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

S.C. Appeal 27A/2009
S.C (Spl) L.A. Application No. 67/2008
C.A Application No. 52/2006

In the matter of an Application for Special Leaved to Appeal from the Judgment of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128(2) of the Constitution

Sri Lanka Insurance Corporation Limited
No. 21, Vauxhall Street,
Colombo 2.

PETITIONER

Vs.

1. Commissioner of Labour
   Labour Department,
   Colombo 05.

2. S.K.S. Rathnayake
   Asst. Commissioner of Labour
   Colombo South Office,
   Labour Department,
   Colombo 5.

3. C.H. Senevirathne
   No. 73, Pepiliyana,
   Boralesgamuwa.

RESPONDENTS

AND NOW BETWEEN

Sri Lanka Insurance Corporation Limited
No. 21, Vauxhall Street,
Colombo 2.

PETITIONER-PETITIONER

Vs.

1. Commissioner of Labour
Labour Department,
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Labour Department,
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No. 73, Pepiliyana,
Boralesgamuwa.

RESPONDENTS-RESPONDENTS

BEFORE: Sisira J. de Abrerw J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Sanjeewa Jayawardena P.C. with Sandamali Chandrasekera
Instructed by Dilan Perera for the Petitioner-Appellant

S. Rajarathnam P.C., A.S.G. for the 1st & 2nd Respondent-Respondents

Chris Caderamanpulle for the 3rd Respondent-Respondent

ARGUED ON: 14.03.2016

DECIDED ON: 14.12.2016

GOONERATNE J.

The Petitioner, Sri Lanka Insurance Corporation Limited sought Special Leave to Appeal from the Judgment of the Court of Appeal marked X15 dated 13.02.2008. This court on 28.08.2009 granted Special Leave on the following questions of law set out in paragraphs 16(a), (b), (c) and (i) of the Petition.

(a) Did the Court of Appeal fall into substantial error by misconstruing the contract entered into between the petitioner and the 3rd respondent as a "contract of service" instead of as a "contract for services?

(b) Did the Court of Appeal err by failing to take into consideration the salient features of the contract entered into between the petitioner and the 3rd respondent which clearly established that the 3rd respondent was only appointed to the Panel of Motor Claims Assessors and was in fact, an "independent contractor" providing professional service?

(c) Did the Court of Appeal misinterpret and misapply the established tests formulated to distinguish between an "employee" and an "independent contractor" as well as the particular facts of the instant case?

(i) Did the Court of Appeal misinterpret and misapply the provisions of the EPF Act and the relevant regulations defining the terms "covered employment" and "earnings"?

To state the facts very briefly, the 3rd Respondent (now alleged to be deceased) filed an application with the 1st Respondent the Commissioner of Labour claiming Employees Provident Fund, dues, for which he is entitled during his tenure of office as a 'Motor Claims Assessor' with the Petitioner for the period 1964 to August 2002. The 3rd Respondent did so on the basis that he was an employee of the Petitioner-Appellant. The 2nd Respondent an Assistant Commissioner of Labour by certificate P2 of 2nd December 2004, made order that in terms of Section 38(2) of the Employees Provident Fund Act, as amended, Petitioner has defaulted in a sum of Rs. 1,470,305/12 and such sum, is payable to the 3rd Respondent. The 3rd Respondent's services to the Petitioner Company was about 40 years. The Petitioner however denied liability to pay the said sum, and took up the position that the Petitioner is not liable to pay any sum under the Employees Provident fund Act.

The 1st Respondent however inquired into the matter and came to the conclusion that the work done by the 3rd Respondent comes within "earnings" as per the said Act and consequently directed the Petitioner Company, to comply with the order of the 2nd Respondent and directed the Petitioner to pay a sum of Rs. 1,470,305/12. Petitioner failed to satisfy the said claim made by the Commissioner of Labour. As such the 1st Respondent filed a certificate to recover the dues in terms of Section 38(2) of the Employees

Provident Fund Act. The Petitioner Company filed a Writ Application in the Court of Appeal challenging the Order dated 16.5.2001 (3R1) of the Commissioner of Labour and also sought to prevent the proceedings of the case filed in the Magistrate's Courts, Colombo for failure to comply with the aforesaid decision to wit, to pay amounts due as contributions under the EPF Act.

