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

1. Colombo Municipal Council,
   Town Hall,
   Colombo 07.
2. V.K.A. Anura,
   Municipal Commissioner,
   Colombo Municipal Council,
   Town Hall,
   Colombo 07.

2A. Dona Samarasinghe Champika
Thushari Roshanie Dissanayake,
Municipal Commissioner,
Colombo Municipal Council,
Town Hall,
Colombo 07.
Petitioners

CASE NO: CA/WRIT/274/2018

Vs.

1. R.P.A. Wimalaweera,
   Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat,
   No.41, Kirula Road,
   Colombo 05.

2. W.M.D.R. Weerakoon,
   Commissioner of Labour
   (Employees' Provident Fund),
   Department of Labour,
   Labour Secretariat,
   No.41, Kirula Road,
   Colombo 05.
3. E.C.P. Dabare,
   Special Investigation Division,
   Deputy Commissioner of Labour,
   Department of Labour,
   Colombo 05.
4. H.K. Mahinda Hettigoda,
   No.34, Peiris Mawatha,
   Dawalasinharama Mawatha,
   Modara,
   Colombo 15.

   Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Senany Dayaratne with Eshanthi Mendis for the Petitioners.
Dr. Charuka Ekanayake, S.C., for the 1st-3rd Respondents.
Niran Anketell with Hafeel Farisz for the 4th Respondent.

Argued on: 02.09.2020

Decided on: 14.10.2020

Mahinda Samayawardhena, J.

The 4th Respondent was appointed as a Distraining Officer/Rate Collector of the 1st Petitioner Colombo Municipal Council by P2 in 1978. P2 *inter alia* states the 4th Respondent shall enter into an Agreement with the Colombo Municipal Council for a period of one year prior to commencing work. The Colombo Municipal Council retained absolute power to terminate the Agreement even within that period, if the work of the 4th Respondent was found to be unsatisfactory. The work assigned to the 4th Respondent was to collect municipal rates due to the Colombo Municipal Council from members of the general public who had defaulted on payments. P2 says the 4th Respondent would be paid only a commission on his collection; no other salary or allowances would be paid. When the annual Agreements between the 1st Petitioner and 4th Respondent had come to an end by effluxion of time, new Agreements were entered into between the parties. As seen from the documents marked P6(a)-(d), the 4th Respondent was not allowed to carry out his work in 1996 despite an Agreement being in force, apparently due to concerns pertaining to misappropriation of collected rates. This shows the fragile nature of the job of the 4th Respondent. The last Agreement between the parties had been in 2016, after which no new Agreement was signed. By P8, the Colombo Municipal Council informed the 4th Respondent of its decision not to extend his "contract period" beyond 31.12.2016. It is thereafter that the 4th Respondent for the first time complained to the 1st Respondent Commissioner General of Labour by P9 about Employees' Provident Fund benefits not being paid to him by the Colombo Municipal Council for his employment as a Rate Collector. In P9, the 4th Respondent admits that during his

entire period of service as a Rate Collector he had not been given any promotions, salary increments etc. In fact, this is because the 4th Respondent was only entitled to a commission on what he collected as arrears of municipal rates. If he did not collect anything, he was not entitled to anything. Payment by way of commission is simple and straightforward.

There had been an inquiry by the 1st Respondent Commissioner General of Labour on the complaint P9. The Colombo Municipal Council says no decision was given after the inquiry, but it received Final Notice by P22, which is a warning prior to the institution of legal action, whereby the Colombo Municipal Council was required to pay a sum of Rs.3,249,535.74 to the 4th Respondent as payment in terms of the Employees' Provident Fund Act. Although I am not inclined to allow the application on this ground, I accept the complaint of the Colombo Municipal Council in this regard. Let me explain.

After receipt of the Final Notice P22, the Legal Officer of the Colombo Municipal Council sent P25 to the 1st Respondent, requiring the latter to issue a copy of the journal entries of the inquiry and the written submissions of the 4th Respondent. The 1st Respondent then sent P26 explaining the basis for P22. In other words, P22 dated 06.01.2018 is the decision and P26 dated 06.06.2018 is the reasons for the said decision.

However, when this matter was raised by the Colombo Municipal Council in the petition filed in this Court, the 1st Respondent tendered 1R6 dated 20.09.2017, stating that the decision with reasons had been pronounced on 20.09.2017. If this position is correct, i.e. that the decision with reasons was delivered on 20.09.2017, the 1st Respondent, in my view, could have easily

sent a copy of the detailed order 1R6 to the Legal Officer of the Colombo Municipal Council in reply to P25. There was absolutely no necessity to give reasons separately by P26. 1R6 dated 20.09.2017 and P26 dated 06.06.2018 are not the same, although the subject matter is the same. The 1st Respondent could not have first taken the decision and thereafter looked for reasons to justify it. That is not justice. It shall happen *vice versa*.

