BLANKA DIAMONDS (PVT.) LTD
v
VAN ELS

SUPREME COURT
G. P. S. DE SILVA, J.
WIJETUNGA, J.
BANDARANAYAKE, J.
SC 120/97
SC SPL LA 181/97
CA 601/96
JANUARY 22, 1998
MARCH 17, 1998
APRIL 3, 1998

Employees Trust Fund Act No. 46 of 1980 – Liability on the employer to contribute to ETF – Who is an employer – Terms and conditions in the letter of appointment – Applicability of section 114 Evidence Ordinance – Contractual Nexus.

The 1st respondent, a Belgium national was employed as the Managing Director of the appellant company incorporated in Sri Lanka and approved by the Board of Investment. The Board of the Employees Trust Fund required the appellant company to settle the ETF dues. The appellant company sought to quash that decision by way of a *writ of certiorari* in the Court of Appeal. The application to the Court of Appeal was dismissed on a technical objection raised.

The appellant company sought and obtained special leave to appeal from the Supreme Court on the question whether the appellant company was the employer of the 1st respondent.

It was contended that, the 1st respondent was offered employment with the appellant company as its Managing Director by a document signed by one P Chairman of a Company incorporated in Belgium – ZP was the Chairman of both Companies. It was alleged that there was no contractual nexus between the appellant and the 1st respondent and that the appellant Company was not the employer.

The appellant company further contended that, in terms of the letter of appointment the 1st respondent received his salary in Belgian Francs in Belgiam and a cost of

living allowance in Sri Lanka payable in Sri Lankan Rupees. The letter of appointment of the 1st respondent was issued under the hand of the Chairman of Z Company. In the circumstances, it was contended that Z Company was the employer of the 1st respondent and not the appellant company.

Held

(1) On an examination of the documents, it appears that the 1st respondent was an employee of the appellant company. The letter of appointment is self contradictory as regards the question of the 1st respondent's employer; in that while the definition refers to a Belgian Company as the employer, under scope of employment, it states that, the employee shall be employed by the company as Managing Director - which is an obvious reference to the appellant company.

The Z company is not registered in Sri Lanka nor does it have any operations in this country. The only connecting link between the two companies is the Chairman.

(2) In the letter of appointment, under the heading "proper law" it is stated that "the agreement should be governed by the law in force in Sri Lanka and the employer agrees to submit to the jurisdiction of the Courts of that State.

(3) If as contended Z company was the employer, there was no need for the Laws of Sri Lanka to have been the law applicable to the contract of employment and for the employee to agree to submit to the jurisdiction of the Courts of Sri Lanka.

The liability to make contributions to the ETF cannot be waived.

(4) The only common factor was that there was a Chairman for both companies; but his status in the appellant company does not confer on him the privilege of making use of his dual capacities as Chairman of two respondent companies incorporated under the Laws of Belgian and Sri Lanka to foist upon the Sri Lanka company as Managing Director who is said to be an employee of the Z company.

The 1st respondent did not perform any services for the Belgium Company as he was recruited to the post of Managing Director of the appellant company, which he has served in Sri Lanka.

(5) Nowhere has the appellant claimed that it was a subsidiary.

The Z company could select such an employee for appointment to the appellant company, if so requested by the latter, but in that event the Z Company would be acting in the capacity of an agent of the appellant company for such selection and no more. The contract of employment between such selectee and the employer would then have to be between the 1st respondent and the appellant company.

Per Wijetunga, J.

> "The appellant having used the services of the 1st respondent as its Managing Director there can be no doubt that the only disenable contract which can be implied is between the appellant and the 1st respondent".

Per Wijetunga, J.

> "If in fact the 1st respondent was an employee of Z Company and his emoluments paid by that company, the appellant could easily have provided to Court proof of such payments by the Z Company as the Chairman of the appellant company was the Chairman of the Z Company. The presumption under section 114 of the Evidence Ordinance could be drawn".

Per Wijetunga, J.

> "The letter of appointment to my mind is a clumsy attempt at circumventing the laws applicable to workmen in Sri Lanka, by resorting to the subterfuge of purporting to define the 'Company' to mean the Belgium Company, though the very document offered the 1st respondent employment with the appellant company in Sri Lanka, as its Managing Director".

