PERERA
V.
MARIKAR BAWA LTD.

COURT OF APPEAL
C. A. NO. 502/80
L. T. COLOMBO NO. 2/5638/73
VIKNARAJAH, J.
MARCH 17, 1989.

Industrial Disputes — Industrial Dispute Act — Independent Contractor — Contract of **Service** *and Contract of* **Services** *— Workman — Test applicable —Termination.*

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 the 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.

(2) The finding of the President of the Labour Tribunal that there has been no termination but the applicant on his own stopped going to work is amply supported by the evidence. In the absence of termination by the respondent, the appellant could not seek relief before the Labour Tribunal.

Cases referred to:

(1) *Times of Ceylon v. Nidahas Karmika Saba Velanda Sevaka Vurthiya Samithiya* 63 NLR 126.

(2) *Stevenson Jordon and Narrison Ltd. v. Macdonald and Evans.* (1952) T.L.R. 101 at 110, 111.

(3) *Collins v. Herts County Council* [1947] K. B. 598 at 615.

(4) *Cassidy v. Ministry of Health* [1951] 1 All E. R. 574 at 579

(5) *Montreal Locomotive Works Ltd. v. Montreal and A.G. for Canada* (1947) 1 D.L.R. 161 at P. 163.

(6) *Bank voor Handel en Schespvaart N.V. v. Slatford* (1952) 2 All E.R. 956 at 971.

(7) *U.S. v. Silk* (1946) 331 U.S. 704.

(8) *Market Investigations Ltd. v. Minister of Social Security* (1968) 3 All E.R. 732 at 737.

APPEAL from an order of the Labour Tribunal.

D. R. P. Goonetileke with *Miss Shiranthi de Saram* for Appellant.

A. J. I. Tilakawardena with *Mrs. Dulani Wimaladharma* for Respondent.

Cur. adv. vult

May 12, 1989.

VIKNARAJAH, J.

This is an appeal by the applicant from the order of the President' Labour Tribunal dismissing his application made against the respondent Company Marikar Bawa Ltd. claiming relief on the ground of unjustifiable termination of his services.

Two matters arise in this appeal for consideration.

(i) whether the applicant is a workman within the meaning of the Industrial Disputes Act.

(ii) whether there was a termination by the respondent Company or whether the applicant left of his own accord.

The applicant was appointed as Head cutter in the Tailoring Department of the respondent Company with effect from 1st February 1970. According to the letter of appointment A1 the appointment will be purely on a contract and commission basis. A commission of 25% of the Tailoring charges will become payable to the respondent Company on all work executed by applicant. The appointment will be on a probation basis for a period of three months from date of commencement of work. During continuance of employment under the respondent company the applicant should cease to do any private work. The hours of attendance and work will be limited to the normal working hours of the respondent company. During the course of applicant's employment he will be solely responsible for the work

undertaken by him. The cutting fittings and alteration shall be attended under his personal supervision and guidance.

Further in terms of A1 the letter of appointment, any losses arising out of garments that are found to be unsatisfactorily executed will have to be borne by applicant and the cost thereof will be set off against payment to applicant.

Termination of services will be effective upon six months notice being given by either party. Upon termination of services the respondent company shall pay the amount that is due to applicant after deducting whatever amount is due to the respondent company.

The applicant accepted the appointment on the above terms and conditions.

The applicant claimed that he was a regular employee of the respondent from January 1970. His complaint was that his work was stopped without justification on the 11th May 1973 on the ground that he refused to sign a letter drafted by the Company varying drastically the terms and conditions of his services.

The respondent Company denied that the applicant was a 'workman' within the meaning of the Industrial Disputes Act in that the applicant was employed as an independant contractor on a commission basis. Further the company's position was that it never stopped the work of the applicant but that the applicant kept away from work on his own.

The learned President after inquiry held that the applicant was not a workman within the meaning of the Industrial Disputes Act and also held that there was no termination by the respondent Company and dismissed the application. The present appeal is from this order.

The main contention of the Counsel for the appellant at the hearing of the appeal is that the learned President has misdirected himself on the law when he held that the applicant

appellant was an independant contractor. Counsel for appellant relied on the judgment of this Court in an unreported case in Appeal No. 23/75 L.T/1/1643/76 decided on 4.9.81 where facts were almost identical and the respondent on that appeal was the same respondent in this appeal. The appellant in that case was a ladies tailor employed by Marikar Bawa Ltd. This Court held that the appellant (ladies tailor) was an employee within the meaning of the Industrial Disputes Act.

