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

In the matter of an application for orders in the nature of writs of certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

C. A. (Writ) Application No. 52/2023

GREENTECH CONSULTANTS

(PVT) Limited

No. 94/50, Kirulapone Avenue,

Colombo 5.

PETITIONER

V.

1. P.W.G.S.S Perera
   Labour Officer,
   District Labour Office- Colombo East,
   18th Floor, Department of Labour,
   Colombo 05.

1st RESPONDENT

2. W.P.M.P. Wijayawardhana,
Assistant Commissioner of Labour,
Colombo East District Labour Office, 18th Floor, Department of Labour, Narahenpita Colombo 05.

2nd RESPONDENT

3.Area Business manager.
Regional Office (Colombo 1-7)
Employee's Trust Fund Board.
21st Floor, "Mehewara Piyasa" ,
Narahenpita,
Colombo 05.

3rd RESPONDENT

4.Steven Joseph Siriwardhena
No. 969/9, School Lane,
Pelawatte,
Battaramulla.

4th RESPONDENT

Before : **Hon. M.T. Mohammed Laffar, J.(Act.P/CA)**

: **Hon. K. Priyantha Fernando, J.(CA)**

Counsel : Nigel Hatch P.C. with Manoj de Silva for the Petitioner instructed by Indunil Bandara

Chamath Jayasekara with Kulani Abhayarathna for the 4th Respondent, instructed by Madhuranga Gamage.

R. Aluwihare, S.C. 1st , 2nd and 3rd Respondents

Written Submissions : Petitioner filed on 08.03.2023

3rd Respondent filed on 09.03.2023

Argued on : 20.03.2025

Decided on : 17.06.2025

K. Priyantha Fernando, J.(CA)

The Petitioner has filed this action against the Respondents seeking inter alia, the following reliefs:

i. A Writ of Certiorari quashing the determination and/or Notices marked X19(a) and/or X19(b) and/or X19(c)

ii. A Writ of Certiorari quashing the determination and/or Notices X23(a) and/or X23(b)

iii. A Writ of Prohibition prohibiting and/or preventing 1st and 2nd Respondents taking any steps pursuant to the determination and/or Notices marked X19(a) and/or X19(b) and/or X19(c)

iv. A Writ of Prohibition prohibiting and/or preventing the 3rd Respondent from taking any steps pursuant to the determination and/or Notices X23(a) and/or X23(b)

Upon the issuance of the formal notices by this Court, the 1st and 2nd Respondents have filed their Statement of Objections on 25.10.2023, while the 3rd Respondent filed its Statement of Objections 30.10.2023. Consequently, the Petitioner has filed its Counter Objections on 31.01.2024.

Subsequently, this matter was taken up for Argument on 20th March 2025 whereby oral submissions were made on behalf of all parties. Then, the Court reserved the matter Judgment and directed all parties to file written submissions.

FACTUAL MATRIX;

The Petitioner by its own admission is a firm engaged in the provision of consultancy services in the fields of urban development, public infrastructure development, water and sanitation, environmental matters, and other socio-economic sectors.

The Petitioner entered into a Consultancy Agreement X3 with the Road Development Authority (RDA), in terms of which the Petitioner was retained to provide consultancy services to the RDA. Under X3, the Petitioner was contracted

to supervise construction works undertaken by contractors. In terms of X3, the Petitioner and Ocyana Consultants (Pvt) Ltd agreed to provide a range of consultancy services for 'COLOMBO NATIONAL HIGHWAY PROJECT' which included the widening and rehabilitation of Orugodawatta-Ambatale road. The contractors for this project were Tudawe Brothers and Komuthi, two leading civil contracting Companies totally unconnected with the Petitioner.

In fulfillment of its obligations under X3, the Petitioner engaged the 4th respondent as Technical Officer in **July 2017** where he was thereafter assigned to the site offices of Komuthi-HOM Engineering and Tudawe Brothers (Pvt) Ltd, two contractors whose work the Petitioner was contractually bound to supervise.

By the letter dated **31.05.2021** (X6), the Petitioner informed the 4th respondent that his services would not be required beyond **30thJune 2021** and requested to complete all outstanding work prior to the said date.

Subsequently, the 4th respondent lodged a complaint X7(b) with the Department of Labour, alleging that the Petitioner had failed to remit the Employee Provident Fund (EPF) contributions due to him. An inquiry was conducted by the Department of Labour and the inquiring officer concluded by the Report R1, that the 4th respondent was, in fact, an employee of the Petitioner and was therefore entitled to EPF contributions from the Petitioner.