In the written submissions filed on behalf of the 1st & 2nd Respondents it is stated that the Petitioner's position is that the 3rd Respondent was paid "fees per report" for assessment done on motor claims (vide paragraphs 11(b) to (d) and 13 of the petition). In the counter affidavit the Petitioner had changed it to be as "job by job basis". Learned President's Counsel for Petitioner argues that Motor Claims Assessors are independent contractors and were not employed on a "contract of service" basis but instead on a "contract for service". As such "Motor Claims Assessors" are not employees under the EPF Act. Petitioner also emphasis that no 'control' can be exercised over the work done by 3rd Respondent and as such 3rd Respondent would be an independent contractor. Another position suggested by learned President's Counsel was that 3rd Respondent was not engaged in a covered employment as he was performing work on a "job by job" basis. My attention was also drawn to letter of 15.11.1963 (X1) an application of the 3rd Respondent to be included in the panel of Motor Claims Assessors of the then Sri Lanka Insurance

Corporation. By letter X2 of 20.02.1964 Petitioner informed that 3rd Respondent was appointed to the panel of Motor Claims Assessors. X2 is described as contract for services between the Petitioner Company and the 3rd Respondent. Petitioner also relies on letter X4, supporting the position that Assessors are engaged in the capacity of independent contractors. In a very prolex petition filed before the Supreme Court learned President's Counsel as well as in the lengthy written submissions attempts to demonstrate the historical background, the scope of the responsibilities assigned to Assessors and draws a distinction between the contract for services entered into with the independent and professional Assessors as opposed to contract of employment entered into with Road Assistant Technicians.

I have considered both oral and written submissions of all parties to this appeal. No doubt the written submissions filed on behalf of the Petitioner are very lengthy, but court is guided on very firm acceptable legal principles inclusive of statutory provisions and applicable regulations. In any event the record maintained in this regard from the Court of Appeal and submitted to this court as an annexture contains all relevant details. Petitioner's grounds of appeal are also noted.

I observe that within the four corners of the relevant statute the employment of the 3rd Respondent needs to be a 'covered employment' to make

the Petitioner liable under the EPF Act. Petitioner contends that 3rd Respondent was not engaged in a covered employment as he was on a job by job basis. There are some basic facts that need to be understood. In fact the Judgment of the Court of Appeal refer to same. The 3rd Respondent was issued letter dated 30.04.1964 by the Petitioner (P5 annexed to the Court of Appeal application).

The said letter indicates the following:

(a) 3rd Respondent to safeguard the interest of the Petitioner Company
(b) When requested by the Petitioner Company the 3rd Respondent to undertake inspections, assessments, investigations and other works of similar nature connected to insurance claims, and submit reports without delay, with his opinion.
(c) Report to refer to nature of damage, scrutinize reports and estimate damages.
(d) 3rd Respondent permitted to vary any claim (delete, add or alter)
(e) If the claim exceeds Rs. 3000/- the 3rd Respondent is required to attach a photograph to his report and report to be submitted within three days to the Motor Claims Department.
(f) Report to be submitted as above but 3rd Respondent cannot authorise repairs.
(g) 3rd Respondent paid Rs. 25/- per claim within the city, outside the city limits Rs. 30/-. 3rd Respondent also paid subsistence.

The above indicates as in (a) to (g) the control exercised over the 3rd Respondent, and the manner of performing duties and functions as required by the Petitioner, for which he is paid as in (g) above.

I have taken note of the affidavit of the 3rd Respondent and its document 3R4 dated 02.07.1996 (internal memo). The following conditions are laid down.

(a) It is needless to emphasize the value of the customer service and only if we are able to co-operate and work as a team, we will be able to achieve our goal.
(b) All assessors should report for work by 9.30 a.m at the Motor Claims Department.
(c) After signing the Attendance Register you should proceed to No. 288 Union Place.
(d) The jobs will be assigned to those who have signed the Register.
(e) Disciplinary Action will be taken against the Assessor pertaining to reports delayed without a valid reason.

The 3rd Respondent no doubt is subject to directions of the Petitioner and follow the strict conditions and procedure laid down by the Petitioner Company. He has no free hand where his employment is concerned, with the Petitioner.

The following cases explain to a great extent as to how the facts of the case in hand could be applied. In a contract of service a person is employed as part of the business, i.e whether the person was fully integrated in the employer's business or remained apart from and independent of it. Stevenson Jordon and Harrison Ltd. Vs. McDonald and Evans 1952 (1) TLR 101 CA per

Denning L.J. In the Petitioner Company which is involved in an insurance business the 3rd Respondent plays an important role and thus becomes a part of the, that business, and the Petitioner Company is dependent on reports of Motor Claims Assessors. Further the 3rd Respondent had a very long period of employment with the Petitioner Company, which is no doubt a longstanding regular relationship. In Nethermere (St. Neots) Ltd. Vs. Gardiner (1984) 1 CR 612, it was held that piece work basis employment which showed longstanding reciprocity of obligations though not covered by a formal contractual obligation to undertake a particular quantity of work are employees of the particular business. The 3rd Respondent could be properly described as an employee or a servant of the Petitioners organisation having regard to the nature of work entrusted to him by the Petitioner. The test seems to be whether a particular employment was a casual nature and not whether the employee was a casual worker. Vide S.R. de Silva – legal Framework of Industrial Relations in Ceylon 1973.

Learned Additional Solicitor General in his submissions cited a very relevant case on the subject. Vide Feredral Commissioner for Taxation Vs. J. Walter Thompson (Australia) Pte. Ltd. 69 CLR 227 at pg. 231-233.

> "The fact that artistes are skilled does not make it impossible for them to be in relation of servants to an employer. It is a mistake to think that only

unskilled people can properly be described as servants. If they are subject to detailed contract in the manner in which they do their work, they must be servants. The fact that remuneration is described as a fee rather than as wages is not decisive. The real character of relation between the parties must be determined, whether the payment made is described as wages, fee, salary, commission or by other term. The fact that the artistes are not whole time employees does not show that they are not employees of the company".

I also had the benefit of perusing the following case laws which convince my approach to the case in hand that the Petitioner Company is liable to make contribution in the manner decided by the 1st & 2nd Respondents, although some cases below deal with the Industrial Disputes Act.

Jamis Appuhamy Vs. Shanmugam (1978) Vol. 80 NLR 298. A case dealing with master and servant and contract of service and contract for service – Independent contractor.

At pg. 301...

Contract of service were identified by Lord Thankerton in Short v. J.E.W. Henderson Ltd. to be as follows:-

"(a) The master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension"

Lord Thankerton then went on to say:

"Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted in to an independent contractor that, if and when appropriate cases arose,

it will be incumbent on this House to reconsider and restate the indicia ... The statement ..... that selection, payment and control are inevitable in every contract of service is clearly open to reconsideration".

Thus, it would appear, notwithstanding the absence of the indicia referred to above, circumstances may arise in which no one could reasonably suggest that the relationship is other than that of the contract of service.

Perera vs. Marikar Bawa Ltd 1989 (1) SLR at 347...

The appellant was the Head Cutter of the respondent Company. He was provided with a cubicle but employed his own workmen and used his own tools. The Company passed on tailoring orders to him and on execution he was paid a commission from the collections for each month. The Company collected the payment from the customer and kept the accounts. The appellant did not sign attendance register and was not entitled to a bonus like other employees. The question was whether appellant was a workman within the meaning of the Industrial Disputes Act. Was his a contract of service or contract for services as an independent contractor.

Held

(1) The applicant's work was an integral part of the respondent's business and he was part and parcel of the organisation. The appellant did not carry on his business of Head Cutter as a business belonging to him. It was a business done by the appellant for the respondent. Therefore he was a workman and an employee within the meaning of the Industrial Disputes Act.

