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

In the matter of an application for mandates in the nature of Writs of Certiorari and/or Mandamus under Article 140 of the Constitution.

CA/WRIT/628/2021

The Insurance Association of Sri Lanka
Secretariat Office,
No. 143 A, Vajira Road,
Colombo 5.

Petitioner

Vs.

1. Assistant Commissioner of Labour
   (The Registrar of Trade Unions)
   Trade Unions Divisions,
   Department of Labour,
   Labour Secretariat,
   No. 41, Kirula Road,
   Colombo 5.

2. Life Insurance Agents Association
   C/o W. C. T. A. Weerasinghe,
   2nd Floor, Gasnawa Road,
   Tholangamuwa.

3. Insurance Regulatory Commission of Sri Lanka
   Level 11, East Tower,
   World Trade Center,
   Echelon Square,
   Colombo 01.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Nigel Hatch PC with Siroshni Illangage for the Petitioner.

Chaya Sri Nammuni DSG with M. Fernando SC for the 1st Respondent.

Nagananda Kodithuwakku for the 2nd Respondent.

Malaka Palliyaguru with Sanjeewa Ranaweera for the 3rd Respondent.

Argued on : 11.01.2023

Written Submissions: Petitioner - 22.02.2023

1st Respondent - 09.03.2023

2nd Respondent- 22.02.2023

3rd Respondent- 22.02.2023

Decided on : 29.05.2023

Sobhitha Rajakaruna J.

The primary issue which needs to be resolved in the instant Application is whether the determination of the Assistant Commissioner of Labour-1st Respondent registering the 2nd Respondent Association as a Trade Union is lawful. The said Association is comprised with life insurance agents as its members. The Petitioner is seeking, inter alia, for a writ of Certiorari quashing the decision contained in letter dated 28.10.2021, marked 'P5', by which the 1st Respondent has refused to cancel his determination to register the above Trade Union.

The 1st Respondent affirming an affidavit submits that she has decided to register the 2nd Respondent Association as a Trade Union as per the provisions of the Trade Union Ordinance No. 14 of 1935 ('Ordinance'). She alleges that;

a) she was satisfied that the 2nd Respondent Trade Union was 'an Association or a combination of workmen' falling within the meaning of the said Ordinance,
b) the interpretation of the term 'workmen' in the Ordinance is wide enough to encompass the members of the 2nd Respondent Trade Union, i.e. Insurance Agents,
c) there is no statutory provision which outright prohibits and/or prevents her from recognizing insurance agents as 'workmen' under the Ordinance.

The Petitioner's main contention is that there is a stringent and separate statutory legal regime that governs insurance agents to that of workmen/employees and insurance agents are prohibited in law from being workmen/employees. The Petitioner asserts that under the law a trade union can only be formed and registered by workmen/employees and thus, the insurance agents being independent contractors cannot in law form and/or join and/or register a trade union under the Ordinance as they are not 'workmen' under the said Ordinance.

The 3rd Respondent who associates with the submissions made on behalf of the Petitioner contends that the insurance agents are independent contractors and not workmen/employees of the insurers or brokers with whom they are registered, in terms of the Regulations of Insurance Industry Act No. 43 of 2000 (as amended) and Rules and Determinations made thereunder.

Initially, the Court needs to examine whether the members of the 2nd Respondent Association come within the definition of 'workman' in the said Ordinance. It can be seen that various verbal or written contracts exist between employers and employees but all such employees/workmen cannot fall into the category of the 'workman' defined in different statutes. If the workman fall into such definition, generally he/she may be entitled to the benefits under the respective statutes as well as under other Acts which provide statutory benefits in the labour law regime. Similarly, it needs consideration whether the 'insurance agents' collectively can be considered as ‘workmen’. In this regard, it is paramount to assess the true nature of the employment relationship between an employer and an employee/workman.

'The employment relationship in Sri Lanka is based on the Employer-Employee relationship, which over the years has gained protection under the law. The common Law concept of the contract based on a Master and servant relationship under the Roman

Dutch Law, which was later influenced by the English Law concepts. The influence of English Law was seen mostly in the area of the rights and liabilities of the Master and servant relationship in regard to third parties.' (vide-***'The Employment Relationship (scope) in Sri Lanka' by R.K.S. Suresh Chandra J.*** [an article published in the International Labour Organization website[1] when he was serving as a legal Counsel specialized in labour law])

It appears that the Sri Lankan Courts in determining the relationship between the employer and the employee have used the traditional tests i.e., (1) the control test, (2) the integration test and (3) the economic reality test. The case of ***Stevenson, Jordan and Harrison Ltd. vs. MacDonald and Evans (1952) 1 TLR 101*** is a case where the above tests were employed in determining the issues of the said case. Although it was decided in 1952, the judicial precedent enunciated in the said case can be considered as valid even in today's context.