Be that as it may, let me now get back to the main issue.

The Petitioners have filed this application predominantly seeking to quash the P22 Final Notice and P26 reasons for the decision of the 1st Respondent that the 4th Respondent is eligible for benefits in terms of the Employees' Provident Fund Act.

Who is entitled to benefits under the Employees' Provident Fund Act No.15 of 1958, as amended? To my mind, this is a difficult question to answer. Learned State Counsel for the 1st Respondent rightly concedes *"The benefit of the Employees' Provident Fund Act accrues to an individual if he was in an employer-employee relationship during the material time and was so employed in a covered employment."* Learned Counsel for the 4th Respondent also admits this when he says "*The 4th Respondent is an employee in terms of the law and the employment is covered employment*". If I may put it in my own words, an employee (as opposed to an independent contractor) engaged in a covered employment is entitled to benefits in terms of the Employees' Provident Fund Act. This means, two conditions shall be satisfied: (a) the person shall be an employee and not an independent contractor; and (b) the employment shall be a covered employment. A word of caution: this does not

necessarily mean every "employee" in a "covered employment" is entitled to Employees' Provident Fund benefits.

The Employees' Provident Fund Act has been amended since its enactment and, from time to time, the subject Minister has made Regulations in terms of section 46 of the Act. For me, this has sometimes led to (at least apparently) irreconcilable, overlapping or contradictory positions within the statutory framework, resulting in the determination of who is entitled to Employees' Provident Fund benefits being more strenuous.

Let me now draw my attention to the statutory provisions in this regard. Section 8 of the Employees' Provident Fund Act reads as follows:

> *(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 by 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) to 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 purposes of the trade or business, or as a partner, of that person's spouse.

(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 employments.

(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 is amplified by Regulations 2-5 of the Employees' Provident Fund Regulations of 1958 read with the First Schedule thereto. These Regulations made by the Minister of Labour in terms of section 46 of the Employees' Provident Fund Act and published in Gazette No.11,573 dated 31.10.1958, have been amended from time to time. Let me quote the relevant Regulations for convenience:

COVERED EMPLOYMENTS

2. (1) Save as hereinafter provided in regulations 3 and 4 -

(a) every employment specified in the First Schedule to these regulations, and

(b) every employment outside Ceylon which is in connection with or for the purposes of, the trade or business of any employer in any employment referred to in that Schedule and which would be a covered employment if it were in Ceylon,

shall be a covered employment.

(2) Every person employed in any covered employment other than -

(a) a person holding the office of director in respect of his employment as such director,

(b) a person who is a partner in any partnership in respect of his partnership,

(bb) a person who is employed under any local authority and for whom superannuation benefits or benefits on termination of employment are provided under any Provident Fund or Pension Scheme established under any other written law,

(c) a person who is employed in a managerial, executive or technical employment and for whom superannuation benefits or benefits on termination of employment are provided under any provident fund or pension scheme or any other fund or scheme, established or administered outside Ceylon, and

(d) a person who is employed outside Ceylon, for the purpose of such employment but who is not ordinarily resident in Ceylon,

shall be an employee to whom the Act applies.

3. Any employment on any work which is usually performed by the day or by the job or by the journey shall not be a covered employment.

4. The employment by any employer of that employer's spouse in the service or for the purposes of the trade or business of that employer shall not be a covered employment.

5. The age prescribed for the purposes of sub-section (3) of section 8 of the Act shall be fourteen years in respect of every covered employment.

FIRST SCHEDULE

Every employment other than employment -

(a) under the Government of Ceylon; or

(b) under the Local Government Service Commission established under the Local Government Service Ordinance, No. 43 of 1945; or

(c) under of any local authority, being a local authority in respect of the employees of which a pension scheme or provident fund has been established under any other written law.

In this Schedule the expression "local authority" means any Municipal Council, Urban Council, Town Council or Village Council.

It is relevant to note that by Regulation 3, independent contractors are excluded from the application of the Employees' Provident Fund Act. If I may repeat for emphasis: "*Any employment on any work which is usually performed by the day or by the job or by the journey shall not be a covered employment.*" The Court shall, in my view, give purposive interpretation to this Regulation, as literal interpretation might lead to absurdity.