APPEAL from the judgment of the Court of Appeal reported in 1997 – 1 Sri LR 360.

Case referred to:

Carson Cumberbatch & Co. Ltd. v *Nandasena* – 77 NLR 73

R. K. W. Gunasekera with *J. C. Weliamuna* for appellant

Chula Bandara for 1st respondent.

Shavindra Fernando SSC for 2nd respondent.

Cur.adv. vult

May 6, 1998.

WIJETUNGA, J.

The appellant, a company duly incorporated in Sri Lanka and approved by the Board of Investment, is carrying on the business of gem cutting and polishing for export to Belgium. The 1st respondent who is a national of Belgium was employed as Managing Director of the appellant company from 01.06.92 to 23.02.95. He claims that the contributions due to the Employees Trust Fund (ETF) on his behalf for the above period of employment had not been remitted by the appellant. The ETF Board, by its letters dated 27.07.96 (P6), 18.08.95 (P8), 29.08.96 (P15) and 29.08.96 (P16) required the appellant to settle all ETF dues, failing

which legal proceedings would be instituted for the recovery of the same. Thereupon, the appellant invoked the jurisdiction of the Court of Appeal for the issuance of a mandate in the nature of a writ of *Certiorari* to quash the decisions/directions of the 2nd respondent in regard to the complaints of the 1st respondent, and for the issuance of a mandate in the nature of a Writ of Prohibition preventing the 2nd respondent from proceeding further against the appellant. The decisions/directions aforesaid were those contained in the letters marked (P6), (P8), (P15) and (P16).

The Court of Appeal, by its judgment dated 04.04.97 ('A'), held that the appellant had failed to make a full and frank disclosure of all matters to Court, had been remiss in complying with its contractual obligations to Court and to disclose *vberrima fides* and proceeded to dismiss and reject the application *in limine* with costs in a sum of Rs. 10,500/= payable to the 1st and 3rd respondents.

By the present application, the appellant had sought leave to appeal from the judgment of the Court of Appeal aforesaid. On the application being supported, this Court had granted special leave to appeal on the question whether on the facts available to Court, the appellant company was the employer of the 1st respondent.

The facts relevant to this matter are briefly as follows:- The 1st respondent was offered employment with Blanka Diamonds (Pvt) Ltd. of Phase III, IPZ, Katunayake, Sri Lanka (appellant) with effect from 01.06.92, as its Managing Director, by the document marked (P2), by Fr. Van den Eynde & Zonen B.V.B.A., (Belgian company), said to be a body corporate in Belgium. The said letter of appointment was signed by Patrick Van den Eynde the Chairman of the Belgian company. Patrick Van den Eynde is the Chairman of both the appellant company as well as the Belgian company aforementioned. It is the position of the appellant that, in terms of clause 4 of the letter of appointment (P2), the 1st respondent received his salary in Belgian francs in Belgium but was also entitled to a cost of living allowance in Sri Lanka which was payable in either Sri Lankan rupees or in Belgian francs.

The 1st respondent was issued with a letter of suspension dated 20.02.95 (P3) under the hand of the Chairman of the Belgian company. His services were terminated on 23.02.95 by the letter of termination (1R2) – (English translation (1R3)), which too is signed

by Patrick Van den Eynde as Business Manager of the Belgian company as well as of the appellant company.

The appellant states that the 1st respondent made a complaint. to the Deputy Commissioner of Labour, Negombo by letter dated 05.05.95, regarding his EPF and ETF contributions, which matter is yet pending.

Thereafter, the 2nd respondent Board directed the appellant to settle all arrears of ETF contributions in respect of the 1st repondent, by the letters referred to above. The appellant took up the position that it is not the employer of the 1st respondent. When threatened with legal action by the ETF Board by (P15) and (P16), the appellant made Application No. 601/96 to the Court of Appeal, for Writs of *Certiorari* and Prohibition, which was dismissed as aforementioned.

