IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Courtaulds Trading Company
(Pvt) Limited.,
Palugahawela,
Katuwellegama.
Petitioner

CASE NO: CA/WRIT/194/2016

Vs.

1. M.D.C. Amarathunga,
   The Commissioner General of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

1A. R.P.A. Wimalaweera,
   The Commissioner General of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.
   And 4 Others
   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: S.A. Parathalingam, P.C., with Mangala Niyarepola for the Petitioner.
Susantha Balapatabendi, Senior D.S.G., for the 1st-4th Respondents.
S.H.A. Mohamed for the 5th Respondent.

Decided on: 05.03.2019

Samayawardhena, J.

The petitioner company filed this application seeking to quash by way of writ of certiorari Notices/Orders marked P8 and P9B issued by the Commissioner of Labour directing the petitioner to pay a sum of Rs. 9,931,823.39 as Employment Provident Fund contribution and a sum Rs. 1,686,360/= as Gratuity due to the 5th respondent employee; and to prohibit the Commissioner of Labour by way of writ of prohibition from enforcing the said Notices/Orders.

The pivotal argument of the learned President's Counsel for the petitioner is that the 5th respondent was hired by the petitioner company as an independent contractor in the capacity of a technical consultant on account of her expertise in the apparel production process and not as an employee of the company, and therefore the 5th respondent is not entitled to EPF and Gratuity.

There is no dispute that a person who is an independent contractor falls outside the category of employee/workman. How to differentiate an independent contractor from an

employee has been the subject of many a judicial pronouncement both here and abroad. So much has been written on this topic by distinguished authors.

One thing is clear. That is, whether or not a person is an independent contractor or an employee is a question of fact, which shall be decided on the unique facts and circumstances of each individual case.

To decide that vexed question, various tests are used. However, for the present purposes, the matter can be decided on the formula suggested by the petitioner himself using the petitioner's own documents.

Learned President's Counsel for the petitioner explains how an employee can be distinguished from an independent contractor in the following manner:

> *An employee acts in accordance with the directions of the employer and as such does not possess individual autonomy to decide the manner in which work should be carried out. Thus, it is stated in law as creating a Master Servant relationship whereby the employee will be subject to the control of his/her employer.*[1]

The independent contractors, on the other hand, according to the learned President's Counsel, are not subjected to such a control by the employer.

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[1] Vide paragraph 9 of the written submission of the petitioner dated 30.10.2018.

Then it is clear that the overriding principle in this assessment is the right of the employer to control the employee. This is one of the tests, in fact, the traditional test, which is known as Control Test.

The learned President's Counsel has cited only one case to convince that the 5th respondent, who, according to the learned Counsel, was hired in the capacity of a technical consultant due to her specialized knowledge and skill would fall under the purview of an independent contractor. That is a Judgment of this Court by Goonaratne J. in *Bartleet Produce Marketing (Pvt) Limited v. V.B.P.K. Weerasinghe* (CA (Writ) 344/2011). A copy of that unreported Judgment has not been tendered with the written submissions, but I traced a copy with difficulty.

It was a case where the 3rd respondent employee worked as a consultant in the employer company. The Commissioner of Labour after inquiry decided that he was an employee and not an independent contractor. This decision was quashed by way of certiorari by this Court. In the unique facts and circumstances of that case, that conclusion is correct. It is amply clear by the following piece of evidence quoted by Goonaratne J. in the Judgment:

"ප්‍ර: උපදේශකවරයකු වශයෙන් සේවයට වාර්තා කරන්න ඕනෑ පෙ.ව. 8.30 කියලා නැහැ. අත්සන් කරලා නැහැ නේද තමුන් කිසිම විටක?

උ: මොකුත් නැහැ.

ප්‍ර: තමන් සේවය අවසන් වෙලා පිටව යන වේලාව සඳහන් කරන්නේත් නැහැ?

උ: නැහැ. අත්සන් කරන්න තිබුණේ නැහැ.

ප්‍ර: නිවාඩු ලබාගැනීමේදී සමාගම අනුගමනය කරන වැඩ පිළිවෙල කුමක්ද?

උ: මා කියනවා සභාපතිතුමාට මට මෙහෙම ප්‍රශ්නයක් තියෙනවා ඒක නිසා මං එන්නේ නැහැ කියලා. ලියල කියලා නිවාඩු ලබාගත්තේ නැහැ.

