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

In the matter of an application for Special Leave to appeal against the Judgment of High Court of Wayamba Province Holden in terms of section 9 of High Court (SPL) Provisions Act No. 19 of 1990 (as amended)

Wickrama Arachchi Kolambage Sanjeewa Kumara
C/O D.M. Herath Banda,
Thenthankuriyawa,
Anamaduwa.

Applicant

SC Appeal 202/2015

SC (SPL) LA 115/15
Provincial High Court
No. HCALT 1/15
LT 28/1784/11

Vs,

K.A. Nandana Kuruppu,
Nandana Brothers,
No. 124/15, I.D.H. Mawatha,
Puttalam.

Respondent

And

K.A. Nandana Kuruppu,
Nandana Brothers,
No. 124/15, I.D.H. Mawatha,
Puttalam.

Respondent -Appellant

Vs,

Wickrama Arachchi Kolambage Sanjeewa Kumara
C/O D.M. Herath Banda,
Thenthankuriyawa,
Anamaduwa.

Applicant-Respondent

And now between

Wickrama Arachchi Kolambage Sanjeewa Kumara
C/O D.M. Herath Banda,
Thenthankuriyawa,
Anamaduwa.

Applicant-Respondent-Appellant

Vs,

K.A. Nandana Kuruppu,
Nandana Brothers,
No. 124/15, I.D.H. Mawatha,
Puttalam.

Respondent-Appellant- Respondent

Before: **S.E. Wanasundera PC J**

Vijith K. Malalgoda PC J

Murdu N. B. Fernando PC J

Counsel: G.R.D. Obeysekara with Unica Fonseka for the Applicant-Respondent-Appellant

Chandana Wijesooriya for the Respondent-Appellant-Respondent

Argued on: 02.07.2018

Decided on: 10.10.2018

Vijith K. Malalgoda PC J

The Applicant-Respondent-Appellant (hereinafter referred to as the Applicant) who was employed by the Respondent-Appellant-Respondent (hereinafter referred to as the Respondent) in August 2006 as electricity supplier and a foreman, had worked under the Respondent until his services were terminated by the Respondent on 1st March 2011.

As against the said decision of the Respondent to terminate his service, the Applicant had gone before the Labour Tribunal of Chilaw and filed an application dated 1st June 2011.

At the conclusion of the Inquiry, by order dated 17th December 2014 the Labour Tribunal had declared that the termination of the Applicant's services is unlawful and a sum of Rupees 337,500/- was ordered as compensation to be paid to the Applicant.

The said order of the Labour Tribunal was challenged by the Respondent before the Provincial High Court holden in Chilaw and by order dated 25th May 2015, the High Court had allowed the said appeal and set aside the order of the Labour Tribunal dated 17th December 2014.

Being dissatisfied with the above order, the Applicant had filed a special leave to appeal application before the Supreme court, and the Supreme Court after considering the said application had granted leave on the following question of Law,

> "Did the High Court in the proper evaluation of the evidence err that the Applicant was not an employee of the Respondent?"

As revealed before us, when the Applicant complained to the Labour Tribunal that the Respondent unlawfully terminated his service, the Respondent responding to the said application had taken up the position that the Applicant was not a 'workman' employed by him but was an 'independent contractor' and that the Tribunal could not entertain the application.

In the said circumstances, the question that the Tribunal had to decide was whether the Applicant was an employee of the Respondent or an independent contractor or in other words the relationship between the Applicant and the Respondent was for a "contract of service" or "contract for service"

Both, the Applicant and the Respondent have admitted that there was no written contract between them and in the said circumstances, the Respondent took up the position that, the Respondent worked as a contractor to the Ceylon Electricity Board, and after obtaining such contracts, he sub-contracted the work to 3rd parties and shared the profit. In the said circumstances he took up the position that the Applicant too was an independent contractor of the Respondent who under took sub-contracts from the Respondent.

However, as against the said position taken up by the Respondent, the Applicant had taken up the position before the Labour Tribunal, that the Applicant and the other workmen who worked for the Respondent, had gathered at the house of the Respondent every morning to obtain instructions, from him with regard to their daily work and similarly reported back to the Respondent around 5.30 p.m. During their work, either when they engaged in clearing the main lines or giving house connections, they used the equipment provided by the Respondent. In the said circumstances the case of the Applicant before the Labour Tribunal was that he was subject to the directions and control of the Respondent during the period in question.

The Applicant in his evidence marked a document admitted to be in the hand writing of the Respondent where at the top of the page Applicant's name appears as "Sanjeewa". The said document refers to payments made to the Applicant for clearing electrical lines and supplying Electricity for the period 2006-2007. In reference to A-1 the Respondent took up the position that the said document has no connection to the Applicant but it refers to monies reserved for the vehicles.

The learned President of the Labour Tribunal had considered the positions taken up by both parties with regard to A-1 and rejected the position taken up by the Respondent. Whilst referring to the evidence of the Respondent it was further observed by the President of the Labour Tribunal that,

the Respondent had not maintained a proper record of the payments made to his employees until July 2011, a date subsequent to the termination of the Applicant.

As observed by this court, our courts have followed several tests to identify the relationship between the two parties and control test is one such test accepted by our courts.

The said test was discussed by *Sharvananda (J)* (as he was then) in the case of ***M.D. Jamis Appuhamy vs. T.P. Shanmugam, (1978) 80 NLR 298*** at *299-300* as follows;

> "The question of the applicant's status, on the facts stated above, thus comes up for decision. Was the applicant an employee under a contract of service or an independent contractor on a contract for service? A contract of service is simply another name for a contract of employment under which the parties are master and servant in the strict sense. A contract for services, on the other hand, is a contract under which an independent contractor agrees to render services to another in circumstances in which the relationship of master and servant is not created. A servant is one who is bound to obey any lawful orders given by the master as to the manner in which his work shall be done. The master retains the power of controlling him in his work and may direct not only what he shall do but how he shall do it. An independent contractor, as opposed to a servant, is one who carries on an independent employment in the course of which he contracts to do certain work. He may, by the terms of his contract, be subject to the directions of his employer. But, apart from the contract, he is his own master as to the manner and time in which the work shall be done.