The Employees Trust Fund Act No. 46 of 1980 (Cap. 622) defines an 'employer' in Section 44 in the following terms: *"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 firm, company, corporation or trade union) and any person, who on behalf of any other person, employs any workman, and includes the legal heir, successor in law, executor or administrator and liquidator of a company and in the case of an unincorporated body, the President or the Secretary of such body, and in the case of a partnership, the managing partner or manager".*

It was the contention of learned counsel for the appellant that it was the Belgian company and not the appellant who was the employer of the 1st respondent. He referred us to the definition contained in the 1st respondent's letter of appointment (P2) which states that "throughout his letter, except where otherwise required..... the company means Fr. Van den Eynde & Zonen B.V.B.A., Pelikaanstraat 62, 2018 Antwerpen, Belgium," He further drew our attention to the application made by the 1st respondent to the Labour Tribunal of Negombo (P17) wherein the 1st respondent referred to two employers, viz. (1) Blanka Diamonds (Pvt) Ltd., and (2) Fr. Van den Eynde & Zn. B.V.B.A. and claimed that he was "employed by the 2nd Employer as the Managing Director of the 1st Employer Company from 1st June 1992". He submitted, therefore,

that there was no contractual nexus between the appellant and the 1st respondent and the appellant consequently was not the employer of the 1st respondent, within the meaning of the definition contained in the ETF Act.

Even on an examination of the very documents submitted by the appellant, it appears that the 1st respondent was an employee of Blanka Diamonds (Pvt) Ltd., the appellant company. The letter of appointment (P2) is itself self-contradictory as regards the question of the 1st respondent's employer, in that, while the definition refers to the Belgian Company as the employer, under scope of employment it states that "the employee shall be employed by the company as Managing Director" which is an obvious reference to the appellant company.

The letter of appointment further states that the 1st respondent is offered "employment with Blanka Diamonds (Pvt) Ltd. of Phase III, IPZ Katunayake, Sri Lanka". Admittedly, the Belgian company is not one registered in Sri Lanka nor does it have any operations in this country. It is referred to in this application as "a body corporate in Belgium and having its registered office in Antwerp in Belgium." The only connecting link between the two companies is the Chairman, Patrick Vas den Eynde who is the Chairman of the Belgium company as well as the appellant company. As the 1st respondent was clearly not the Managing Director of the Belgian company, the company referred to in paragraph 3 of (P2) must necessarily be the appellant company and the reference therein to the "Management of the Company" too should be to the Management of the appellant company.

Again at paragraph 14 thereof, under the heading "proper law" it is stated that "this Agreement shall be governed by the law in force in Sri Lanka from time to time and the Employee hereby agrees to submit to the jurisdiction of the Courts of that State." If, as contended, the 1st respondent was an employee of the Belgian company, there was no need for the law of Sri Lanka to have been the law applicable to the contract of employment and for the employee to agree to submit to the jurisdiction of the courts of Sri Lanka.

It is ironical, therefore, in that context, that the appellant chose to state in paragraph 7 of its amended petition dated 30.09.96 in

the Court of Appeal *inter alia* that "the Belgium law requires termination of a workman within three days of suspension. Accordingly on 24th February, 1995, the services of the 1st respondent was terminated by his employer the Belgium Company", which is in the teeth of the above provision of the agreement.

The letter of suspension (P3), in not less than three places, refers to the 1st respondent as "Managing Director of Blanka Diamonds (Pvt) Ltd.", and that he is suspended from that post. Once again, in the charges brought against the 1st respondent by (P4) dated 24.02.95, it is repeatedly stated that the 1st respondent acted in his "position of Managing Director of Blanka Diamonds (Pvt) Ltd."

In fact, in (P4) under the heading "Overview of the proof of above charges" it is stated in paragraph 2 as follows:- "Proof of charge (2): engaging the company into illegal acts.

On February 18th Mr. Van Els introduced an illegal payment system for the personnel of Blanka Diamonds (Pvt) Ltd. in order to avoid the payment of EPF contributions for new employees". This further supports the position that he was doing so in his capacity as Managing Director of the appellant company.

Thus, the sole basis of the petitioner's claim that the 1st respondent was not its employee is the letter of appointment (P2), to the contents of which reference has already been made.