Let me pause for a while to say this. There is a misconception that the broader meaning given to the word "employee" in section 47 of the Employees' Provident Fund Act takes away the rigors of Regulation 3 in the applicability of the Act. But this is not so. Section 47 of the Employees' Provident Fund Act (which is the interpretation section) reads as follows:

> *"employee" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, or oral or in writing, and whether it is a contract of service or of apprenticeship or a contract personally to execute any work of labour, and includes any person ordinarily employed under any such contract, whether such person is or is not in employment at any particular time.*

This definition does not *per se* expand the scope of entitlement to Employees' Provident Fund benefits. This definition speaks of "contract of service" but does not speak of "covered employment". Section 8(3) of the Employees' Provident Fund Act is specific when it declares: "*Subject to the other provisions of the Act, every person over a prescribed age who is employed by any other person <u>in any covered employment shall be an employee to</u>*

whom this Act applies." "Covered employment" is defined by way of the Regulations referred to earlier. Hence, "*any person who has entered into or works under a contract with an employer in any capacity*" including "*a contract personally to execute any work of labour*" can be an employee, but may still not be eligible for the benefits of the Employees' Provident Fund.

To have an overall understanding of this complex area of law, let me refer to two Regulations made in terms of the Act, which deal with commission-based payments and commission-based employments.

Section 47 of the Act defines the word "earnings" as follows:

> *(a) wages, salary or fees;*
>
> *(b) cost of living allowance, special living allowance and other similar allowances;*
>
> *(c) payment in respect of holidays;*
>
> *(d) the cash value of any cooked or uncooked food provided by the employer to employees in prescribed employments and any such commodity used in the preparation or composition of any food as is so provided, such value being assessed by the employer subject to an appeal to the Commissioner whose decision on such appeal shall be final;*
>
> *(e) meal allowance; and*
>
> *(f) such other forms of remuneration as may be prescribed.*

According to the *Labour Code of Sri Lanka* – a compilation of labour laws published in 2010 by the Ministry of Labour

Relations and Productivity Promotion – Regulation 60(3) of the Employees' Provident Fund Regulations of 1958 has been amended by Gazette No.14,711 dated 02.09.1966. After the amendment, Regulation 60(3) reads as follows:

> *For the purposes of section 47 of the Act, the earnings of any employee shall include remuneration paid to him at piece rates and remuneration, if any, paid to him by way of commission for any services rendered to the employer.*

It is important to realise that the expansion of the definition given to the word "earnings" does not entitle an employee paid by way of commission to Employees' Provident Fund benefits. The definition of the word "earnings" is there to decide the quantum of contributions to be made to the Employees' Provident Fund, both by the employer and employee, and not to decide who is an employee or what is a covered employment.

I must also make reference to the Regulations published in Gazette No.14,936 dated 11.12.1970. The said Regulations have been made under section 10(3) of the Act.

Section 10 of the Act enacts:

> *(1) Subject to the provisions of subsection (3) of this section and of section 27, an employee to whom this Act applies shall, in respect of each month during which he works in a covered employment, be liable to pay to the Fund a contribution of an amount equal to eight per centum of his total earnings from that employment during that month.*
>
> *(2) Subject to the provisions of subsection (3) of this section and of section 27, the employer of every employee to whom*

> *this Act applies and who is liable to pay contributions to the Fund shall, in respect of each month during which such employee is in a covered employment under such employer, be liable to pay to the Fund on or before the last day of the succeeding month, a contribution of an amount equal to twelve per centum of such employee's total earnings from that employment during that month.*
>
> *(3) The liability of an employee in a covered employment and his employer to pay contributions under this section shall commence on the day immediately after the date fixed in relation to such employment by the Minister by Order published in the Gazette. Different dates may be fixed under this subsection for different classes of employees in the same covered employment.*

Section 10(3) provides for the Minister to fix the dates for commencement of Employees' Provident Fund contributions by the employer and employee in respect of certain covered employments. By Gazette No.14,936, the Minister has fixed 31.12.1970 as the date of commencement of payment in respect of the covered employments stated therein.

I will advert to one item in the said Gazette, i.e. item 23(e), which refers to commission agents. It reads as follows:

> *Employment in the service of any undertaking, not being an undertaking carried on by a person as an undertaking in which only members of his family are employed in which less than three persons are employed and which is established wholly or partly for the purpose of carrying on the business of…(e) a commission agent.*

Although "commission agent" is referred to in this item as a "covered employment", closer scrutiny reveals that all commission agents cannot be considered persons engaged in covered employment. If I may repeat, according to this item, a person who is in employment in the service of an undertaking (job/business/piece of work) established wholly or partly for the purpose of carrying on the business of a commission agent can be considered a person engaged in covered employment. This item gives prominence to "*the business of a commission agent*", not the role of a commission agent *per se.*

Be it noted that the Regulations mentioned above do not repeal or replace the express provisions in Regulation 3, i.e. "*Any employment on any work which is usually performed by the day or by the job or by the journey shall not be a covered employment*", which, as I have already stated, excludes independent contractors from claiming benefits under the Employees' Provident Fund Act.