THE PETITIONER'S POSITION:

The Petitioner argues that the 4th Respondent is not an employee of the Petitioner and the Petitioner is not his employer due to the following reasons;

a) Payment of "Consultancy fees" based on the invoices furnished by the 4th Respondent himself. X5(1)" (Vide page 53 of the brief) to "X5(38)".

b) Time sheets recommended by the Resident Engineer and certified by the Team

   Leader "X5A (1)" to "X5 A (48)" (Vide page 91 of the brief)

c) Payments made by the G.H.R. Development (Pvt) Limited that manages Petitioner's payments to Independent Contractors.

d) 4th Respondent never worked at Petitioner's office.

e) The 4th Respondent provided services at offices of the said two contractors. Komuthi and Tudawe Brother's, in respect of widening and improvement or Orugodawatta-Ambatale Road. These two organizations were the contractors on this project.

f) He got directions from those contractors and Petitioner did not issue directions to the 4th Respondent as to the provision of his services at those sites.

g) 4th Respondent used his own equipment.

h) 4th Respondent was free to provide his services as an Independent Contractor to any party.

i) No Letter of Appointment issued to the Petitioner

The sole contention advanced by the Petitioner is that 4th Respondent was engaged as an Independent Contractor. Following contentions were advanced by the Learned President's Counsel for the Petitioner:

1. The 4th respondent as an Independent Contractor was engaged as a Technical Officer from July 2017 to June 2021 for the widening and rehabilitation of Orugodawatta-Ambatale road which was part of the 'COLOMBO NATIONAL HIGHWAY PROJECT'.
2. Before obtaining the services of the 4th respondent for the project, the Petitioner **sought and obtained the approval of the RDA** in terms of X4(a) and X4(b).
3. In X4(a), the position of the 4th respondent has been identified as the 'Technical Officer'.
4. Under the heading "Staffing" in Clause 12 of X3, the details of the personnel required for project has been set out. It shows **two categories of staff**, namely, key professional staff and other professional staff, whereas the technical officers falling to the latter category of other professional staff. Hence, the 4th respondent was not part of the key professional staff of the project.
5. Attention was drawn to the CV of the 4th respondent, X4(c) which reveals that he **was 69 or 70 years old when he was engaged as a Technical Officer**; thus, when the 4th respondent's services were obtained, he has well passed the retirement age.

6. After he left State Service, namely the Central Provincial Council in year 2000, he has carried out **short term assignments with various private sector organizations**, and each such assignment does not exceed more than more than 3 years. Except one, all other assignments involved, road development projects funded by international donor agencies.
7. Moreover, all these assignments have been done for companies providing consultancy services, like that of the Petitioner. On six separate occasions, the 4th respondent had short term work assignments with the same company, namely MG Consultants (Pvt) Limited
8. Above *per se* establishes that the 4th respondent **never had permanent employment since he left State service** and worked on ad hoc assignments with different entities, providing consultancy services, even prior to being engaged on this assignment as a Technical Officer.
9. The 4th respondent made a **subsequent complaint X26(b) to the Labour Department representing that Komuthi was his employer** and sought Gratuity against them. X26(b) reveals that a third party-"Komuthi" who was one of the contractors is named as the employer by the 4th respondent in claiming "gratuity". The 4th respondent has claimed that his employment with Komuthi **commenced on 15.07.2017** which coincide with the Petitioner engaging his services. It was submitted that X26(b) establishes as the 4th respondent was engaged as a Technical Officer in

the capacity of an Independent Contractor-he was free to provide his services to others as well and in fact, did so as established by X26(b)

10. At the inquiry held pursuant to X26(b) before the 1st respondent on 08.02.2023, the Complainant confirmed that his complaint was not against the Petitioner, but against Komuthi HCM in respect of non-payment of Overtime for 2018 and 2019. Thereupon, the 1st respondent who conducted inquiry informed the Petitioner's representative that he is not required at this inquiry as the complaint is not against the Petitioner. In this regard, paragraph 11(d) of the Objections of 4th respondent states as follows: "**Over-time payment was paid by Komuthi-HOM Engineering Joint Venture** while Tuduwe Brothers (Pvt) Ltd did not pay any overtime payment". (emphasis added)
11. By his Statement of Objections, the 4th respondent has admitted that one of the contractors-Komuthi has paid him overtime payment. It was submitted that the 4th respondent who alleges to be an employee/workman cannot have two employers; this admission of the 4th respondent that 'Komuthi' was employer corroborates the Petitioner's position.
12. As revealed from the invoices produced as X5(1) to X5(38), the 4th respondent has been paid "Consultancy fees" based on the invoices furnished by the 4th respondent himself.
13. A close perusal of an 'invoice' (vide X5(1)) reveals that, at the top left of the same, the 4th respondent's name is there, and below his name and word

"Bill to" is there, followed by the Petitioner's name and its address. At the bottom of the invoice, the 4th respondent's name and signature appears, followed by payment instructions, specifying payment to be made to his HNB Account.

