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

Cinnamon Hotel Management
Limited.,
Formerly known as:
Keels Hotel Management Limited.,
No. 117, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 2.
Petitioner

CASE NO: CA/WRIT/284/2015

Vs.

1. M.D.C. Amarathunga,
   Commissioner General of Labour,
   Labour Secretariat,
   Colombo 5.
2. R.P. Eresha Udayangani,
   Assistant Commissioner of Labour,
   Colombo South,
   Labour Department,
   Colombo 5.
3. P. E.C. Cooray,
   Labour Officer,
   Labour Department,
   Colombo 5.

4. U. Padmaperuma,
No. 255/1,
Polwatte,
Ampitiya.
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Maithri Wickremesinghe, P.C., with Rakitha Jayatunge for the Petitioner.

Manohara Jayasinghe, S.S.C., for the Respondents.

Decided on: 25.07.2019

Mahinda Samayawardhena, J.

The 4th respondent employer complained to the Commissioner of Labour that although he was employed by the petitioner, Keels Hotel Management Services Limited, as the Group Musician in the Hotels and Resorts under its control and management from October 1992-October 2012, his gratuity was not paid to him.

The petitioner took up the position that the 4th respondent was never an employee of the petitioner, but was an independent contractor providing services as Group Musician to various other different entities, such as, Hotel Swanee—Beruwala, Ceylon Holiday Resorts Ltd—Bentota Beach Hotel, International Tourists & Hoteliers Ltd, Travel Club Private Ltd—Male as seen from

documents marked P4-P8 tendered by the 4th respondent himself to the Commissioner of Labour.[1]

After inquiry, the Commissioner of Labour rejected the said defence of the petitioner and accepted the position put forward by the 4th respondent and issued X4 directing the petitioner to pay a sum of Rs. 3,018,031.25 as gratuity to the 4th respondent from October 1992-October 2012 calculated on the basis of the last drawn salary and years of service. The date of commencement of the employment has been taken from P1[2], and the date of cessation of employment and the last drawn salary from P8[3] and P9[4].

The petitioner filed this application seeking to quash X4 by way of certiorari.

It is common ground that an employee is entitled to statutory benefits whereas the independent contractor is not.

So much has been written and so many theories/tests such as Control Test, Integration Test, Dominant Impression Test, Mutuality of Obligation Test, Multiple Factor Test have been evolved on how to distinguish an employee from an independent contractor. It is undoubtedly a vexed question, which does not have a straightforward answer. Therefore it is now largely accepted that whether a person is an employee or an independent contractor is purely a question of fact to be decided on unique facts and circumstances of each individual case. In this process, labels,

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designations, particular terms used by the employer in the documents exchanged between the two parties, the manner in which the payments were made for the services etc. are, more often than not, misleading and not binding.

Hence the argument of the learned President's Counsel for the petitioner that the 4th respondent has not tendered a letter of appointment, a letter of termination, a letter of transfer, a letter of retirement, a contract of employment, salary slips etc. to prove employer-employee relationship between the petitioner and him, and therefore the 4th respondent is not an employee of the petitioner is unacceptable.

Section 20 of the Payment of Gratuity Act, No. 12 of 1983, as amended, defines the words "employer" and "workman" in the following manner.

> *"employer" means any person who employs or, on whose behalf any other person employs any workman and includes a body of employers (whether such body is a body corporate or unincorporate or a public corporation) or any person who on behalf of any other person employs any workman and any person or body of employers who or which has ceased to be an employer but does not include a co-operative society established under the Co-operative Societies Law, No. 5 of 1972, or a local authority.*
>
> *"workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing and whether it is a contract of service or of apprenticeship or a*

> *contract personally to execute any work or labour and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any workman whose services have been terminated.*

Then it is clear that the words "employer" and "employee" have been given a liberal meaning in the Act to prevent the employers from taking high technical objections to deny the employee his statutory dues.

What is there in the instant case to establish employer-employee relationship between the petitioner and the 4th respondent?

By P12 dated 20.05.2003[5] the Managing Director of the petitioner has written to the Principal, Trinity College of Kandy "*to confirm that [the 4th respondent] is employed in our establishment in the capacity of Group Entertainer. His basic monthly remuneration is Rs.75,000/=*." The petitioner says that it was given as a help. Whatever may be the reason for issuing that letter, the petitioner does not say that the Managing Director of the petitioner has stated an utter falsehood in that letter. Can this Court believe that a reputed company such as the petitioner, which, according to the Group Directory marked 1R6, is in charge of Hotel Management in Leisure Section of the John Keels Group, would issue bogus letters addressed to responsible institutions in order to help people who are not employees of them?

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P11 is another letter dated 26.08.2003[6] issued by the Managing Director of the petitioner "*to confirm that [the 4th respondent] is employed in our establishment in the capacity of Group Entertainer. His basic monthly remuneration is Rs.75,000/=*." The petitioner now says that it was issued to the 4th respondent to obtain a loan from a Bank. Whatever may be the reason, the point is whether it is an unauthenticated letter or a letter containing incorrect facts. Neither of them.

P3 dated 17.12.1999[7] is revealing. That is a formal letter written by the Managing Director of the petitioner addressed to the petitioner in reply to a letter sent by the latter to the former seeking enhancement of his monthly salary. The body of the letter reads as follows:

> *I write with reference to your letter of 7th December wherein you have requested an enhanced remuneration for your services.*
>
> *We are pleased to inform you that with effect from January 1, 2000 we will increase your remuneration to Rs.75,000/= per month which will be valid for a period of three years up to 31st December, 2002 as agreed by you.*
>
> *All other terms and conditions of your engagement will remain unchanged.*
>
> *Please return the duplicate of this letter, duly countersigned in confirmation of your acceptance of the above, for our records.*

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[7] Page 59 of X.