ප්‍ර: මෙම සමාගමේ උපදේශක තනතුර තමුන් බාර ගන්න කොට කලින් සමාගම්වල ඒවාට මොනවද කළේ?

උ: ටෙලිෆෝන් එකෙන් උපදෙස් දුන්නා. මාර්කට් මේ විධියටයි තිබෙන්නේ ඒ අනුව වැඩ කරන්න කියලා මා උපදෙස් දුන්නා.

ප්‍ර: කාටද කළේ?

උ: තේ නිෂ්පාදනය කරන කර්මාන්තශාලා වලට කර්මාන්තයේ අවුරුදු 40 ක් පමණ දැන ගෙන හිටි අයට.

ප්‍ර: මේ සමාගමේ උපදේශක තනතුර කරන කාලයේ තමුන් පිළිගත්තා අනිකුත් සමාගම් වලට ගිවිසුමක් නැති වුණත් තේ නිෂ්පාදකයින් සමඟ ඒ ආකාරයෙන්ම කටයුතු කරගෙන ගියා කියලා?

උ: මාසයක් විතරයි. ඒ අය දැනගත්තා මට කලින් තිබුණ රක්ෂාව නැහැ කියලා.

ප්‍ර: තමුන් මෙම සමාගමට උපදෙස් සපයන කොට කිසිම ගිවිසුමක් තිබුණේ නැහැ?

උ: ගිවිසුමක් ගැන හිතන්න කලින් මගේ ගෙදරට ඇවිල්ලා වැඩ කරන්න කියලා නේ කිව්වේ."

The consultant in that case, had no fixed time to report for work. He did not sign the attendance register when reporting for work and leaving work. There was no standard procedure to take leave of work. Whilst working as a consultant in the petitioner company, he had been providing services as a consultant to others too. There was no Agreement signed between the company and himself in relation to the employment.

However, the facts are totally different in this case. From the documents tendered by the petitioner, it is clear that the 5th respondent is an employee and not an independent contractor. I will now refer to a few of them.

1. According to P3(b) issued by the petitioner company the 5th respondent, a female Pilipino national living here under Visa has joined the petitioner company on 22.01.2007 and left the company on 14.05.2015 after working in the company as Consultant Technical for 8 years and 3 months. P3(b) particularly says her "basic salary" is USD 2,679.00. This is not a "consultancy fee" paid depending on work.

   This goes to show that the 5th respondent has worked in the company for a continuous period of 8 years and 3 months for a fixed monthly salary.

   The fact that the petitioner worked in the capacity of Technical Consultant from 22.01.2007-14.05.2015 has been admitted by the petitioner company in paragraph 2(d) of the statement of objections filed at the inquiry before the Labour Commissioner marked P4 as well.

2. According to paragraph 2(a) of P4, "*The Complainant is a Pilipino national and was solicited and hired by the Respondent when the Complainant was resident/ domiciled in the Philippines*".

   That means, the petitioner company has got her down to Sri Lanka when she was in Philippines to work in the petitioner company in Sri Lanka. During that period, according to paragraph 2(e) and (f) of P4, the petitioner company has processed her Visa/Work Permit to stay in Sri Lanka. She has worked fulltime under the petitioner.

3. P3(c)-P3(k) are Consultancy Agreements signed between the petitioner and the 5th respondent.[2]

   In those Agreements it is stated that "*The consultant (the 5th respondent) will be required to attend all technical consultation related to Product Development Department. (Detail attached with Job Description)*".

   That means the 5th respondent has been given a specific task to perform, and that is described in detail in the attached document to the Agreement. However, the said "*Job Description*" has not been tendered to Court by the petitioner company. When such specific task is given, there shall necessarily be a supervision to see whether she performs that task to the satisfaction of the employer.

4. Another condition of the said Agreements is "*The consultancy hours of the consultant will be from 7.30 am to 5.45 pm from Monday to Friday or as agreed by the two parties.*"

   That means, there is a specific time on which she shall report for work and a specific time for her to off for the day, and was under direct control and supervision by the petitioner employer.

   The clause in the Agreements that "*Nothing in this Agreement shall be construed to create an employment relationship between the parties to this Agreement*" is not decisive. Whether or not employer-employee relationship

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[2] The belated argument that except three of those Agreements, other Agreements are with another company is not acceptable, and I will deal with it separately.

is formed, shall be decided not by the label but by circumstances in each individual case.