Whether a person is an employee in the legal sense (contract of service) or an independent contractor (contract for service) is a vexed question without a straightforward answer. Only the former is entitled to statutory benefits such as the Employees' Provident Fund, not the latter. Many theories and tests, including the Control Test, Integration Test, Dominant Impression Test, Economic Reality Test, Mutuality of Obligation Test, and Multiple Factor Test, have been formulated to address this question. More will be added to this list in time to come. But none of these tests are decisive. The answer to the question of whether someone is an employee or independent contractor invariably depends on the unique facts and circumstances of

each individual case. Hence, I will deal more with facts than theories, since this is a Court of Law and not an Academy of Law, as Chief Justice Abrahams stated as far back as in 1936, in *Vellupillai v. The Chairman, Urban District Council 39 NLR 464 at 465.*

Rate Collectors collect dues on warrants issued by the Municipal Commissioner and return collection receipts to the Municipal Council on a weekly basis. The 4th Respondent's payment was a 7% commission on the default rate collection, which was settled on a quarterly basis by the Colombo Municipal Council. No separate monthly salary or any other remuneration was paid. Unlike other salaried employees of the Colombo Municipal Council, the 4th Respondent was not entitled to overtime payments, allowances, medical benefits, promotions, increments etc. There was no necessity for him to mark attendance or follow the regular protocols for taking leave or the like. This has been admitted by the 1st Respondent in P26 containing the reasons for the impugned decision.

I have already stated that the documents marked P6(a)-(d) point to the fact that for a period of about one year in 1996 the 4th Respondent had not been permitted to collect rates due to some alleged wrongdoing regarding collection of rates. No inquiry seems to have been held or disciplinary action taken against the 4th Respondent. If he were an employee, a different procedure would have been adopted. If the work of an independent contractor is unsatisfactory or questionable, he is not given work; he cannot be dismissed or subjected to disciplinary action.

Entering into third party Agreements to collect default rates is, in my view, recognised *inter alia* under section 40(1)(g) of the

Municipal Councils Ordinance, which says the Municipal Council shall have the power "*to enter into any contract with any person for any work to be done or services to be rendered*". Section 228 provides for such contracts to be reduced to writing, as had been done in the instant case. Section 229 provides for sufficient security to be taken for the due performance of the contract. The requirement of a security deposit was informed to the 4th Respondent in the letter P2 itself, even before the parties entered into an Agreement.

In terms of section 252 of the Municipal Councils Ordinance, warrants for recovery of rates and taxes can be issued "*to some collector or the other officer of the Council*", thereby distinguishing between Rate Collectors and other officers of the Municipal Council apparently discharging similar functions. The phrase "*some collector*" itself speaks volumes of the nature of the job of the 4th Respondent. According to section 253, arrears of rent as opposed to rates can be collected by an authorised officer of the Council assisted by his assistants, not by Rate Collectors. According to the appointment letter P2, the 4th Respondent is not assisted by employees of the Council in collecting default rates. He does so on his own without any compulsion by the Municipal Council.

I have already stated that the yearly Agreements entered into between the 1st Petitioner and 4th Respondent had express clauses to specify it was not a contract of service but a contract for service, the Colombo Municipal Council was not obliged to retain the services of the 4th Respondent during the relevant periods stated in the Agreements, and the 4th Respondent was

not entitled to remuneration other than the stipulated commission fee.

Although these clauses are not decisive, since the Municipal Councils Ordinance itself provides for entering into such written independent Agreements (for contracts for services as opposed to contracts of services), I consider the said clauses to be binding on the parties.

P6(c) goes to show that the father and elder brother of the 4th Respondent had also been Rate Collectors. However, it does not appear they made claims for benefits in terms of the Employees' Provident Fund.

In the reasons for the decision given in P26, the 1st Respondent says the 4th Respondent acted as an agent of the Colombo Municipal Council in collecting default rates and was therefore an employee of the Colombo Municipal Council. Section 311 of the Municipal Council Ordinance distinguishes between duly appointed officers or servants of the Council and contractors or agents to whom collection of rates is entrusted. Hence, although a Rate Collector can act as an agent of the Colombo Municipal Council, he does not automatically become eligible to claim benefits in terms of the Employees' Provident Fund Act.

