1978 *Present :* **Samerawickrame, J., Ismail, J. and Gunasekera, J.**

FREE LANKA TRADING CO. LTD., Petitioner

and

W. L. P. DE MEL, COMMISSIONER OF LABOUR and OTHERS, Respondents

S. C. Application No. 271/75

Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971—Persons employed as "Technical Sales Representatives"—Written agreement governing conditions and terms of employment—Nature of actual work done and extent of control exercised by employer—Whether workman within the meaning of Act or independent contractor—Scheduled employment—Persons not actually working in a shop or office—Shop and Office Employees Act, section 68 (2) (b)—Law No. 1 of 1976.

The petitioner in these proceedings sought to quash an order made by the Commissioner of Labour under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971. The said order directed the petitioner company to reinstate the 2nd to 7th respondents to this application, to pay them wages during the period of non-employment and to grant them other relief. It was contended on behalf of the petitioner that these persons were not workmen in a scheduled employment within the meaning of this Act.

These respondents had been engaged by the petitioner as "Technical Sales Representatives" on a written agreement on which the petitioner strongly relied. They were referred to as Independent Agents in this agreement. Clauses 3 (*e*) and 5 (*f*) of the agreement read as follows:—

3 (*e*). "The Independent Agents agrees to determine for himself the hours and days he will work in the company's behalf and will only submit those reports to the company that ne deems necessary in the conduct of his business as an Independent Agent".

5 (*f*). "The Independent Agent is aware of the definition of 'worker' as appearing in the Annual Holidays Act, Shop and Office Act, Wages Boards Ordinance, Workmen's Compensation Act and the definition of 'employee' as appearing in the Industrial Disputes Act, and agrees and acknowledges that he is not within such definitions and that he has received legal advice to that effect and to the import and meaning of all the provisions of this Agreement."

However, it appeared that in fact, the position was that the work done by these Sales Representatives and their relations with the management were regulated not by the terms of this agreement but carried out in a very different manner very much at variance with the said terms. The conduct of the business by these Sales Representatives and the mode of the discharge of their duties appeared to have been very much under the control of the management and so much so that they had, inter alia, to finish Daily Call Sheets, a work calendar every Saturday for the following week, weekly reports on sales etc. and came under the direct supervision and disciplinary control of the General Sales Manager.

Held: (1) That the said agreement appeared to have been entered into so as to erect a facade under cover of which the management could seek to avoid performance of obligations cast by law upon employers towards the employees. Though it is proved that the representatives were paid a commission or a salary and commission, the mode in which remuneration was paid was not decisive on the question whether a person was an employee or an independent contractor.

(2) That the clauses of the said agreement which purported to set out the agreement of the parties on its legal effect were not relevant as the contract was not intended to be and/or was not acted upon.

(3) That under the definition of scheduled employment introduced by Law No. 1 of 1976 read with section 68 (2) (*b*) of the Shop and Office Employees Act, these respondents came within the category of workmen in a scheduled employment within the meaning of the Termination of Employment of Workmen Act.

Cases referred to:

Market Investigations Ltd. v. Minister of Social Security, (1968) 3 All E.R. 732; (1969) 2 W.L.R. 1; (1969) 2 Q.B. 173.

Bank Voor Handel en Scheepvaart v. Slatford, (1952) 2 All E.R. 956; (1951) 2 K.B.D. 779.

Global Plant Ltd. v. Secretary of State for Social Services, (1972) 1 Q.B. 139; (1971) 3 All E.R. 385; (1971) 3 W.L.R. 269.

Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance, (1968) 2 Q.B. 497; (1968) 1 All E.R. 433; (1968) 2 W.L.R. 775.

U. S. v. Silk, (1946) 331 U.S. 704.

Montreal Locomotive Works Ltd. v. Montreal and A.G. for Canada, (1947) 1 Dominion Law Reports (Canada) 161.

APPLICATION for a Writ of Certiorari and Prohibition.

H. W. Jayewardene, Q.C., with *J. C. Ratwatte* and *Miss S. Fernando*, for the petitioner.,

D. C. Amerasinghe, for the respondent.

Cur. adv. vult.

August 18, 1978. SAMERAWICKRAME, J.

The petitioner-company filed this application asking for a writ of certiorari to quash the order of the 1st respondent, who is the Commissioner of Labour, made under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 directing it to reinstate the 2nd to 7th respondents, to pay them wages during the period of non-employment and to grant them other reliefs. The position of the petitioner is that these respondents were not workmen in a scheduled employment within the meaning of the Act.

The petitioner company had engaged these respondents as Technical Sales Representatives and had entered into the agreement marked "A" with each of them. In that agreement, they are referred to as Independent Agents, paragraph 3 (e) states—

> "The Independent Agent agrees to determine for himself the hours and days he will work in the Company's behalf and will only submit those reports to the Company that he deems necessary in the conduct of his business as an Independent Agent".

Clause 5 (f) of the Agreement reads:—

> "The Independent Agent is aware of the definition of 'worker' as appearing in the Annual Holiday Act, Shop and Office Act, Wages Boards Ordinance, Workmen's Compensation Act and the definition of 'employee' as appearing in the Industrial Disputes Act, and agrees and acknowledges that he is not within such definitions and that he has received independent legal advice to that effect and to the import and meaning of all the provisions of this Agreement."