14. Attention was drawn to the definition of the term 'invoice' as contained in page 904 of the 'Black's Law Dictionary' (Ninth Edition):

"*Invoice, n. (14C)* ***An itemized list of goods or services furnished by the seller to a buyer, specifying the price and terms of sale***...."(emphasis added)

15. By issuing invoices, the 4th respondent has billed the Petitioner Consultancy fees in respect of the services he provided for the project. This payment mechanism is completely different to a payment mechanism adopted in respect of an employee. In respect of an employee, the employer merely pays a salary and issues a salary slip, and the same does not involve any billing by the employee to the employer.

16. As revealed by X15, these consultancy fees have been paid to the 4th respondent not by the Petitioner, but by the G.H.R. Development (Pvt) Limited that manages Petitioner's payments to Independent Contractors. This follows that the term "Consultancy Fee" is no way a mere label unilaterally used by the Petitioner to disguise a purported employer-employee relationship it had with the 4th respondent. This payment mechanism demonstrates that the 4th respondent was engaged as a Technical Officer only in the capacity of an Independent Contractor.

17. In most months in a year, **same figures have been billed to the Petitioner as Consultancy Fees by the 4th respondent, which has been subject to an increase of 10% in years 2018, 2020 and 2021**. However, it was submitted that this does not make such payment a salary, as unlike a monthly salary, this fee has been billed to the Petitioner by the 4th respondent via invoices.
18. Time sheets recommended by the Resident Engineer and certified by the Team Leader, X5A (1) to X5A (48), 4th respondent never worked at Petitioner's office. He provided services at offices of the two contractors, Komuthi and Tudawe Brothers in respect of widening and improvement of Orugodawatta-Ambatale Road. He got directions from those contractors and Petitioner did not issue directions to the 4th respondent as to the provision of his services at those sites.
19. 4th respondent was provided with the equipment and other facilities by the Civil work Contractors of the project in terms of the Clause 14 under the heading, "facilities" in X3.
20. 4th respondent was free to provide his services as an Independent Contractor to any party, and admittedly has provided services to "Komuthi".
21. No letter of appointment issued to the Petitioner.
22. By X6 under the caption "Completion of Consultancy Services", the Petitioner informed the 4th respondent that his services as a "Consultant Technical Officer" will not be required beyond 30th June 2021. It is clear

from the contents of X6, it is not a termination letter issued to an employee as it merely states that the 4th respondent's services are not required beyond 30th June 2021. The 4th respondent has signed and accepted it without any protest.

23. A perusal of the subsequent complaint to the Labour Department X7(b) reveals that no relief has been sought as to termination of employment, and the only reliefs sought are to obtain EPF and ETF money. This per se establishes that the 4th respondent's acquiescence in law that he was not an employee of the Petitioner as he realized he was not entitled to reinstatement and/or compensation as he was not an employee of the Petitioner.

The Petitioner has drawn the attention of this Court to the following Authorities:

In CA (Writ) 274/218 ***Colombo Municipal Council and Others vs. Commissioner General of Labour and Others***, decided on 14.10.2020 where the Court held that, "*the relationship between the Colombo Municipal Council (CMC) and the 4th Respondent, a Rate Collector of the CMC was not that of employer-employee, but the 4th respondent was only an independent contractor of the CMC. Hence the EPF Act is inapplicable in this instance*".

In the said case, Samayawardhena J. held, inter alia, as follows:

"*The 1st Respondent in P26 says the 4th Respondent was part and parcel of the CMC, 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 CMC***".

In C.A. (Writ) 28/2012-***Consolidated Marine Engineers vs. Assistant Commissioner of Labour and Others*** decided on 29.05.2020, the Court issued a writ of Certiorari quashing the direction to pay EPF in respect of the 4th to 6th Respondents, who **provided services as security guards** on the basis that they have failed to prove that they were employees of the Petitioner within the meaning of the EPF Act, and hence the conclusion of the Respondents is not supported by the evidence led at the inquiry. In holding so, Janak De Silva J. considered the following:

a. The 4th to 6th respondents **did not sign the attendance book** maintained by the Petitioner in relation to the other employees. They maintained their own book and got it signed by the Accountant of the Petitioner;
b. Applying the integration test, there is **no evidence to show that the work done by the 4th respondent were an integral part of the business** of the Petitioner or that they are part and parcel of the Petitioner.
c. Neither is there, evidence that the 4th to 6th respondents were employees of the Petitioner **as a matter of economic reality**;

d. It is true that the 4th to 6th respondents were issued identity cards by the Petitioner. But the evidence taken as a whole negates any relationship of employer-employee between the parties.