Another reason given by the 1st Respondent in P26 to justify the conclusion that the 4th Respondent was an employee entitled to Employees' Provident Fund benefits is that the 1st Petitioner had issued an identity card to the 4th Respondent, describing him as a Rate Collector of the Colombo Municipal Council. In the absence of proper identification, the general public would not be inclined to make default payments to Rate Collectors. The

warrants given to Rate Collectors signed by the Municipal Commissioner is a similar factor. Such warrants confer authority on Rate Collectors to emphasise compliance from the public. Neither the said identity card nor the warrants have a direct bearing on the employment status of the 4th Respondent. These are not critical factors in deciding whether the 4th Respondent was an employee or independent contractor.

The 1st Respondent in P26 says the 4th Respondent was part and parcel of the Colombo Municipal Council, which may be meant to suggest he played a pivotal role there. I am unable to accept this. The services of the 4th Respondent would have been helpful to the institution but cannot be said to have been an integral part thereof. The job of a Rate Collector is limited to collecting rates from defaulters, that also outside of the premises of the Colombo Municipal Council. In the Agreements signed between the parties, there is a clause to say "*The Rate Collector shall not accept or collect any arrears of Rates in respect of a warrant/demand notice issued to the Rate payer from any person or persons who come to pay such arrears to Town Hall premises*." This shows the nature of the 4th Respondent's job. Citizens regularly pay rates to the Municipal Council. Dues of defaulters are collected through independent contractors. Monies that remain unpaid are recovered through legal action.

The 1st Respondent in P26 says the longstanding reciprocity of obligations between the 1st Petitioner and 4th Respondent, spanning 38 years, can be considered a service contract. The relationship between the parties was premised on separate Agreements entered into on a yearly basis. The services of the 4th Respondent were rendered on independent contracts which

cannot be said to form an employer-employee relationship in the strict legal sense that would attract application of the Employees' Provident Fund Act.

In the unique facts and circumstances of this case, I take the view that the relationship between the Colombo Municipal Council and the 4th Respondent was not that of employer-employee, but the 4th Respondent was only an independent contractor of the Municipal Council. Hence the Employees' Provident Fund Act is inapplicable in this instance.

In view of the above finding, there is no necessity for me to consider the applicability of sub-paragraph (c) of the First Schedule to the Employees' Provident Fund Regulations of 1958, which, for the present purposes, says "*every employment other than employment under any local authority (being a local authority in respect of the employees of which a pension scheme or provident fund has been established under any other written law) shall be covered employment*".

In view of my observations made at the beginning of this Judgment in respect of P22, P26 and 1R6, the preliminary objections taken up by learned Counsel for the 4th Respondent on laches and the availability of alternative remedies are not entitled to succeed.

Before I part with this Judgment, let me take the liberty to stress the following. Learned Counsel for the 4th Respondent relies heavily on two of my earlier Judgments on the same subject, i.e. *Sri Lanka Telecom PLC v. The Commissioner General of Labour (CA Minutes of 22.11.2019)* and *Courtaulds Trading Company v. The Commissioner General of Labour (CA Minutes of 05.03.2019)*,

and a Supreme Court Judgment, i.e. *Sri Lanka Insurance Corporation Ltd v. The Commissioner of Labour (SC Minutes of 14.12.2016)*, to argue that the 4th Respondent is an employee and not an independent contractor. I regret my inability to come to the same conclusion in this case but with good reason. Although the principles of law involved are the same, the facts are different.

A Judgment is only an authority for what it actually decides and has no universal application to each and every subsequent case on a similar issue, as the facts involved may substantially differ.

In *Gunaratne Menike v. Jayatilaka Banda [1995] 1 Sri LR 152 at 157*, Chief Justice G. P. S. de Silva remarked:

> *The principle laid down in a decision must be read and understood in the light of the nature of the action, and the facts and circumstances the Court was dealing with.*

In *Mary Beatrice v. Seneviratne [1997] 1 Sri LR 197 at 203*, Justice Senanayake quoted with approval the following pertinent observation of Lord Halsbury in the House of Lords case of *Quinn v. Leathem [1901] AC 495 at 506*:

> *[T]hat every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found they are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of*

reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

I quash the decision of the 1st Respondent contained in P22 and the reasons for the said decision contained in P26 by certiorari. The Petitioners are granted the reliefs as prayed for in paragraphs (c)-(f) and (i) of the prayer to the petition.

The application of the Petitioners is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal