plaintiff unequivocally sought a variation of the terms and conditions from the owners, *i.e.,* a variation of the terms with regard to the delivery charges US$ 10,000, initially agreed between the parties on 08-10-2008. This gives credence to the fact that the contract entered on 08-10-2008 evinced by **P1A** and **P1D** was for a lump sum contract and that it was entered into between the plaintiff and the owner/manager of the distressed ship, acting through an agent, *i.e.,* the defendant.

Thus.in my view, the case before us is a classic example of an agency relationship, where the principal is named and disclosed and the plaintiff cannot shy away from such fact.

This position and understanding is further strengthened by **P3A.** In **P3A** dispatched on 10-10-2008 on urgent basis, the plaintiff addresses the manager directly and says, '*as said in our message to Mr. Dinesh* [of the defendant company] *as we had no fixed position of the drifting vessel, our offer was a day rate of US$ 5000 based Colombo/Colombo* ***(initially thought to be 2 days)***. *We received no confirmation…We would appreciate* ***if you could*** *send us immediate confirmation…"*

The said communication, in my view, especially the *words 'as said in our message to Mr. Dinesh', 'we received no confirmation,' and 'we appreciate if* ***you*** [the manager] *could send us immediate confirmation'* clearly denote that not only the principal was known and disclosed, but the plaintiff had direct communication with the owner/manager. It also demonstrates that on 10-10-2008, the plaintiff unequivocally requested the manager for variation of the terms of the contract, which were initially agreed and decided upon on 08-10-2008 between the owner/ manager and the plaintiff.

In my view, the aforesaid e-mails should be considered, in the light of the issue bearing number two, raised by the plaintiff before the trial court *i.e.*, with regard to the date of the contract being 08-10-2008 and having in mind that the 2nd question of law raised before this Court is also founded on the same premise.

**P10, P3C** and **P3A** further denotes, that the plaintiff is seeking an amendment and or a variation or an enhancement of the initial terms of contract entered on 08-10-2008, with regard to the consideration and or the amount initially agreed to be paid for services provided, as a lump sum payment. The variation is to convert the consideration to a per day rate for the reasons stated therein *viz.*, it cannot now keep to a fixed rate. On 10-10-2008 by **P3B** the defendant acting in the capacity of the agent circumscribed to the said request, by stating *'we will compensate additional payment'*. The said wording in **P3B** in my view should be looked at and analysed taking into consideration the bigger picture and specifically the manner and circumstances of this case and not in isolation as done by the district court and the high court.

Hence, in my view, the agreement and or the consensus to vary the terms of contract in order to make additional payment rests and or lies entirely on the owner/manager of Marine One. It does not lie with the defendant, who only acted in the capacity of the agent of the owner/manager of Marina One. In coming to this finding, I am guided by the well-known legal principle that an **agent is not personally liable when he enters into a contract on behalf of a disclosed and named principal.**

I have also considered the exhaustive submissions and the numerous texts, authorities and material relied upon by both parties pertaining to an agent and the agency relationship. I do not think it is necessary for this Court, at this juncture to enter into an academic exercise in analysing the legal texts and authorities referred to by the parties with regard to principles of contract and agency and to come to a finding in respect of duties and liabilities of an agent or the merits and demerits of the submissions made by the appellant and the respondent.

Suffice is to state, that the cases referred to by both counsels, are land mark judgements in the regime of shipping and maritime law. The observations made by the Lordships and the learned judges of the United Kingdom in the said cases are without any exception illuminating and enlightening. Whilst appreciating that the findings and the observations therein have persuasive value in our legal system, the judicial dicta therein should be looked at not in isolation but in the light of the hierarchical court structure of the United Kingdom. Hence, I wish to examine the cases referred to by both parties in the said perspective.

The **Swan case**, referred to and relied upon by the respondent is a decision of the Admiralty Court of the Queen's Bench Division (a court of first instance), whereas the **Gadd case**, referred to by the appellant is a decision of the Exchequer Chamber, an appellate court, decided in the year 1876. Similarly, the **Ariadne Steamship Co. case**, [ also cited in 1922(1) KB 518] referred to by the appellant is a case of the Court of Appeal of the United Kingdom. The appeal preferred against the judgement of the said **Ariadne case** was to the House of Lords and is reported to as the **Universal Steam Navigation Co. case,** which was relied upon by both the appellant and the respondent to substantiate its arguments.