In C.A. (Writ) 628/2011, ***St Regis Packaging (Private) Limited vs. Commissioner General of Labour and Others*** decided on 18.01.2017, the Court issued a writ of Certiorari, quashing P2 that imposed EPF liability on the Petitioner in respect of the 4th Respondent on the basis that the inquiry proceedings that preceded P2 were tainted with **procedural impropriety**.

THE POSITION OF THE 1ST TO 3RD RESPONDENTS:

On behalf of the 1st to 3rd Respondents, following counter arguments were raised:
The first contention is that the 4th Respondent was integral to the operations of the Petitioner Company.

1. In the ordinary course of its operations, the Petitioner enters into consultancy agreements with third parties under which it is contractually required to render a range of professional services. However, to perform the technical and support functions required under these agreements, the Petitioner recruits personal including consultants, technical officers and administrative staff and assigns them into project sites to perform the tasks necessary for **fulfilling its contractual obligations**. It is thus clear that the services rendered are in direct furtherance of the Petitioner's obligations under consultancy agreements.

2. In other words, the profits the Petitioner generates is directly dependent on the work carried out by such personnel who are engaged specifically to implement the terms of the Consultancy Agreements.
3. This model of operating, whereby personnel are recruited and deployed for the performance of project-specific obligations, is fundamental to the Petitioner's ability to fulfill its contractual commitments and consequently, to earn revenue.
4. Absent the contribution of such individuals, the Petitioner would have no means of delivering the services it is contractually bound to provide and would be unable to generate profit.
5. Accordingly, the individuals recruited and deployed in this manner are not peripheral but integral to the core business operations of the Petitioner. In the circumstances, it is untenable to now assert that such personnel, whose work is essential to the fulfillment of contractual obligations, do not constitute employees.
6. In terms of Consultancy Agreement X3, the Petitioner is required to supervise various contractors engaged in road construction works on behalf of the RDA. The scope of the consultancy services expected of the Petitioner is set out in Section E of Appendix A, titled 'Description of Services/Terms of Reference'.
7. Further, Section D of Appendix A provides that the Petitioner is obligated to furnish a team of consultants for the project through the direct engagement of individual experts, and to **deploy the necessary technical**

and administrative support staff required to carry out the assignments entrusted to the Petitioner.

8. Specifically, paragraph 12 of Section E stipulates that the consultancy services to be provided shall include the engagement of various categories of domestic and support staff, which are listed in an accompanying table. Under **Section 3 of this table, titled "Technical Staff", it is explicitly stated that the Petitioner must engage Technical Officers as part of its obligations**.

9. It was furtherance of these express contractual obligations that the Petitioner recruited the 4th Respondent as a Technical Officer. **Thus, this recruitment was not incidental or ancillary, but was a direct requitement arising from the Petitioner's obligations under X3**.

10. Accordingly, the 4th respondent, along with other personnel similarly recruited, was essential to the Petitioner's ability to perform its contractual obligations and to generate revenue therefrom. Absent such personnel, the Petitioner would have had no means of discharging it contractual duties.

11. In simple terms, the Petitioner was compelled to hire such as 4th Respondent to **carry out the services it had contracted to perform and to earn a profit**. As such, the 4th Respondent was an integral component of the Petitioner's operations and business model, and must therefore be regarded as an employee of the Petitioner.

Regarding the control of which the Petitioner exercised over the 4th Respondent, following submissions were made:

The degree of control exercised by the Petitioner over the 4th Respondent is evidenced by the findings set out in the Report marked as R1.

1. The 4th Respondent became aware of vacancies for the position of Technical Officer and applied to the Petitioner Company. Pursuant to this, he was **interviewed by** Mr. D. A. Karunadasa**, the Project Leader of the Petitioner Company**.
2. Following the interview, he was recruited as a Technical Officer and was assigned to the Orugodawatta-Ambatale Road Development Project. **He was instructed to report directly to the Resident Engineer for the Project**. According to X3, the Petitioner bore the responsibility for recruiting the **Resident Engineer who was paid a monthly salary by the Petitioner and for** all purposes, functioned as an employee of the Petitioner.
3. The **4th Respondent has worked under the direct supervision and control of the said Resident Engineer who was responsible for assigning tasks and monitoring the 4th Respondent's performance** on a daily basis.
4. He was **required to report to work daily from 8.00 a.m. to 5.00 p.m., and was also paid overtime by the Petitioner for any work performed** more than standard working hours.