Lord Justice Denning has stated in the above case that it is often easy to recognize a contract of service when you see it but difficult to say where in the difference lies. 'A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it..' He has further stated that it is almost impossible to give a precise definition to the distinction.

In ***Collins vs. Herts County Council (1947) 10 K.B. 598 (at p. 615)***, Justice Hilbery, has stated that 'The distinction between a contract for services and a contract of service can be summarized in this way: In the one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but how it shall be done'.

The above tests have been discussed even in United States in the cases of ***United States vs. Silk 331 U.S. 704 (1947) and Harrison, Collector of Internal Revenue vs. Greyvan Lines, Inc 329 U.S. 709 (1947)*** which dealt with driver-owners of trucks. It was held in the above two

[1] https://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_205382/lang--en/index.htm

cases which were considered together; 'The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance.....The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors'.

In ***Market Investigations Ltd. vs. Minister of Social Security (1969) 2 QB 173*****,** the Queen's Bench Division (Administrative Court England and Wales) referring even to the above ***United States vs. Silk 331 U.S. 704 (1947) case*** has observed that; 'The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service.'

Now, I must consider whether an express or implied contract, involving insurance agents in respect of their services, will usually be a contract of service or contract for service. When examining the nature of services of an insurance agent, the Section 114 of the Regulation of Insurance Industry Act No. 43 of 2000 (as amended) and Regulations made thereunder have a vital impact.

> Section 114;
> '"insurance agent" means an individual registered as an insurance agent with an insurer or broker under the provisions of this Act, and who in consideration of a commission solicits or procures insurance business for such insurer or broker as the case may be';

The Rule 2 of the Rules made under the said Act ('P2a') provides the basic qualifications for a person to be registered as an insurance agent. Among other qualifications, the said Rule 2(g) implies that a salaried employee of a registered Insurer or Broker cannot be registered as an insurance agent.

In light of the above, I take the view that a person registered as an insurance agent with an insurer or broker under the provisions of the said Regulations of Insurance Industry Act and who in consideration of a commission solicits or procures insurance business for such

insurer or broker rather than drawing a salary periodically should be considered as an insurance agent under our law. The interpretation given in the said Regulations of Insurance Industry Act and the Rules made thereunder, draw a clear inference that a service contract between the insurance agent and insurer should be assumed as a contract for services and not as a contract of service. Anyhow, I take the view that such contract cannot be assumed as a contract for service if such insurance agent gains additional benefits such as promotions, payments in the mode of a salary or increments thereto or hold designations in the company cadre etc. In other words, the nature of the relationship between the insurance agent and the insurer/broker may convert the relevant contract to a contract of service from the state of contract for service. Certainly, the true nature of the contract can be ascertained by employing the above tests such as the control test, integration test etc.

In view of the above judicial precedent and the legal jurisprudence which paved way to identify the types of employment, it appears that an employee cannot be classified as an insurance agent/casual employee/temporary employee/seasonal employee/apprentice/ trainee based on a mere format of a written agreement or on a verbal contract. In other words, in order to identify and understand the true nature of such employment, it is not sufficient to specify the category of employment in the contract but it needs an assessment based on the true relationship between the employer and the employee. Thus, a mere label of an 'insurance agent' cannot be considered as an accessory to assess whether such agent would come within the definition of workmen stipulated in the said Ordinance.

'A workman is governed by a contract of service and an independent contractor is governed by contract for service. However, the decision as to the nature of the contract to identify whether a person providing services to an organization is a workman under a contract of service or an independent contractor under a contract for service becomes difficult with globalization, changes in employment methods, flexibilities in employment, developments in science and technology and the devices designed by employers to circumvent their obligations. In many cases, employers who have power to include clauses favourable for them due to unequal bargaining power between the parties have included designations such as self-employed persons, agents, consultants, free-lancers and sub-contractors to label the workmen as independent contractors with the belief that they could circumvent their statutory obligations'. (Vide- **A. Sarveswaran, '*Who is a Workman? A***

critical evaluation of the tests to differentiate a workman from an Independent Contractor in the light of judicial decisions' **-** International Research Conference on Management and Finance University of Colombo IRCMF – 2011[2])

The ***Construction Industry Training Board vs. Labour Force Ltd. (1970) 3 All ER 220*** is a case where it had been discussed about a contract *sui generis* which can be different from contract of service and contract from service. Fisher J. in the above case has referred to Atiyah's (**P. S. Atiyah*, 'Vicarious Liability in the Law of Torts'*, 1967, p. 38**) following words; '.....Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy.'