In *Collins vs. County Council,* Hilbery, J. summarized the distinction in this way:-

> "In 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."

In the case of ***The Times of Ceylon Ltd Vs. The Nidahas Karmika Saha Velanda Sevaka Vurthiya Samithiya 63 New Law Reports 126*** **at 132,** *T.S.Fernando (J)* had observed;

> "Being in mind that ultimate test to be applied is whether the hirer had authority to control the manner and execution of the act in question or, to put in the words to be found in the judgment of the Supreme Court of India, whether there exists in the master a right to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work,…."

In the case of ***Sri Lanka Insurance Corporation Ltd Vs. A.C.R. Wijesundera SC Appeal 99/2010*** SC minute dated 28.06.2017 Supreme Court observed that;

> "Even though the Appellant submitted that there was no master- servant relationship between the Applicant and the Appellant, I find that the Assessors had to sign daily when they reported to work, had to provide reasons if they got late to work and the time of arrival is later than 9.30 a.m. every day; they were not given assignments if they got late; they had to report to the superior officer who gave the assignments every day before 9.30 a.m.; they were given equipment by the Appellant subsequent to them having used their own equipment initially; they were paid travelling expenses and they were also paid for the printed photographs taken by them of the damaged vehicles."
>
> "If any kind of work has to be performed independently, there cannot be any time restrictions and there cannot be superior officers under whom the worker has to perform.

> Any 'contract for services' has to be only for the work to be done by a person alone, using his talent or capability as regards the particular kind of work, within his limits and within his freedom. An independent professional performs his work with his expertise in the job and the person who hires him on a 'contract for services' does not have any strings hung on him. The services are appreciated and paid for, due to his capability to do the job which he was hires to do. There cannot be any control whatsoever, if there is only a **contract for service**. An independent contractor frequently carries on, an independent business whereas under a **contract of service**, a man **sells his labour and service to the enterprise of another**. In the case in hand, the Applicant sold his service and labour to the Appellant. The Appellant in this case has had many controls over the Applicant and thus it points at the stance taken up by the Applicant that the Appellant was his employer."

As observed by me, the learned President of the Labour Tribunal was mindful of the said test when concluding that there exists a master servant relationship between the Applicant and the Respondent. (Pages 6-8 of the order)

The Appellate courts are reluctant to interfere with the findings of the Trial Courts including the Labour Tribunal unless a serious miscarriage of justice has taken place when the Tribunal was analyzing the evidence and the law relating to its findings.

In the case of ***Jayasuriya Vs. Sri Lanka State Plantation Corporation 1995 2 Sri LR 379 at 391,*** Amarasinghe J had observed the above as follows;

> "The industrial Disputes Act No 43 of 1950 states in section 31 D that the order of a Labour Tribunal shall and shall not be called in question any court except on a question of Law. While Appellate Courts will not intervene with pure finding of fact, yet if it appears that,

The tribunal has made a finding wholly unsupported by the evidence or

Which is inconsistent with the evidence and contradictory of or

Where the tribunal has failed to consider material and relevant evidence or

Where it has failed to decide a material question or

Misconstrued the question and has directed its attention to the wrong matters or

Where there was an erroneous misconception amounting to a misdirection or

Where it failed to consider material documents or misconstrued them or

Where the tribunal has failed to consider the version of one party or his evidence or erroneously supposed there was no evidence, the finding of the tribunal is subject to review by the Court of Appeal."

As observed above in this judgment, the learned President of the Labour Tribunal has correctly analyzed the evidence placed before the Labour Tribunal and had applied the test relating to identification of the relationship between the Applicant and the Respondent.

However when considering the judgment of the High Court of Provinces, I observe that the learned High Court Judge had failed to appreciate the role of the High Court in an appeal process and has merely given his interpretation to the evidence led before the trial court i.e. the Labour Tribunal and interfered, with the finding on mere questions of fact.

The above position is in violation of section 31 D of the Industrial Disputes Act and contrary to the decision in ***Jayasuriya V. Sri Lanka State Plantation Corporation (supra)*** decided by the Supreme Court.

In the case of ***Ceylon Cinema and Film Studio Employees Union V. Liberty Cinema Ltd [1994] 3 Sri LR 121*** the Court of Appeal too, had held that,

> "The question of assessment of the evidence is within the province of the Labour Tribunal and if there is evidence on record to support its findings the Appellate Court cannot review those findings even though on its own perception to the evidence it may be inclined to come to a different conclusion."

For the reasons setout above I hold that the Learned High Court Judge has erred in law when he interfered with the findings of the Labour Tribunal on a pure question of fact by giving his own interpretation to the evidence and the documents led before the Labour Tribunal. I therefore answer the question of law enumerated above by this court, in favour of the Applicant-Respondent-Appellant and against the Respondent-Appellant-Respondent.

I further make order setting aside the judgment dated 27.05.2015 of the Provincial High Court holden in Chilaw and affirm the order of the Labour Tribunal of Chilaw dated 17.12.2014.

Appeal allowed. However, I order no costs.

Judge of the Supreme Court

S.E. Wanasundera PC J

I agree,

Judge of the Supreme Court

Murdu N. B. Fernando PC J

I agree,

Judge of the Supreme Court