I would further add that, inclusion of such a clause in Agreements goes to suggest that the employer well in advance has taken precautionary steps to deny employer-employee relationship whereas it is a matter to be decided on facts at the end of the relationship. That, in my view, shows the *mala fides* of the employer.

5. Document marked P3(l) cuts across the petitioner's argument. It is a document issued by the petitioner to the HSBC Bank to say that the 5th respondent "*is an employee of our organization. She is employed as a Technical Consultant and her monthly salary is as follows; Basic Salary-USD 2,820.00*".

   The petitioner's position is that it was issued to help the 5th respondent to obtain a loan from the said Bank. Whatever may be the reason, it reflects the true nature of the relationship between the two parties. Full time Technical Consultant with a fixed salary is an employee of the company.

6. The email correspondence marked compendiously P6(b) shows that the 5th respondent is an integral part of the company's team and her work has integrated into the business of the petitioner company. P6(b) shows how her services had been appreciated and acknowledged by the employer.

7. P6(d) shows that the company has got the Heath Insurance for the 5th respondent through Ceylinco Health Insurance Scheme. If the 5th respondent was an

independent contractor, there was no such necessity to look after her health.

8. By P6(a) the 5th respondent has *inter alia* stated that instead of physically signing the attendance register, she was asked to place her finger print on a finger print machine. This has been admitted by the petitioner in paragraph 7(d) of P7. That means, her working hours have been closely monitored without leaving any room to cheat the employer.

   If the working hours of the 5th respondent was closely monitored in that manner, the denial of the petitioner employer that there was no control over her taking leave of work by the company is plainly unacceptable.

9. Further, the petitioner in paragraph 7(b) of the further written submissions tendered to the Labour Commissioner marked P7 has stated as follows:

   "*The Complainant was expected to render consultancy services between 7.30 am to 5.45 pm to the Company at its various plants and factories as directed by the Respondent from time to time and did not report to any specified or regular place of work as akin to employment.*"

   This goes to show how she was controlled by the employer by giving directions. This further goes to show that, even in instances where she had to go to various other plants and factories of the petitioner company, she had to work during specified working hours, i.e. between 7.30 am-5.45 pm. No concession regarding working hours has been given in any circumstances.

Taking the above matters into account, it is clear that the petitioner company has had a heavy control over the 5th respondent in the discharge of her duties as a Consultant in the petitioner company. There is no law that people who are recruited as Consultants or discharging duties as Consultants shall necessarily fall within the category of independent contractors. It is my considered view that the decision of the Commissioner of Labour in P9A that there was an employer-employee relationship between the petitioner and the 5th respondent is flawless.

Hence the petitioner's main argument fails.

The next argument of the learned President's Counsel for the petitioner relates to the name change of the company in some documents. The name of the petitioner company in the petition is Courtaulds Trading Company (Pvt) Limited. P9(b) Order is in that name. However, P9(a) Notice, P3(f)-(k) Consultancy Agreements are in the name of Courtaulds Clothing Lanka (Pvt) Ltd and Courtaulds Clothing Dambadeniya (Pvt) Ltd. The petitioner is now trying to say that those Agreements are not with the petitioner company. This is a belated defence not taken up at the inquiry before the Labour Commissioner. The 5th respondent tendered those Agreements to the Labour Commissioner in support of her application. In response to those Agreements, the petitioner in paragraph 2(b) of the statement of objections marked P4 stated as follows:

> *At all times material, the Complainant (the 5th respondent) was engaged in the capacity of a Consultant/Technical*

Consultant under Consultancy Agreements entered into between the Complainant and the Respondent (the Petitioner), copies of which have been produced by the Complainant with the complaint.

The petitioner has thereby clearly admitted that all the aforesaid Agreements were entered into between the petitioner and the 5th respondent even though the company name is changed in some of those documents. I reject that argument.

Another argument mounted by the learned President's Counsel is that, after this inquiry before the Commissioner of Labour there was another inquiry, and therefore P8, P9(a) and P9(b) are invalid. It appears that whilst the case was pending further attempt has been made to see whether an amicable settlement is possible. However the petitioner has not participated in that inquiry and at last the earlier decision has not been changed. I reject that argument too.

Application of the petitioner is dismissed with costs which I fix at Rs.100,000/= payable by the petitioner to the 5th respondent employee.

Judge of the Court of Appeal