In the said background, the observations made by Viscount Cave L.J. and Lord Shaw of the House of Lords, in the **Universal Steam Navigation case, [**referred to earlier at pages 13 and 14 of this judgement] in my view, have greater persuasive precedent than the rest of the dicta relied upon by the parties. Their Lordships observations, that the word 'agents' indicate clearly and precisely that the party so signs,' *signs as agents for others and not to be personally bound as principal'* and also the word 'agent' is *'conclusive assertion of agency and a conclusive rejection of the responsibility of a principal and is and must be accepted in that twofold sense by the other contracting party'*, have a great importance with regard to matters pertaining to shipping and shipping transactions.

I am mindful, that the observations in the **Universal Steamship Co. case** is in respect of a 'Charter Party' and the instant appeal is not and is in respect of providing emergency supplies for a ship in distress. Nevertheless, I am of the view, that the legal principles that govern, in either situation are similar. If a party signs a contract in the capacity of an agent, the agent is not personally liable and the liability falls fairly and squarely on the principal and the principal alone.

Thus, I am of the view that in the instant appeal, the use of the word 'agent' in **P1A**, clearly indicate that a principal existed. The plaintiff was privy to this document and was aware of the principal. Moreover, in view of the e-mail correspondence the plaintiff itself had with the said principal, who was named and disclosed, the liability for all acts and matters executed and done, rests entirely with the principal Silver Line Maritime Malaysia, the owner/manager of the shipping vessel Marina One.

When the principal is revealed and also named and disclosed, no responsibility lies upon an agent. Appending and the use of the word 'agent' with regard to an executing party in a contract or agreement is the dominating factor in deciding the relationship between the principal and agent. Significantly, the guiding light upon which a trial court should base its findings is the intention between the parties at its outset. Hence, undisputedly, the words in **P1A** have a greater bearing in deciding this appeal.

Thus, in the instance appeal, my considered view, is that the defendant company only acted in the capacity of an agent of a disclosed and named principal. Hence, there is no liability that can be attributed to the agent, Kardin International (Pvt) Limited, the appellant before this Court, to make good the additional payment of US$ 10,000 as pleaded by the plaintiff before the trial court.

The high court and the district court, in my view grievously misapprehended and misdirected itself, in fact and in law, in failing to consider that the defendant acted only in the capacity of an agent and cannot be sued to recover monies due and owing from the principal. Therefore, in my view, no liability can be pinned upon or visited upon the agent, the appellant before this Court, when the principal is named and disclosed. Furthermore, the defendant in any event cannot be considered as a principal as held by the lower courts.

In the said circumstances, I answer the **1st question of law** raised before this Court in the affirmative and in favour of the appellant.

The **2nd question of law**, as stated earlier, stems from the same facts and understanding as well as the principles and law governing agency relationships. As discussed in detail in this judgement, the agreement entered with the plaintiff on 08-10-2008 by the defendant, for the supply of fresh water to the vessel in distress 'Marina One' positioned in the high seas off the coast of Sri Lanka, was made in the capacity of an 'agent' and specifically as an agent of a disclosed and a named principal. Similarly, the defendant did not enter into any contract with the plaintiff as a principal as was contended by the plaintiff.

Moreover, the issue bearing number two raised by the plaintiff, speaks of the initial agreement dated 08-10-2008. It does not refer to nor contemplate the subsequent variation sought by the plaintiff, vide **P10**, **P3A** and **P3C**.Nevertheless, the trial judge emphasised its finding based

only on the said documents **P10**, **P3A** and **P3C** which were neither in the offing nor in existence on 08-10-2008 when the initial understanding was reached and a contract was formed and executed by and between the parties, namely, the plaintiff and the defendant on behalf of the owner/manager of Marina One.

Therefore, I am of the view, for reasons more fully discussed in this judgement, that *issue two* raised at the trial could not have been answered in the affirmative by the trial court. Hence, in my view, the said issue was erroneously answered in favour of the plaintiff.

The district court judgement together with the answer to the afore stated *issue two* was upheld by the high court. Thus, in my view, the high court too was in error in upholding the judgement of the district court, upon the basis and reasoning discussed above.

Hence, I answer the **2nd question of law**, that the high court misdirected itself in fact and in law in failing to consider that the district judge erred in answering the said issue bearing number two, raised by the plaintiff which crystalised the grievance of the plaintiff in the affirmative and in favour of the appellant.