Samarakoon CJ. and Wanasundara J. in ***Ceylon Mercantile Union vs. Ceylon Fertilizer Corporation (1985) 1 Sri. L.R. 401*** have referred to Fisher J.'s above judgement. The said ***Ceylon Mercantile Union case*** is a matter where the court discussed about a contract of service and also the nexus between the Hunupitiya Labour Co-operative Society (one of the respondents) and the workmen.

In this backdrop, the crucial issue is how an insurance agent can be excluded from the definition of workmen stipulated in the said Ordinance. The Section 2 of the said Ordinance defines the word 'workman' as;

> "workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is express 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.

[2] http://archive.cmb.ac.lk:8080/xmlui/handle/70130/1632

It is an accepted norm that a person who engages in contract for service or an independent contractor cannot be considered as a regular employee of the person who obtains services (principal party). On a careful perusal of the above interpretation section, it appears that the contract for services is excluded from the said definition. The maxim *expressio unius est exclusio alterius* (a Latin term literally meaning "the expression of one thing is the exclusion of the other") can be adopted here to further clarify my above finding as the said Section has specifically used the words 'contract of service'. Then it is the prime duty of the Registrar of Trade Union (1st Respondent) to independently be satisfied whether the members of the Association who seek registration come within the definition of workmen.

The contention of the 1st Respondent is that she has acted in terms of Section 10 of the said Ordinance and decided to register the 2nd Respondent-Association as a Trade Union after satisfying herself that the objects and rules/constitution ('1R2') of the 2nd Respondent did not conflict with the provisions of the said Ordinance. Further, the 1st Respondent contends that the term 'workman' in the said Ordinance is wide enough to encompass members of the 2nd Respondent-Association. As per the affidavit filed by her, she has arrived at that conclusion on the basis that the insurance agents have been recognized as falling within the definition of 'workman' under the Industrial Disputes Act by labour tribunal and High Courts of Sri Lanka. Ironically, the submissions (paragraph 30 of the written submission dated 09.03.2023) made on behalf of the 1st Respondent clearly envisage that there was nothing before the 1st Respondent to indicate to him that the members of the 2nd Respondent-Association fell outside the definition of Section 2 of the Ordinance. This clearly establishes the fact that the 1st Respondent has not taken into consideration the salient features of the service contracts of the members of the said Association. The Constitution, marked '1R2', illustrates the fact that the members of the 2nd Respondent-Association are employees who engage in life insurance industry on contract basis in all the life insurance institutions. A mere statement to that effect in the Constitution is not sufficient for the 1st Respondent to be satisfied that the members of the said Association falls within the definition of Section 2 of the Ordinance. I am of the view that a grave responsibility will be cast upon the 1st Respondent to examine, at least randomly, the salient features of the contracts between such members and the relevant life insurance institutions. This is because the issue whether the 'insurance agents' are independent contractors was an outstanding question within the insurance industry in the country for a considerable period of time.

Thus, I take the view that the 1st Respondent has not adopted a lawful mechanism in arriving at the impugned decision, especially in reference to the question whether the relationship between such members and the life insurance institutions are in the nature of contract for services/independent contractors. Even this Court is unable to assess and determine whether the members of the 2nd Respondent-Association come within the definition of 'workman' in the Ordinance as there are no evidence before Court to make such determination.

In the above-mentioned case of ***Construction Industry Training Board vs. Labour Force Ltd.***, Fisher J. has further observed that the question whether a contract is one of service or is a contract for services is a question of fact. He has further stated that it is, 'however, a question of law what are the right tests to be applied in determining whether a contract falls into the one or the other class, and a decision of the tribunal could be upset by this Court if it was of the opinion that the tribunal had applied the wrong tests, in other words had misdirected itself in law,...'

Based on the above circumstances, I am inclined to issue a writ of Certiorari quashing the decision of the 1st Respondent reflected in letter dated 28.10.2021 ('P5') and also the decision of the 1st Respondent to register the 2nd Respondent-Association under the Ordinance. In light of the above, I proceed further to issue a writ of Mandamus directing the 1st Respondent to delete and/or expunge from the Registrar of the Trade Unions, the registration of the 2nd Respondent Association as a Trade Union and also to cancel the respective certificate of registration.

Application is allowed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal