SUPREME COURT
SECOND DIVISION

LA SUERTE CIGAR AND CIGARETTE FACTORY,
***Petitioner*,**

-versus-

G.R. No. L-55674
July 25, 1983

DIRECTOR OF THE BUREAU OF LABOR RELATIONS, THE LA SUERTE CIGAR AND CIGARETTE FACTORY PROVINCIAL (Luzon) AND METRO MANILA SALES FORCE ASSOCIATION-NATU, and THE NATIONAL ASSOCIATION OF TRADE UNIONS,
***Respondents*.**
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D E C I S I O N

GUERRERO, *J.*:

In the determination of the basic issue raised in the case at bar involving the status of some 14 members of private respondent local union whether they are employees of petitioner company in which case they should be included in the 30% jurisdictional requirement necessary to support the petition for certification election, or independent contractors and hence, excluded therefrom, Our rulings

in Mafinco Trading Corp. vs. Ople, 70 SCRA 139, where We reiterated the "control test" earlier laid down in Investment Planning Corp. vs. Social Security System, 21 SCRA 924, and in Social Security System vs. Hon. Court of Appeals and Shriro (Phils.) Inc., 37 SCRA 579 are authoritative and controlling.

In the Mafinco case, the Court, through Justice Aquino, said:

> "In a petition for certiorari, the issue of whether respondents are employees or independent contractors should be resolved mainly in the light of their peddling contracts. — Pro hac vice the issue of whether Repomanta and Moralde were employees of Mafinco or were independent contractors should be resolved mainly in the light of their peddling contracts. A different approach would lead this Court astray into the field of factual controversy where its legal pronouncements would not rest on solid grounds.
>
> "A contract whereby one engages to purchase and sell soft drinks on trucks supplied by the manufacturer but providing that other party (peddler) shall have the right to employ his own workers, shall post a bond to protect the manufacturer against losses, shall be responsible for damages caused to third persons, shall obtain the necessary licenses and permits and bear the expenses incurred in the sale of the soft drinks is not a contract of employment. - We hold that under their peddling contracts Repomanta and Moralde were not employees of Mafinco but were independent contractors as found by the NLRC and its factfinder and by the committee appointed by the Secretary of Labor to look into the status of Cosmos and Mafinco peddlers. They were distributors of Cosmos soft drinks with their own capital and employees. Ordinarily, an employee or a mere peddler does not execute a formal contract of employment. He is simply hired and he works under the direction and control of the employer. Repomanta and Moralde voluntarily executed with Mafinco formal peddling contracts which indicate the manner in which they would sell Cosmos soft drinks. That circumstance signifies that they were acting as independent businessmen. They were free to sign or not to sign that contract. If they did not want to sell Cosmos products under the

conditions defined in that contract, they were free to reject it. But having signed it, they were bound by its stipulations and the consequences thereof under existing labor laws. One such stipulation is the right of the parties to terminate the contract upon 5 days' prior notice. Whether the termination in this case was an unwarranted dismissal of an employee, as contended by Repomanta and Moralde, is a point that cannot be resolved without submission of evidence. Using the contract itself as the sole criterion, the termination should perforce be characterized as simply the exercise of a right freely stipulated upon by the parties.

"Tests for determining the existence of employer-employee relationship. — In determining the existence of employer-employee relationship, the following elements are generally considered, namely: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employees' conduct - although the latter is the most important element.

"Factors to determine existence of independent contract relationship. — An independent contractor is one who exercises independent employment and contracts to do a piece of work according to his own methods and without being subject to control of his employer except as to the result of the work. 'Among the factors to be considered are whether the contractor is carrying on an independent business; whether the work is part of the employer's general business; the nature and extent of the work; the skill required; the term and duration of the relationship; the right to assign the performance of the work to another; the power to terminate the relationship; the existence of a contract for the performance of a specified piece of work; the control and supervision of the work; the employer's powers and duties with respect to the hiring, firing, and payment of the contractor's servants; the control of the premises; the duty to supply the premises, tools, appliances, material and labor; and the mode, manner, and terms of payment.'"

In the Shriro case, We held that the common law rule of determining the existence of employer-employee relationship, principally the

"control test", applies in this jurisdiction. Where the element of control is absent; where a person who works for another does so more or less at his own pleasure and is not subject to definite hours or conditions of work, and in turn is compensated according to the result of his efforts and not the amount thereof, relationship of employer and employee does not exist.

And supplementing the above jurisprudence is Our ruling in Social Security System vs. The Hon. Court of Appeals, Manila Jockey Club, Inc., Phil. Racing Club, 30 SCRA 210 wherein the Supreme Court, speaking through then Associate Justice, now Chief Justice Fernando, held:

> "The question of when there is employer-employee relationship for purposes of the Social Security Act has been settled in this jurisdiction in the case of Investment Planning Corp. vs. Social Security System, 21 SCRA 924 which applied the so-called control test, that is, whether the employer controls or has reserved the right to control the employee not only as to the result of the work to be done but also as to the means and methods by which the same is to be accomplished. In other words, where the element of control is absent; whether a person who works for another does so more or less at his own pleasure and is not subject to definite hours or conditions of work, and in turn is compensated according to the result of his efforts and not the amount thereof, we should not find that the relationship of employer and employee exists. This decision rejected the economic facts of the relation test."

The instant petition for certiorari seeks to reverse the resolution of the Director of the Bureau of Labor Relations dated January 15, 1980 ordering that a certification election be conducted among the sales personnel of La Suerte Cigar and Cigarette Factory, as well as his resolution dated November 18, 1980 denying the motion for reconsideration and directing that a certification election be conducted immediately. The said resolutions reversed and set aside the order of dismissal dated August 29, 1979 of the Med-Arbiter.

The antecedent facts show that on April 7, 1979, the La Suerte Cigar and Cigarette Factory Provincial (Luzon) and Metro Manila Sales

Force Association (herein referred to as the local union) applied for and was granted chapter status by the National Association of Trade Unions. (hereinafter referred to as NATU)

On April 16, 1979, some thirty-one (31) local union members signed a joint letter withdrawing their membership from NATU.

Nonetheless, on April 18, 1979, the local union and NATU filed a petition for direct certification or certification election which alleged among others, that forty-eight of the sixty sales personnel of the Company were members of the local union; that the petition is supported by no less than 75% of the sales force; that there is no existing recognized labor union in the Company representing the said sales personnel; that there is likewise no existing collecting bargaining agreement; and that there had been no certification election in the last twelve months preceding the filing of the petition.

The Company then filed a motion to dismiss the petition on June 13, 1979 on the ground that it is not supported by at least 30% of the members of the proposed bargaining unit because (a) of the alleged forty-eight (48) members of the local union, thirty-one (31) had withdrawn prior to the filing of the petition; and (b) fourteen (14) of the alleged members of the union were not employees of the Company but were independent contractors.

NATU and the local union opposed the Company's motion to dismiss alleging that the fourteen dealers are actually employees of the Company because they are subject to its control and supervision.

On August 29, 1979, the Med-Arbiter issued an order dismissing the petition for lack of merit as the fourteen dealers who joined the union should not be counted in determining the 30% consent requirement because they are not employees but independent contractors and the withdrawal of the 31 salesmen from the union prior to the filing of the petition for certification election was uncontroverted by the parties.

Thereafter, on September 24, 1979, the local union on its own signed only by the local union President, filed a motion for reconsideration and/or appeal from the order of dismissal on the following grounds: (a) the findings of facts of the med-arbiter as it appears on the order

are contrary to facts and (b) in finding that no employer-employee relationship exists between the alleged dealers and respondent firm, the med-arbiter decided in a manner not in accord with the factual circumstances attendant to the relationship.

Acting on the motion for reconsideration/appeal, the Director of the Bureau of Labor Relations, in the Resolution dated January 15, 1980, reversed and set aside the order of dismissal, holding that the withdrawal of the 31 signatories to the petition two days prior to the filing of the instant petition did not establish the fact that the same was executed freely and voluntarily and that the records are replete with company documents showing that the alleged dealers are in fact employees of the company.

The Company then filed a motion to set aside the resolution dated January 16, 1980 of the Director of the Bureau of Labor Relations, contending that the appeal was never perfected or is jurisdictionally defective, copy of the motion for reconsideration/appeal not having been served upon the Company, and that the Resolution was based solely on the distorted and self-serving allegations of the union.

The local union opposed the Company's motion for reconsideration and submitted a memorandum on April 22, 1980 in amplification of its opposition.

At this juncture, the legal counsel of NATU filed a manifestation on May 15, 1980 stating that the act of the local union of engaging another lawyer to handle the case amounts to disaffiliation, for which reason said legal counsel was withdrawing from the case. The local union counter-manifested that the local union had not been officially notified of its expulsion from the NATU; that there was no valid ground for its expulsion; that the National Executive Council of NATU had not approved such expulsion; and that it had no objection to the withdrawal of Atty. Marcelino Lontok, Jr. as its counsel.

Then came a motion of NATU through its President and legal counsel withdrawing as petitioner and contending that since the local union was no longer affiliated with it, it was no longer interested in the case. Twelve members of the National Executive Council then came in and

manifested that they constitute a majority of the Executive Board of NATU and affirmed that the local union was still an affiliate of NATU.