The **3rd and 4th questions of law** raised by the respondents, when Leave to Appeal was granted by this Court, were not pursued before us, at the hearing. However, since the parties in the written submissions filed subsequent to the hearing of this appeal have made reference to the said two questions of law, I wish to briefly refer to them, at this stage.

The said two questions of law have been formulated upon the basis, that the 1st and 2nd Questions of Law raised by the appellants are not pure questions of law but are questions of fact and that in view of the provisions of section 5C of the **High Court of the Provinces (Special Provisions) Amendment Act No 54 of 2006** that the Supreme Court cannot set aside the judgement of the Civil Appellate High Court and the District Court on questions of fact.

In order to substantiate the said position, the respondent submitted that according to the aforesaid provisions of section 5C, when an appeal lies directly to the Supreme Court, with leave of the Court first had and obtained, the leave requested by a party aggrieved *shall be granted by the Supreme Court, where in its opinion the matters involve a substantial question of law or is a matter fit for review by such Court.*

The learned counsel further submitted that, when interpreting the word 'fit for review' referred to above, it should be considered with the *ejusdem generis* principle of interpretation and it must be only matters relating to issues of law and not matters relating to issues of fact. He also submitted that the two questions of law raised by the appellant are questions relating to facts and more so, the manner in which the trial judge and the high court looked into and interpreted same.

Thus, he contended that the said two questions of law should be answered in favour of the respondent.

Countering the said argument, the learned counsel for the appellant submitted that it is trite law that mistakes of fact have been grounds for setting aside judgements of lower courts and drew the attention of this Court to the observations of **Kennuman S.P.J. in Carthelis Appuhamy v. Siriwardena et al 49 NLR 529, at page 537** which states,

> *"On one matter, viz., whether the will can be regarded as an "unnatural or unreasonable" will- the Judge has come to a conclusion without weighing or deciding the facts on which he could base his inference, and I think this conclusion has coloured the attitude of the Judge to the other features in the case. I think this amounts to a misdirection and a serious one. To some extent the Judge has depended on conjectures and assumptions which cannot be justified. There have been a number of points decided by the Judge on an incorrect appreciation of the evidence. For some of his findings the Judge has given no reasons or inadequate reasons. And finally, though it was obvious and at one stage the Judge himself so felt-that there were some strong points in favour of the petitioner, the Judge has drawn a picture of the petitioner's case in unrelieved funeral colours".*

The learned counsel also cited **Ranchagoda v. Viola 1999 (2) SLR 1** a judgement of this Court, **Peiris v. Fernando 62 NLR 534** a decision of the Privy Council and the landmark decision **Colletes v. Bank of Ceylon 1984(2) SLR 253** to substantiate that in the instant appeal, when the trial judge drew wrong inferences upon documents produced and was influenced by irrelevant considerations which were not before the trial court to determine, that such judgement is based on mistakes of fact which amounts to mistakes in law.

I have considered the submission made, by both parties relating to the 3rd and 4th questions of law raised before this Court and am of the view that the provisions of the High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006 amply provides and grants this Court jurisdiction to consider matters, where there is a serious misdirection on primary facts which vitiates the judgement of the trial court. Moreover, my considered view is that in the said circumstances, the juridical power of the Supreme Court cannot be restricted in deciding of an appeal.

Hence, I answer the 3rd and 4th questions, in favour of the appellant and categorically hold that the 1st and 2nd questions of law based on paragraph 28 'c' and 'd' of the Petition of Appeal upon which leave was granted by this Court, are questions of law that can be considered by this Court in the exercise of its appellate jurisdiction.

In concluding, I answer the 1st and 2nd questions of law in the affirmative and the 3rd and 4th questions in law raised before this Court in favour of the appellant.

For the reasons more fully adumbrated herein, I allow the appeal of the defendant-appellant -appellant.

I set aside the judgement of the High Court of the Western Province sitting in Mount Lavinia dated 17th November, 2014 and the judgement of the District Court of Mount Lavinia delivered on 15th March 2012. The appellant is also entitled to costs of this appeal payable by the plaintiff-respondent- respondent.

Appeal is allowed.

Judge of the Supreme Court

**Buwaneka Aluwihare, PC, J.**

I agree

Judge of the Supreme Court

**P.Padman Surasena, J.**

I agree

Judge of the Supreme Court