In contravention of and in flagrant disregard of clause 3 (e) set out above, the Technical Sales Representatives were called upon by a Memorandum signed by an official of the petitioner-company 1R2M to furnish Daily Call Sheets setting out the customers whom they interviewed, a work calendar every Saturday for the following week, weekly reports on sales, full list of customers in their districts with the names of their Engineering Staff and Supplies Managers, and they were told that they

"should know all sales stories verbatively..... and that they will be tested by the District Manager, Office Manager and General Sales Manager after the next sales conference. Failure to satisfy them will entail suspension of Representatives from sales till the abovementioned requisite is perfected."

At the inquiry held by an Assistant Commissioner of Labour, the Attorney-at-Law who appeared for the Sales Representatives said that his clients had to start work at 8 a.m. and were required to work till 4 p.m.; that they had to sign an Attendance Register. They had to send a daily call sheet and if they had not worked, the reason for not working had to be entered. They came under the direct supervision and disciplinary control of the General Sales Manager. They had to get prior leave in case they had to leave their districts. The Technical Sales Representatives had been trained to propagate sales in the magna way, that is, in the way prescribed by the management and they had to adhere strictly to the technique laid down. Even the dress that a Technical Sales Representative should wear when he was in the field was prescribed by the Management. Learned Counsel who appeared for the petitioner-company at the inquiry disputed only the statement that the Sales Representatives had to sign an attendance register. He relied strongly on the agreement "A" and its provisions.

It appears to be the position that work was done by the Sales Representatives and their relations with the management was regulated, in truth and in fact, not by the terms of the agreement "A" but in a different manner very much at variance with the terms of that agreement. The conduct of business by the Sales Representatives and the mode of the discharge of their duties appear to have been very much under the control of the management. The Agreement "A" appears to have been entered into so as to erect a facade under cover of which the management could seek to avoid performance of obligations cast by Law upon employers towards their employees. It is true that the representatives were paid a commission or a salary and commission but the mode in which remuneration is computed is not decisive on the question whether a person is an employee or an independent contractor.

It has been laid down in recent decisions that the idea that control over the manner of performance of the work is not the sole criterion in determining whether a contract is a contract of service or a contract for furnishing services. In *Market Investigations Ltd. v. Minister of Social Security*, (1968) 3 A.E.R. 732, Cooke J. referred to the observation of Lord Wright in *Montreal Locomotive Works Ltd. v. Montreal and A.G. for*

Canada, (1947) 1 D. L. R. 161, the dictum of Lord Denning in *Bank Voor Handel en Scheepvaart v. Slatford*, (1952) 2 A.E.R. 956 at 971—

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

and the view of the Judges of the U. S. Supreme Court in *U. S. v. Silk* (1946) 331 U. S. 704, that the test to be applied was not " power of control, whether exercised or not, over the manner of performing service to the undertaking ", but whether the men were employees " as a matter of economic reality. " Cooke, J. went to say at p. 737—

> " The observations of Lord Wright, of Denning, L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this : ' Is the person who has engaged himself to perform these services performing them as a person in business on his own account? ' If the answer to that question is ' yes ' then the contract is a contract for services. If the answer is ' no ' then the contract is a contract of service ".

It is my view that if one asks the questions posed by Cooke, J. in respect of the sales representatives in the instant case, the answer is that they were not in business on their own account and were in fact not permitted to be on their own by the management of the petitioner-company. Another authority in point in which Cooke, J.'s judgment is cited is *Global Plant Ltd. v. Secretary of State for Social Services*, (1972) 1 Q.B. 139.

I should refer to clause 5 (*f*) of the Agreement which I have set out above. The effect of a clause seeking to agree on the legal effect of an agreement has been considered in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance*, (1968) 2 Q. B. 497 at 512. Mackenna, J. dealing with a clause that declared a party to be an independent contractor said—

> " It may be stated here that whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else ".

He went on to consider when such a clause may have some effect. As the contract before me was not intended to be and/or was not acted upon, this clause is doubly irrelevant.

I hold that the sales representatives were employees of the petitioner-company and workmen within the meaning of Act No. 45 of 1971. Learned Counsel for the petitioner submitted that they were not workmen in a scheduled employment. Under a new definition of scheduled employment introduced by Law No. 1 of 1976, scheduled employment means, *inter alia*, employment in every shop and every office within the meaning of the Shop and Office Employees (Regulations of Employment and Remuneration) Act. But learned Counsel for the petitioner submitted that as many of the sales representatives were sent out in the field they were not employed in a shop or in an office. Learned Counsel for the 2nd, 4th, 5th and 6th respondents referred us to section 68 (2) (*b*) of the Shop and Office Employees Act. It reads—

> "(2) For the purposes of this Act, a person shall be deemed to be employed in or about the business of a shop or office if he is wholly or mainly employed—
>
> (*b*) in the service of the employer upon any work, whether in the shop or office or outside it, which is ancillary to the business carried on in that shop or office, and notwithstanding that he receives no reward for his labour ; but he shall not be deemed to be so employed if his only employment in the service of the employer is in the capacity of a caretaker ".

In view of this provision, I hold that the sales representatives held scheduled employment within the meaning of Act No. 45 of 1971.

There had been earlier inquiries held by the Department of Labour in disputes between the same parties in which the same question had arisen. As both parties were heard and were represented at such inquiries, I think the proceedings and the evidence led at such inquiries may be taken into account but the petitioner-company should have the opportunity of adducing any fresh evidence it may have and a fresh decision should be arrived at. It was submitted that these two requirements had not been fully met. As documents signed by the officers of the petitioner-company and the unchallenged facts fully support the finding of the 1st respondent, I am not disposed, even if there is some irregularity, to exercise my discretion and issue a writ.

In the result, the application of the petitioner-company is dismissed with costs.

ISMAIL, J.—I agree.

GUNASEKERA, J.—I agree.

Application dismissed.