5. Initially, he was paid a monthly salary of 70,000 which was subject to an annual increment of 10%. At the time of the termination of services, he was drawing a monthly salary of Rs. 84,700/-
6. In the event he sought leave, prior approval was required either from the Resident Engineer or the Project Leader. **Any leave taken was subject to a corresponding deduction from the 4th Respondent's monthly salary**.
7. The payment of his monthly salary was **conditional upon the submission of a duly signed timesheet which had to be endorsed by the Resident Engineer and certified by the Project Leader, before being forwarded to the Petitioner's finance division for processing**.
8. The payment of the full monthly salary was **further subject to a minimum work threshold, whereby he was required to have worked either 129 hours in a month or a minimum of 24 days**. This requirement was confirmed by the Finance Manager of the Petitioner Company.
9. As outlined above, he was recruited by the Petitioner and deployed to a project site that required supervision in accordance with the terms of the Consultancy Agreement.
10. While the project site belonged to the contractors of the RDA, who were subject to such supervision, the **mere fact that the site belonged to a third party does not absolve the Petitioner of its status as the employer**. The work performed by the 4th Respondent constituted duties the Petitioner was contractually obligated to perform under X3.

11. It is pertinent to note that the **Resident Engineer to whom the 4th Respondent reported, was also recruited by the Petitioner pursuant to the same Consultancy Agreement**.

12. The mere fact that the Petitioner sought concurrence of the RDA prior to the recruitment does not alter the employer-employee relationship between the Petitioner and the 4th Respondent. **Such concurrence was obtained pursuant to the terms of X3, solely to ensure that the RDA was satisfied with the personnel recruited by the Petitioner**.

13. In terms of paragraph 4(g) of the Petition, it is claimed that a salary was never paid to the 4th Respondent. However, perusal of the invoices X5(1)-X5(38) corroborate the findings of the report R1 where he was given a uniform monthly salary which was subject to an annual increment of 10%. Had the 4th Respondent been an independent contractor there could not have been such a uniform monthly payment.

14. Furthermore, the invoice X5(32) clearly demonstrate that his monthly salary was **reduced proportionately in respect of the leave taken** by 4th Respondent.

15. The Petitioner avers that payments to the 4th Respondent were made by G.H.R. Development (Pvt.) Ltd, which was responsible for handling the Petitioner's payment processes. However, the Petitioner also asserts that G.H.R. Development (Pvt.) Ltd merely settled the invoices of the 4th Respondent and that the **Petitioner subsequently reimbursed G.H.R. Development for those payments**. Thus, it is evident that the **actual**

source of payment to the 4th respondent was the Petitioner. The mere use of an intermediary to facilitates payment does not mean that the Petitioner can resile from the fact that it was the Petitioner who paid the salary.

16. As evidenced by Clearance Certificate Y2, the 4th Respondent was required to complete specific tasks and return specific items upon the termination of the services. Notably, the body of the certificate explicitly states that, "*this form is to be completed by the employee and submitted to the Team Leader's office through the Resident Engineer.*" Therefore, the Petitioner's own documentation recognizes and categorizes the 4th Respondent as an employee.

THE 4TH RESPONDENT'S CASE:

The 4th Respondent's contention is that he was employed by the Petitioner for the post of "Technical Consultant" and provided services within the framework of being an "employee" of the Petitioner Company.

It was submitted to the Court that:

a. The 4th respondent was employed by the Petitioner for the construction of 'Colombo National Highway Project'.
b. The 4th respondent's name has been submitted by the Petitioner as the Technical Officer for prior approval by the RDA;
c. The 4th respondent had provided his curriculum vitae distinctly representing that he was applying for the post of a Technical Officer.

The attention of this Court was drawn to the following:

a. The Petitioner allowed the 4th respondent to maintain his own office in relation to the said business **at the place of operation of the business**;
b. He was required to work a fixed number of hours for a number of days (8 hours per day for 24 days per month) as stipulated in the terms of Agreement;
c. Attendance and leave applied for by the 4th respondent were taken into consideration when the monthly salary is paid;
d. In terms of clause 3.2.3 of the Agreement X3, he was refrained from engaging in any business or professional activity which conflicts directly or contractually to the work assigned to him;
e. Process of payment of the 4th respondent was under the control of the Petitioner;
f. 4th respondent was considered as one of the key professional staff members who was represented to the RDA as a potential candidate of the technical staff.