It may be recalled that the position taken up by the petitioner was that it had nothing to do with the 4th respondent being employed as an independent contractor by various hotels managed by the petitioner, which are, in the eyes of the law, separate legal entities. Hotel Swanee is one such hotel where the petitioner was employed as a Group Musician.

P4, Withholding Tax Deduction Form, is relevant to Hotel Swanee.

Learned President's Counsel for the petitioner made submissions vigorously on the withholding tax deductions done in respect of payments made to the 4th respondent as reflected in P4-P7[8] to say that those deductions decisively prove that the 4th respondent was an independent contractor as opposed to an employer who drew a monthly salary.

But 4R1 negates that contention. If I may elaborate it further, if the 4th respondent was not an employee under the petitioner, but an independent contractor under various other hotels, there was no reason for the 4th respondent to write to the petitioner for enhancement of his monthly salary when he was at that time admittedly being employed by Hotel Swanee, and there was no corresponding duty on the part of the petitioner to formally reply to it. Be noted that the letter written by the Managing Director of the petitioner is addressed to: "*Mr. Chuti Padmaperuma (the 4th respondent), Hotel Swanee, Moragolla, Beruwala*". When that letter is read it is abundantly clear that the 4th respondent had been working for the petitioner as his master in various other hotels under the control or management of the petitioner for a fixed

[8] Pages 60-63 of X.

monthly salary. Who made the payment and how payment was made to the 4th respondent etc. are irrelevant for the purpose of the payment of the Gratuity Act.

This can be explained by another Withholding Tax Deduction Form marked by the 4th respondent but relied upon by the petitioner. Monthly salary increasement in P3 is applicable to 01.01.2000-31.12.2002. Withholding Tax Deduction Form P6[9], is relevant to the month of February 2001. That means, it covers the period stated in P3. It may be noted that, although by P3 monthly salary was increased by the petitioner, the name of the payer stated in P6 is "International Tourists & Hoteliers Ltd". That goes to prove that Withholding Tax Deduction Forms heavily relied on by the petitioner to say that the 4th respondent is an independent contractor and not an employee under the petitioner or any other Keels Group Hotels are shams.

P2[10] is another letter issued by the Managing Director of the petitioner to the 4th respondent regarding Keels Hotel Management Services Limited Staff facilities being extended to the 4th respondent. It says that the 4th respondent would be entitled to the same concessions as all the other employees in the Keels Hotel Management Services Limited are entitled to when visiting any of the Group's Hotels, and the same staff facilities whenever he is entertaining there. In general, no independent contractors are given such concessions or facilities by way of a formal letter.

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P8[11] is a contract of employment entered into between Travel Club Private Ltd of Male as the employer and the 4th respondent as the employee. The learned President's Counsel for the petitioner vehemently submits that Travel Club Private Ltd is a company incorporated in Male and nothing to do with the petitioner. But by looking at the Group Directory of the John Keels Holdings PLC marked 1R6, it is clear that, Travel Club Private Ltd of Male is a resort hotel of John Keels Group under the management of the petitioner. On behalf of the Travel Club Private Ltd P8 has been signed by Sunimal Senanayake, the Executive Vice President of John Keels Holdings as Sector Head of Maldivian Resorts. It may be noted that he was the officer who has sometimes represented the petitioner at the inquiry before the Commissioner of Labour[12] and tendered counter affidavit dated 16.06.2016 on behalf of the petitioner in Court.

The Managing Director who issued P11 and P12 confirming that the 4th respondent was an employer under the petitioner in the capacity of Group Entertainer with the basic monthly salary of Rs.75,000/= is the officer who tendered the affidavit affirming the facts stated in the original petition.

Hence the argument of the learned President's Counsel that Travel Club Private Ltd, which employed the 4th respondent by P8 is a distinct company which has been incorporated under the Laws of Male and therefore nothing to do with the petitioner is unacceptable in the eyes of the law regarding payments of gratuity.

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[12] Pages 47-48 of X.

I hold that the Commissioner of Labour cannot be found fault with when the petitioner was ordered to pay gratuity in a sum of Rs. 3,018,031/25 for the period of October 1992-October 2012 calculated on the last drawn salary.

The learned President's Counsel for the petitioner takes up another two technical objections seeking to quash the decision of the Commissioner of Labour.

One is that there was no fair hearing before the Commissioner of Labour. I must straightaway say that this is a highly unreasonable accusation. This can be understood by reading the averments of the petition. At the request of the petitioner the inquiry has been held twice. With full legal representation, the petitioner has filed two sets of comprehensive written submissions—one dated 14.08.2014[13] and the other dated 29.10.2014[14]. The simple position taken up by the petitioner before the Commissioner of Labour was that the 4th respondent was never an employee under the petitioner. The petitioner had nothing else to say and nothing to prove.

In that backdrop the issue which the Commissioner of Labour had to decide was whether the 4th respondent was an employee of the petitioner or not. The Commissioner has decided that the 4th respondent was.

The second objection is failure to give reasons to the said conclusion. Although the Commissioner of Labour has not given reasons for that conclusion, I am fully convinced that the said

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conclusion is flawless in the facts and circumstances of this case, which I have discussed above. It would have been very easy for me to have quashed that decision at the stroke of a pen on the ground that no reasons have been given. Had I done so, it would have been a grave injustice to the employee, the weaker party, who may be on the last lap of his long journey of life. The employee cannot be made to suffer for which he is not responsible and has no control over.

I dismiss the application with costs.

Judge of the Court of Appeal