C M U Vs. Ceylon Fertilizer Corporation 1985 (1) SLR at 418 & 419 - By a majority judgment (CJ Samarakoon dissenting) Wimalaratne J. Held:

"I have had the benefit of reading the judgments prepared by the Chief Justice and by Wanasundera, J. where the facts are set out.

Wanasundera, J. after discussing the manner in which the workmen have been dealt with by the Fertilizer Corporation concludes that the function of the Hunupitiya Labour

Society was to act as mere agents to supply labour to the Corporation, whilst the Corporation became the employer of the labour so supplied.

The Chief Justice is unable to agree that the Society was merely an agent, for the reason that the Society was actively engaged in working and putting into practice the terms of its contract R6 with the Corporation. Implicit in the judgment of the Chief Justice is the conclusion that the Society and not the Corporation is the employer of these workmen.

The instant case is similar to a situation where a contractor regularly brings labour to the employer's workplace to perform work in the regular course of the business of the employer, and the employer directs how the work is to be performed, and even calls upon the contractor not to employ particular persons from among the workforce. In that situation, my view is that there is no contract of employment between the contractor and workmen. This situation is different to one where a person enters into a contract with another to construct a building, and that other (the contractor) employs labour for the purpose. In that case it may not be difficult to establish the employer-employee relationship between the contractor and the workmen, since the employment of the workmen is on behalf of the contractor, and not on behalf of the person with whom the contractor has contracted to build.

Wanasundera, J. takes the view that on the facts of this case the relationship of employer and employee between the Corporation and the workmen has been established not only by an application of the test of "control", but also by the test of "integration". that is that the workmen were intrinsic to the working of the Corporation.

I am in agreement with the views of Wanasundera, J. The payment of wages by the Society was only a physical act of handing over the wages in the capacity of agent of the Corporation. One has to remember that it was the Corporation, and not the Society that determined the wages of each category of workers – check roll as well as piece-rate workers. As regards control of work, even the Chief Justice has no doubt that it was the Corporation that assigned the work, stipulated the proportions of mixing and indicated the mode of distribution. What appears to have influenced the Chief Justice is that

disciplinary control was in the hands of the Society. There is, however a strong finding of fact by the President that "it is absolutely clear that the supervision and control of the workmen were exercised not by the 2nd respondent (the Society) but by the 1st respondent (the Corporation). "I cannot see sufficient reason to disturb that finding of fact".

The Employees Provident Fund Act in its Part II refers to covered employments, employees to whom the Act applies and contributions. Section 8 of the said Act in its entirety reads thus:

8. Covered employments and employees to whom this Act applies

(1) Any employment, including any employment in the service of a corporation whose capital or a part of whose capital is provided by the Government, may be regulation be declared to be a covered employment.

(2) Regulations may be made –

(a) To treat as a covered employment any employment outside Sri Lanka which is for the purposes of a trade or business carried on in Sri Lanka and which would be a covered employment if it were in Sri Lanka; and

(b) Be treat as not being a covered employment or to disregard.

(i) Employment under a person who employs less than a prescribed minimum number of employees.

(ii) Employment of a person in the service or for the purpose of the trade or business, or as a partner, of that person's spouse.

S 8(2)(b)(iii) re-numbered as s 8 (2)(b)(ii) by as s 5 of Act 8

(3) Subject to the other provisions of this Act, every person over a prescribed age who is employed by any other person in any covered employment shall be an employee to whom this Act applies, For the purposes of this subsection different ages may be prescribed for different covered employment –

(4) Any regulation declaring any employment to be a covered employment may provide that such persons only as earn less than a prescribed amount in that employment or as are of a prescribed class or description, and not other persons in that employment, shall be employees to whom this Act applies.

The above sections brings within its ambit employment in a Corporation whose capital or part is provided by the Government. Section 8(2) (b) (ii) refer to instances as not being covered employment. The said Section 8, further expands to bring persons over a prescribed age and employed to be employees under the Act.