CONCLUSION:

In the instant case, this Court must decide in which capacity the 4th Respondent worked, viz. whether he was an 'independent contractor' or whether he was employed as an 'employee' by the Petitioner.

In **Free Lanka Trading Co Ltd vs. W L P De Mel and Commissioner of Labour** (1978) 79 (II) NLR 161, in which quotation by Lord Denning distinct an 'employee' with an 'Independent Contractor' was quoted as follows:

"*Under a contract of service, a man was employed as a part of the business, and his work is done as an integral part of the business; whereas under a contract for service, his work, although done for the business is not integral into but is only an accessory to it*".

In terms of the above quotation, if the service is considered relevant to the integral part of the business, he is considered to be a 'servant' of the employer, whereas if the services rendered are not considered as integral, he is considered to be an 'Independent Contractor'.

In the landmark case of ***Montral Locomotive Works and AG for Canada*** (1947) 7 DLR 161, followed by ***Perera vs. Marikkar Bawa*** (1989) 1 SLR 347, it was decided that the 'Four-Fold Test' should be applied in deciding whether the master-servant relationship exists between the employer and employee, which includes the tests as follows: i. Control test; (ii) Integration Test; (iii) Economic reality test; (iv) Multiple test.

To find out as to what kind of relationship existed between the Petitioner Company and the 4th Respondent, the said tests need to be applied and followed. One important element in a contract of services is the **payment of wages** or other remuneration between the parties.

In the instant case, it was contended by the Petitioner that the 4th respondent has been paid "Consultancy Fees" based on the invoices marked as X5(1) to X5(38) furnished by the 4th respondent himself. However, same figures have been billed to the Petitioner as Consultancy Fees by the 4th respondent, which has been subject to an increase of 10% in years 2018, 2020 and 2021.

Perusal of the invoices X5(1)-X5(38) corroborate the findings of the report R1 where the 4th respondent was given a uniform monthly payment which was subject to an annual increment of 10%. The invoice X5(32) clearly demonstrate that his monthly payment was reduced proportionately in respect of the leave taken by 4th Respondent.

Admittedly, the payments to the 4th Respondent have been made by G.H.R. Development (Pvt.) Ltd, which was responsible for handling the Petitioner's payment processes. However, the Petitioner also asserts that G.H.R. Development (Pvt.) Ltd merely settled the invoices of the 4th Respondent and that the Petitioner subsequently reimbursed G.H.R. Development for those payments. Thus, it is evident that the **actual source of payment to the 4th respondent was the Petitioner**. The mere use of an intermediary to facilitates payment does not mean that the Petitioner cannot resile from the position that it was the Petitioner who paid the payment. Merely because the fee has been billed to the Petitioner by the 4th respondent via invoices, this cannot be considered as consultancy fee.

This is not a "consultancy fee" paid depending on work. This goes to show that the 4th Respondent has worked in the company for a continuous period of 4 years for a fixed monthly salary.

Regarding the **degree of control exercised** by the Petitioner over the 4th Respondent is evidenced by the findings set out in the Report R1. These findings are reproduced in paragraphs 1-6 at pages 10 and 11 of this judgment.

In the instant case, the fixed working hours, leave only upon prior permission, deduction of salary if leave was taken, were all supervised by the Resident Engineer who was employed by the Petitioner. There had been considerable degree of control over the 4th Respondent and furthermore, he has been prohibited by the terms of the contract itself from working for others in similar capacity.

The relevant clause 3.2.3 at GC-8 in the General Conditions of Contract reads as follows:

"*The consultant **shall not engage**, and shall cause their Personnel as well as their Sub-Consultants and their Personnel not to engage, either directly or indirectly, in any business or professional activities which **would conflict with the activities assigned to them under this Contract***".

This Clause clearly revealed the fact that the 4th respondent has been assigned to do specific activities under the Contract. Those activities appear to be assigned by the Contractor in furtherance of the contractual obligations between the Petitioner Company and the Contracting party.

In the case CA Writ 194/2016 decided on 05.03.2019 it was held that, based on the facts and circumstances of the case, that the 5th Respondent who was working as a "Technical Consultant" in the Petitioner Company was an employee and not an independent contractor.

In the said case, the Court has applied the 'Control Test' in reaching its conclusion. Accordingly, the following excerpts from the judgment are directly relevant to the matter at hand:

"……According to P3(b) issued by the petitioner company the 5th respondent, a female Pilipino national living here under Visa has joined the petitioner company on 22.01.2007 and left the company on 14.05.2015 after working in the company as Technical Consultant for 8 years and 3 months. P3(b) ***particularly says her "basic salary" is USD 2,679.00 This is not a "consultancy fee" paid depending on work.*** *This goes to show that the 5th Respondent has worked in the company for a continuous period of 8 years and 3 months for a fixed monthly salary…..*

Another condition in the said Agreement is

"The consultancy hours of the consultant will be from 7.30 a.m. to 5.45 p.m. from Monday to Friday or as agreed by the two parties".