The letter (P12) dated 19.02.93 addressed by the 1st respondent to the Chairman/Managing Director, Blanka Diamonds (Pvt) Ltd., FTZ, Phase III, Katunayake, (which the present Managing Director of the appellant company admits, in his affidavit dated 11.02.97 filed in the Court of Appeal, was voluntarily given by the 1st respondent), is also very revealing. It states in paragraph 1 that "I wish to inform you that I have been receiving all my dues from Blanka Diamonds (Pvt) Ltd. for services rendered by me as per the terms of the agreement from the date of commencement of my employment. Further, I wish to mention that as you are already making contributions towards a Social Security Scheme outside Sri Lanka on expatriate officers, I do not expect you to contribute towards EPF on ETF in Sri Lanka on my behalf."

It had been written to the Chairman/Managing Director of the appellant company over two years prior to the termination of the 1st respondent's services and acknowledged *inter alia* the receipt of all dues from the appellant company for services rendered by the 1st respondent and seeks to exempt the appellant company from making contributions to the EPF/ETF in Sri Lanka. This is implicit acknowledgement of the fact that the appellant company was the employer of the 1st respondent and was obliged in law to make EPF/ETF payments on behalf of the 1st respondent. Whether such payments can be avoided by agreement between employer and employee is another matter, which will be dealt with presently, but that letter supports the position that there was consensus between the appellant and the 1st respondent as regards the employer-employee relationship.

As regards the liability to make contributions to the ETF, there can be no waiver of contributions by agreement between employer and employee as section 16(1) of the ETF Act provides that "the employer of every employee to whom this Act applies shall, in respect of each month during which such employee is employed by such employer, be liable to pay in respect of such employee, to the fund, on or before the last day of the succeeding month, a contribution of an amount equal to 3 *per centum* of the total earnings of such employee from *his employment* under such employer during that month".

Learned counsel for the appellant submits that if the Belgian company was only an agent for Blanka Diamonds (Pvt) Ltd., then there is no necessity for the Belgian company to sign the letter of appointment and thereafter to suspend and terminate the 1st respondent. He states that all vital decisions pertaining to the petitioner have been taken by the Belgian company. It is indeed in regard to its connection with the Belgian Company that the appellant has concealed itself with a veil of secrecy. As stated above, the Chairman of both companies is one and the same person. The recruitment of the 1st respondent as the Managing Director of the appellant company has been done in Belgium and the argreement signed by the parties is in itself contradictory as regards the status of the 1st respondent *vis-a-vis* the two companies. On the one hand, in the definition clause it is sought to

refer to the Belgian company as the 'company' referred to in the agreement, but in the self-same document the word 'company' has been used to mean Blanka Diamonds (Pvt) Ltd., the appellant company. This is perhaps why the 1st respondent referred to two employers in his application to the Labour Tribunal. Clearly, the 1st respondent did not perform any services for the Belgian company as he was recruited to the post of Managing Director of the appellant company, which he has admittedly served in Sri Lanka. Nowhere has the appellant claimed that it was a subsidiary of the Belgian company.

In fact, when the 1st respondent claimed in paragraph 6 of his affidavit dated 03.12.96, filed in the Court of Appeal, that

" (a) *Fr. Van den Eynde & Zonen B.V.B.A. is the Parent company based in Belgium which owns 99.9% of the issued share capital of the petitioner company and Mr. Patrick Van den Eynde is the Chairman of the said parent and the petitioner companies.*

(b) *The said Parent Company selected me as the Managing Director of the petitioner company and a letter of appointment dated 1st June, 1992 marked 'P2' by the petitioner, was issued by the parent company on behalf of the petitioner."*

the present Managing Director, by his counter affidavit dated 11.02.97, categorically stated that the Belgian company does not hold any shares in the appellant company, (in proof of which he annexed a certificate issued by the Chairman of that company), and further denied that the letter of appointment was given on behalf of the appellant or that the Belgian company is the parent company as alleged by the 1st respondent.

Thus, the appellant's position undoubtedly is that these two companies are distinct legal entities, operating independently of each other in two different countries.

The question then arises as to the capacity in which the Belgian company purported to offer employment to the 1st respondent as Managing Director of the appellant company. Admittedly, there was no legal nexus between the two companies. The only common

factor was that Patrick Van den Eynde was the Chairman of both companies. The Articles of Association of the appellant company show that he is one of the 'Life Directors'. But, his status in the appellant company does not confer on him the 'privilege' of making use of his dual capacities as Chairman of two different companies incorporated under the laws of Belgium and Sri Lanka, to foist upon the Sri Lankan company a Managing Director who is said to be an 'employee' of the Belgian company. The Belgian company could select such an employee for appointment to the appellant company, if so requested by the latter. But, in that event, the Belgian company would be acting in the capacity of an agent of the appellant company for such selection and no more. The contract of employment between such selectee and the employer would then have to be between the 1st respondent and the appellant company.

The letter of appointment (P2), to my mind, is a clumsy attempt at circumventing the laws applicable to workmen in Sri Lanka, by resorting to the subterfuge of purporting to define the company to mean the Belgian company, though the very document offered the 1st respondent employment with the appellant company in Sri Lanka, as its Managing Director. The evidence of the appellant company having employed the 1st respondent is so overwhelming that a contract of employment between them must necessarily be implied, despite the contents of this dubious document (P2).

I see no difficulty in applying the principles laid down in *Carson Cumberbatch & Co. Ltd.* v *Nandasena* (1) on which learned counsel for the appellant heavily relied, to the facts of this case. That case recognizes (at page 81) that 'employ' means 'use the services of' a person and states (at page 82) "that when the first part of the definition of the term 'employer' speaks of 'a person who employs a workman' it contemplates a person who employs another under a contract of services, express or implied", (emphasis added). Again, (at page 84) the Court has expressed the opinion that "the person referred to as a person employing a workman in each of the three limbs of the definition is intended to refer to a person who is under contractual obligation to the workman". In the instant case, the appellant having used the services of the 1st respondent as its Managing Director, there can be no doubt that the only discernible

contract which can be implied is between the appellant and the 1st respondent. Though a strenuous attempt was made to show that there was no contractual obligation on the part of the appellant towards the 1st respondent, the material aforementioned clearly indicates that in truth and in fact, it was the appellant company which employed the 1st respondent as its Managing Director.

Even the letter of termination – English translation (1R3) – shows that Patrick Van de Eynde has signed in dual capacities, i.e. as 'Business Manager of the Belgian company as well as of the appellant company, making specific reference to the fact that the 1st respondent had functioned as the Managing Director of the appellant company.

Though the 3rd respondent produced in the Court of Appeal marked (3R4), a copy of a letter addressed by the 1st respondent to the Director, Enforcement Unit, ETF Board dated 07.12.95, enclosing four schedules containing details of his salary particulars for the years 1992 to 1995, the present Managing Director of the appellant company, in his counter affidavit dated 11.02.97, was content to merely deny that the 1st respondent was an employee of the appellant and to state that the appellant not being the employer of the 1st respondent, was not in a position to comment thereon as it was not in possession of the payment schedules. This was in the face of the 1st respondent's categorical assertion in his affidavit dated 03.12.96 that he was paid his salary in Belgian francs to his bank account in Luxembourg through a bank account of the appellant in Switzerland and that his living allowance was paid in Sri Lanka by the appellant in both Rupees and American Dollars as per schedule marked (1R1).

If, in fact, the 1st respondent was an employee of the Belgian company and his emoluments were paid by that company, the appellant could easily have provided to Court proof of such payments by the Belgian company, as Patrick Van den Eynde was the Chairman of both companies and was in a position to furnish such particulars from the Belgian company. In these circumstances, the Court is entitled to draw the presumption under illustration (f) of section 114 of the Evidence Ordinance, against the appellant.

For the reasons aforesaid, I hold that on the facts available to Court, the appellant company was the employer of the 1st respondent.

The appeal is accordingly dismissed with costs in Rs. 10,500/= each, payable to the 1st and 2nd respondents.

G.P.S. DE SILVA, C. J. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal dismissed.