The relevant statute and its regulations very clearly and correctly identify a 'covered employment' and an 'employees' who are subject to the above statute. I cannot see a basis in the way argued by learned President's Counsel for the Petitioner, that the 3rd Respondents employment is not a covered employment, within the relevant statute. Material provided to this court is more than sufficient to conclude that 'Motor Claims Insurance Assessors' fall within the ambit of the Employees Provident Fund Act and their employment is a 'covered employment'. As such the Petitioner is liable to contribute to the Employees Provident Fund, and decision taken in this regard by the 1st and 2nd Respondents can never be faulted.

My attention has been drawn to the regulations made in terms of the Employees Provident Fund Act. Vide 1R1 to 1R3.

1R1 inter alia states (Regulation 3) an employment performed by the day or by the job or by the journey shall not be a covered employment. Learned President's Counsel in his submissions attempted to bring the Petitioner within this definition. I do not think it is so as the 3rd Respondent's employment is not performed by the day or by the job. 3rd Respondent employment is entrusted to him by the Petitioner by contract and with instructions and certain specified acts to be performed by him, and thereby the Petitioner exercise control over the 3rd Respondent. By 1R2 the subject of insurance is declared a covered employment and so are the functions of Assessor by Regulation 23 of 1R3. Regulation 7 of Gazette 1R2 brings within the term 'employee' of the Employers Provident Fund Act persons employed on a remuneration of piece rate or a commission. As such both 1R1 and 1R2 Gazettes in no uncertain terms indicate that provident fund contribution should be paid even for work done on a piece rate basis or a commission for service.

In view of matters discussed in this Judgment and the points considered in the Judgment of the Court of Appeal which I agree, it is incorrect on the part of the Petitioner to state that the terms of the contract had been misinterpreted by the Respondent. I reject the submissions made on behalf of

the Petitioner that the 3rd Respondent performs the work of an independent contract. Documents 3R4, P5 contains valuable material and information which counter the position of the Petitioner. The historical background relied upon by the Petitioner, are no doubt matters to be considered, but I am unable to agree that in this case, it paves the way for an independent contract. In any employment or profession, will have a historical background. It is certainly not the test to determine the issue suggested by the Petitioner. In a world where persons are employed in the private sector or government or semi government organisations, variety of functions are entrusted and imposed upon such persons in their employment. Perhaps it is arguable whether a particular employment has some features of independentness, but certainly not conclusive to support the contention of the Petitioner. What matters is the test of 'control' and 'integration'. In the case in hand supervision and control inclusive of discipline of the 3rd Respondent was in the hands of the Petitioner, which takes the case out of an independent contract. Directives given in P5 and 3R4 also demonstrate trust and reliance placed on technical expertise and professionalism of the 3rd Respondent but it cannot conclude that it is the role of an independent contractor. The role of the 3rd Respondent is that of an employee or a workman and thus support a 'contract of service'. It was a service done by the 3rd Respondent not for himself or for a business belonging to him.

It was service done for the Petitioner Company. 3rd Respondent was part and parcel of the Petitioners business, and was a workman or an employee'.

Petitioner Company also state that Motor Assessors were free to serve any other organisation if they wished. Another comparison done was with Road Assistant Technician, who are employees of the Petitioner Company. I have considered the matters highlighted by the Petitioner in his Petition of Appeal in this regard. All that is stated therein are suggested explanations of something or assumptions as a basis of reasoning and nothing more, that flow from such suggestions. I am unable to accept such reasoning of the Petitioner Company, in this connection.

In all the facts and circumstances of the case in hand I have no hesitation in affirming the Judgment of the Court of Appeal. In the process the role played by the 1st and 2nd Respondents could not be faulted, and they did so within the available statutory frame work.

The 3rd Respondent's unbroken 40 years of service was carried out as an integral part of the business of the Petitioner Company, notwithstanding the modern industrial complexities projected on behalf of the Petitioner Company. In the case in hand whatever professional skills or its technical nature

would not and cannot override the ‘control test’ and the ‘integration test’ which is the ultimate deciding factor. As such this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree

JUDGE OF THE SUPREME COURT