That means there is a specific time on which she shall report for work and a specific time for her to off for the day, and was under direct control and supervision by the petitioner employer.

The clause in the Agreement that "*Nothing in this Agreement shall be construed to create an employment relationship between the parties to this Agreement" is not decisive. Whether or not employer-employee relationship is formed, shall be decided not by the label* ***but by circumstances in each individual case****……*

…….The email correspondence marked compendiously P6(b) shows that the 5th respondent is an integral part of the company's team and her work has integrated into the business of the petitioner company. P6(b) shows how her services had been appreciated and acknowledged by the employer….

Accordingly, Court held that:

"*Taking the above matter into account, it is clear that the petitioner company has had a heavy control over the 5th respondent in the discharge of her duties as a consultant in the petitioner company.* ***There is no law that people who are recruited as consultants or discharging duties as consultants shall necessarily fall within the category of independent contractors****. It is my considered view that the decision of the Commissioner of Labour in P9A that there was an employer-employee relationship between the petitioner and the 5th respondent is flawless*".

In ***Perera v Marikar Bawa*** 1989 1 SLR 347,

"*The appellant was the Head Cutter of the respondent company. He has 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 Industrial Disputes Act. Was a contract of service or contract for services as an independent contractor".

Accordingly, it was held that:

"*The applicant's work was an integral part of the respondent's business and he was part and parcel of the organization.* ***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*".

In the said case, even though the appellant was being paid based on commission and employed his own workman, the Court held that he was an employee of the respondent company as his work was integral to the work of the company.

In the instant case too, there **the 4th respondent did not carry on his business/service as a technical officer as a business belonging to him**. It was a business done by the 4th Respondent for the Petitioner Company in furtherance of the Petitioner's obligations under consultancy agreements.

IS THE 1ST RESPONDENT'S ORDER VITIATED BY THE VIOLATION OF PRINCIPLES OF NATURAL JUSTICE?

It was contended by the Petitioner that R1 reveals that observations, findings, recommendations contained in it are mainly based on affidavit statements and the documents produced by the 4th respondent; copies of those documents were not made available to the Petitioner; R1 mainly consists reproduction of evidence and submissions without evaluation of evidence and interpretation of documents; findings are not supported by evidence, contrary to the evidence produced, unreasonable and irrational; evidence and submissions of the Petitioner has been ignored; payment mechanism of billing consultancy fees by issuing invoice has been disregarded.

Furthermore, it was contended that the 1st Respondent has come to the wrong findings regarding the equipment which were not provided by the Petitioner, but by the Civil Works Contractors of the project (Tudawe Brothers and Komuthi) as revealed by Clause 14 in X3. The 1st Respondent has noted the clearance certificate dated 30.06.2021 which was issued to the 4th Respondent upon returning items but ignored that the 4th Respondent has signed it under the title 'Consultant'. It is alleged that this is lack of objectivity.

In CA (Writ) 628/2011 – ***St. Regis Packaging (Pvt.) Limited vs. Commissioner General of Labour and Others***- Judgment dated 18.01.2017-The Court issued a writ of Certiorari, quashing P2 that imposed EPF liability on the Petitioner in

respect of the 4th Respondent on the basis that the inquiry proceedings that preceded P2 were tainted with procedural impropriety.

In the instant case, a close perusal of R1 reveals that the evidence, the oral and written submissions forwarded by the Petitioner have been considered by the 1st Respondent. The payment mechanism of billing Consultancy Fees by the 4th respondent to the Petitioner has been considered in 3rd, 4th and 5th paragraphs at page 4 of R1.

It was contended that the 1st respondent has come to the wrong findings with regard to maintaining a sub office at Angoda, giving equipment to the 4th respondent; has ignored that the 4th respondent signed clearance certificate dated 30.06.2021 under the title 'Consultant' which is an omission demonstrate the lack of objectivity of the 1st Respondent.

In ***Jafferjee vs. Commissioner of Labour***-(2008 1 SLR 12) – the CA issued a writ of Certiorari, quashing the impugned decision in respect of EPF on the basis that 1st and 2nd Respondents have failed to assign reasons for their decisions. It is further held that "*Reasons means not just the evidence recorded and the documents filed but an evaluation of the evidence and whenever possible, an interpretation of the documents*".