The applicant prior to his being appointed as Head cutter in February 1970 was employed as a tailor by Wilbert who was employed by the respondent as a Head cutter. Wilbert paid the salary of applicant. Wilbert was given a cubicle to discharge his duties as Head cutter. In February 1970 the applicant had left the services of Wilbert as he had obtained a cubicle also in the premises of respondent Company and was an appointed Head cutter. After he was appointed Head cutter the applicant hired tailors to do his work. He had also brought his own equipment like scissors, measuring equipments, thread etc. to work in the department. The applicant stated in evidence that after he took over the department, he came to enjoy the same status and category as Wilbert, Samarasinghe and Arthur Perera. The applicant stated that he was called the 'cutter' and was given full administration in the department. He said as follows 'I was made the Head of the Department and made responsible for the working of that department".

After having obtained a cubicle the applicant stated that

(a) being the cutter he took orders and gave directions to the tailors under him as to how they should do their work.

(b) that he did not sign an attendance register like a regular employee of the respondent.

(c) that the respondent did not make any contribution to the E.P.F. in respect of him.

(d) that he received no bonus although the regular employees of the respondent are entitled to bonus.

The applicant also stated that in 1973 the officers of the Labour Department visited the cubicle and requested him to pay E.P.F. contribution in respect of his employees.

On behalf of the respondent Bawa, the Managing Director of the respondent firm gave evidence. He said he was working director from 1973. He said that this firm was established in 1869 by his grandfather. Bawa stated that that the firm was doing business in selling textiles and jewellery. He said that they did tailoring also as part of their business and they have been advertising themselves as tailors and also advertising the names of their expert cutters. He admitted that they have several tailoring departments in the establishment. In 1973 respondent had four tailoring departments. They had a tailoring department for ladies also. Bawa admitted that applicant made his application for the post of cutter after the post was advertised (vide R5). Bawa stated in evidence that no rent was paid by the head cutters for the cubicles occupied by them. The cubicles belong to the respondent company.

According to A1 the applicant had to pay a commission to respondent out of the tailoring charges. But Bawa stated in evidence that the firm collects this money from customers on behalf of the tailors and accounts are maintained by the firm and are entered by the office staff. The tailors only take the measurement and give the particulars to the salesman who recorded it in the book. Bawa admitted that the accounts relating to the tailoring that is the charges collected etc. are maintained by the firm. It is the firm that collects the tailoring charges and out of that pays the commission that is due to the tailors.

The appellant was a Head Cutter and possessed of special skill and experience and the respondent could naturally have had no control over the manner of the performance of his services.

A 'workman' is defined in section 48 of the Industrial Disputes Act. According to that definition a person who is an independent contractor falls outside the category of

'workman'. It is therefore necessary to determine whether the appellant was an employee or servant of the respondent company as distinguished from an independent contractor. A distinction between the two classes has been broadly stated to be that while in the case of the former there is a contract of service in the case of the latter, what comes into existence is a contract for services. *Times of Ceylon v. Nidahas Karmika Saba Velanda Sevaka Vurthiya Samithiya*(1).

In *Stevenson Jordon and Narrison Ltd. v. Macdonald and Evans* (2) it was held that some work done by an accountant was within a contract of service and some work done by him was outside. Denning L.J. stated at pages 110, 111.

> "The test usually applied is whether the employer has the right to control the manner of doing the work. Thus in *Collins v. Herts County Council* (3) Mr. Justice Hilbery said 'The distinction between a contract for services and a contract of services can be summarised 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'. But in *Cassidy v. Ministry of Health* (4) Lord Justice Somerwell pointed out that the test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship. Lord Justice Somerwell went on to say: "one perhaps cannot get much beyond this" Was the contract a contract of service within the meaning which an ordinary person would give to the words?". I respectfully agree. As (Sir Raymond Evershed M. R.) has said, it is almost impossible to give a precise definition of the distinction. It is often easy to recognise a contract of service when you see it, but difficult to say wherein 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 taximan and a newspaper contributor are employed under a contract for services".

Then Denning L. J. goes to the test which he indicates at page 111.

> "One features 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".

In *Montreal Locomotive Works Ltd. v. Montreal and A. G. for Canada* (5) Lord Wright said thus:

> "In earlier cases a single test, such as the presence or absence of control was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (i) control (ii) ownership of the tools (iii) chance of profit (iv) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business in the sense of carrying it on for himself or on his own behalf and not merely for a superior".

In *Bank voor Handel en Schespvaart N. V. v. Slatford* (6) Denning L. J. said.

> ". . . the test of being a servant does not rest nowadays on submissions to orders. It depends on whether the person is part and parcel of the organisation".