The Court of Appeal further emphasized the distinction between its Appellate jurisdiction and its power of Judicial Review, observing that it was not for the Court of Appeal to decide on whether the 3rd Respondent was an employee or not, it was for the 1st and 2nd Respondents to decide on that issue. However, the

Court of Appeal held as the said issue is a mixed question of law and fact, thus the Court intervene on same if that decision illegal or ultra vires.

However, in the instant case, the 1st Respondent has given detailed report (R1) with observations and reasons consisting of 8 pages. He has not acted illegally or his decision is not ultra vires.

The Petitioner has drawn the attention to the case C.A. (Writ) 274/2018 – ***Colombo Municipal Council and Others vs. Commissioner General of Labour*** decided 14.10.2020, where it was held that, "*the relationship between the CMC and the 4th Respondent, a Rate Collector was not that of employer-employee, but the 4th Respondent was only an independent contractor of the CMC. Hence the EPF Act is inapplicable in this instance".*

In the said case, Samayawardena J. held, inter alia, as follows*:*

"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".

The facts of the said case are clearly distinguishable from the facts of this case as analyzed in this judgment. In the instant case, applying the integration test, as I have already examined, there is sufficient evidence to show that the work

done by the 4th Respondent were an integral part of the business of the Petitioner or that they are part and parcel of the Petitioner.

In CA (Writ) 28/2012 – ***Consolidated Marine Engineers vs. Assistant Commissioner of Labour*** -decided on 29.05.2020, the Court of Appeal issued a writ of certiorari quashing the direction to pay EPF in respect of the 4th to 5th Respondents, who provided services as security guards on the basis that they have failed to prove that they were employees of the Petitioner within the meaning of the EPF Act, and hence the conclusion of the Respondent that there is a contract of service between the Petitioner and 4th to 6th Respondents is not supported by the evidence led at the inquiry. In holding so, Janak De Silva J. considered the following:

a. The 4th to 6th Respondents did not sign the attendance book maintained by the Petitioner in relation to the other employees. They maintained their own book and got it signed by the Accountant of the Petitioner.

b. Applying the integration test, there is no evidence to show that the work done by the 4th Respondent were an integral part of the business of the Petitioner or that they are part and parcel of the Petitioner.

c. Neither is there, evidence that the 4th to 6th Respondents were employees of the Petitioner as a matter of economic reality.

d. It is true that the 4th to 6th Respondents were issued identity cards by the Petitioner. But the evidence taken as a whole, negate any relationship of employer-employee between the parties.

The facts of the said case too are clearly distinguishable from the facts of this case as analyzed above. In the instant case, applying the integration test, I have already found, there is sufficient evidence to show that the work done by the 4th Respondent were an integral part of the business of the Petitioner or that they are part and parcel of the Petitioner.

THE 4TH RESPONDENT'S COMPLAINT PERTAINING TO GRATUITY – Y1(b)

In terms of Y1(b), the 4th Respondent has named Komuthi HCM Engineers as his employer. Komuthi was one of the contractors on whose project site the 4th Respondent carried out his work.

Accordingly, the Petitioner contends that it cannot be the 4th Respondent's employer asserting that he himself has admitted the Komuthi is his employer. Admittedly, the 4th Respondent has taken a contradictory stance in the complaint regarding the non-payment of EPF and ETF marked X7(b) naming the Petitioner as his employer. It was admitted by the 1st to 3rd Respondents that the 4th Respondent has taken a contradictory stance in the complaint marked Y1(b) concerning gratuity, by referring to Komuthi HCM Engineers as the employer.

Notwithstanding the above, the determination of the relationship is a matter of law. It is within the statutory remit of the Department of Labour to examine the relevant facts and arrive at a finding on the existence or absence of such a relationship. In cases involving complex employment arrangements such as outsourcing, where even the employee may be unclear as to the identity of the actual employer. In such circumstances, the subjective view of the employee

cannot be determinative of the legal status of the relationship. There is no evidence adduced as to whether in fact, any gratuity was paid by Komuthi HCM to the 4th Respondent. Although the 1st Respondent has not considered this factor, taken along with other evidence, in my view, it does not change the relationship of Employer-Employee between the Petitioner and the 4th Respondent.

In the instant case, I find that the 1st Respondent has given ample reasons with sufficient analysis of evidence in the report marked as R1. It does contain clear determination on the crucial issue whether the 4th Respondent was an independent contractor or an employee.

In the circumstances, I see no reason to grant reliefs prayed for by the Petitioner. Accordingly, this Application is dismissed. No costs.

Judge of the Court of Appeal

M.T. Mohammed Laffar, J. (Act.P/CA)

I agree.

Judge of the Court of Appeal