In the American case of *U. S. v. Silk* (7) Silk sold coal by retail, using the services of two classes of workers, unloaders and truck drivers. The unloaders moved the coal from railway vans into bins. They came to the yard when they wished and were given a wagon to unload and a place to put the coal. They provided their own tools and were paid so much per ton for the coal they shifted. The question was whether certain men were 'employees' within the meaning of that word in the Social Security Act 1935. The Judges of the Supreme Court decided that the test to be applied was not "power of control, whether exercised or not, over the manner of performing services to the undertaking but whether the men were employees 'as a matter of economic realty'. All nine Judges held that these men were employees.

In *Market Investigations Ltd. v. Minister of Social Security* (8) it was held that a part time interviewer engaged by a market research Company was under a contract of service. Cooke J. observed at page 737.

> "The observation of Lord Wright, of Denning L. J. and of the Judges of the Supreme Court in the U.S.A. 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".

It thus appears from the above cases that the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service. Control is just one of many factors whose influence varies according to circumstances. The test which emerges from the authorities seems to me, as Denning L. J. said, whether on the one hand the employee is employed as

part of the business and his work is an integral part of the business or whether his work is not integrated on to the business but is only accessory to it or as Cooke J. expressed it, the work is done by him in business on his own account.

It would appear from the evidence of Bawa the Managing Director of the respondent company, that the respondent was carrying on a tailoring business for many years and had a tailoring department. All accounts are kept by the staff of respondent company. All payments by customers are collected by the staff of the respondent company and every month the amount due to the applicant is calculated and paid. The mode of calculation was different in that a certain percentage of the collection is paid to the applicant. It is abundantly clear from the evidence of the Managing Director that the applicant's work was an integral part of the respondent's business. It was part and parcel of the organisation.

The applicant 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.

The applicant was not on par with the other staff of the respondent because the mode of payment was different but he still remained part and parcel of the organisation.

I hold that the appellant was an employee within the meaning of Industrial Disputes Act and entitled to maintain this application before the Labour Tribunal as 'workman'. The President misdirected himself on the law in coming to the finding that the appellant was an independent contractor.

The other matter which arises for decision in this appeal is whether there was termination by the respondent Company or whether the appellant left of his own accord.

The appellant's evidence was that the respondent Company stopped the work of the appellant and terminated his services from 11th May 1973. According to appellant on 8th May 1973 Hussein Marikar Bawa called him and asked him to give

in writing if he wanted higher payment for the work done as he had to place it before the Board. On the following day appellant gave the letter A1 dated 9.5.73 in which he alleged that Marikar Bawa threatened him. According to appellant thereafter Marikar Bawa had called all the salesmen and instructed them not to give work to appellant. He thereafter sent the letter A3 dated 15.5.73 addressed to all the Directors wherein appellant alleges that his work has been stopped from 11.5.73. The respondent Company replied by the letter R6 dated 26.5.73 wherein the respondent Company denies having stopped work and requesting appellant to come on 30.5.73.

On 7.6.73 the applicant-appellant made his application to the Labour Tribunal for relief alleging unjustifiable termination. Appellant did not go and meet the Director on 30.5.73 as requested in the letter R6. This letter was produced by the Director when he gave evidence in cross-examination before the Labour Tribunal.

The appellant admitted in evidence that he did not receive any letter of termination nor did anybody say that his services were terminated. Although appellant's position was that his work was stopped, on 11th May 1973 he stated that he continued to work till 25th May in respondent's premises, in order to complete his work.

The Managing Director Bawa stated in evidence that he did not stop the work of appellant from 11th May. He stated that after he sent the letter A3 dated 15.5.73, the appellant came and asked his pardon and asked for an advance of Rs. 2000/- to go on a pilgrimage to Kataragama. This money was given to appellant and he promised to come back within two weeks and start work again, instead of which appellant filed the application in the Labour Tribunal on 7.6.73.

Appellant admitted in evidence that he received Rs. 2000/- from Bawa on 28.5.73 for which he signed a receipt but at first he tried to make out that it was part of the moneys due to him but later admitted that it was an advance. The appellant at

first denied that he went to Kataragama but later admitted that after he returned from Kataragama he filed his application in the Labour Tribunal.

It would appear from appellant's evidence that after he sent the letter A2 on 9.5.73 he stopped going to work and followed it with letter A3 dated 15.5.73 and made out a case to file an application before the Labour Tribunal.

The President's finding on the evidence is that there has been no termination by the respondent but that the appellant on his own stopped going to work. I do not see any reason to interfere with this finding which is amply supported by the evidence.

As there has been no termination by the respondent the appellant cannot maintain his application before the Labour Tribunal.

The appeal is dismissed without costs.

Appeal dismissed.