There followed a counter-manifestation of Atty. Marcelino Lontok, Jr. on August 27, 1980 stating that six signatories to the aforesaid manifestation had no authority to make the said foregoing statement as they had resigned from the Executive Board en masse; that the acts of the President may not be reversed by the Executive Council; and that the twelve signatories did not constitute a majority of the sixty (60) members of the Executive Council.

The local union made its reply to the counter-manifestation stating that the power to expel an affiliate exclusively belonged to the National Executive Council of NATU, under Section 2, Article V of the NATU Constitution and By-Laws; that such power could only be wielded after due investigation and hearing; that disaffiliation is effected only by voluntary act of the local union, which is not the case here, because it is the President and legal counsel who are trying to expel the union.

Simultaneously with said reply, the local union filed an opposition to Atty. Lontok's motion to dismiss - withdraw petition, stating that Atty. Lontok had no more personality to file the same inasmuch as he had previously withdrawn as counsel in his manifestation dated May 7, 1980, and the local union has accepted the same in its counter-manifestation dated May 16, 1980; that expulsion requires two-thirds vote of the members of the National Executive Council, as well as investigation and hearing; that engaging another lawyer is not a ground for expulsion of an affiliate; and that the local union was compelled to hire another lawyer because up to the last day of the reglementary period, Atty. Lontok still had not filed an appeal from the decision of the Med-Arbiter.

On November 18, 1980, the Director of the Bureau of Labor Relations promulgated a resolution denying the Company's motion for reconsideration and directing that the certification election be conducted immediately. Hence, this petition.

In the apparently simple task of determining whether the Director of the Bureau of Labor Relations committed grave abuse of discretion

amounting to lack of jurisdiction in ordering the direct certification election, three difficult issues must be resolved, namely:

I. Whether or not the 14 dealers are employees or independent contractors.

II. Whether or not the withdrawal of 31 union members from the NATU affected the petition for certification election insofar as the thirty per cent requirement is concerned.

III. Whether or not the withdrawal of the petition for certification election by the NATU, through its President and legal counsel was valid and effective.

A basic factor underlying the exercise of rights under the Labor Code is status of employment. The question of whether employer-employee relationship exists is a primordial consideration before extending labor benefits under the workmen's compensation, social security, medicare, termination pay and labor relations law. It is important in the determination of who shall be included in a proposed bargaining unit because it is the sine qua non the fundamental and essential condition that a bargaining unit be composed of employees. Failure to establish this juridical relationship between the union members and the employer affects the legality of the union itself. It means the ineligibility of the union members to present a petition for certification election as well as to vote therein. Corollarily, when a petition for certification election is supported by 48 signatories in a bargaining unit composed of 60 salesmen, but 14 of the 48 lacks employee status, the petition is vitiated thereby. Herein lies the importance of resolving the status of the dealers in this case.

It is the contention of the company that the dealers in the sale of its tobacco products are independent contractors. On the other hand, the Union contends that such dealers are actually employees entitled to the coverage and benefits of labor relations laws.

According to the petitioner, to effectively market its products, the Company maintains a network of dealers all over the country. These arrangements are covered by a dealership agreement signed between the Company and a dealer in a particular area or territory. And

attached to the petition is a representative copy of the said dealership agreement which We quote below:

"DEALERSHIP AGREEMENT

KNOW ALL MEN BY THESE PRESENTS:

This DEALERSHIP AGREEMENT, executed at Pasay City, Philippines, this 8 day of March 1977, entered into by JOSE TEN SIU KEE, JR., of legal age, married and a resident of 178-E San Ramon Street, Iloilo City, hereinafter referred to as DEALER, and TELENGTAN BROTHERS & SONS, INC., doing business under the style of "LA SUERTE CIGAR & CIGARETTE FACTORY" hereinafter referred to as FACTORY, bears witness that:

WHEREAS, JOSE TAN SIU KEE, JR. of 178-E San Ramon Street, Iloilo City, had applied to be a DEALER of the FACTORY for the territories of ILOILO and/or such other territories that the FACTORY may designate from time to time; and

WHEREAS, the FACTORY had accepted the application of JOSE TAN SIU KEE, JR., and therefore, appointed him as one of its dealers in ILOILO end or such other territories that the FACTORY may designated from time to time, who is willing and able to do so as such for the main purpose of extensively selling the products of the FACTORY in the said territories, under the following express terms and conditions, to wit:

1. That the DEALER shall handle for sale and distribution of cigarette products of the factory covering the territories of ILOILO and/or such other territories that the FACTORY may designate from time to time, in accordance with existing laws and regulations of the government, without however, incurring any expenses in doing so, without the previous written consent of the FACTORY being first had and obtained;

2. That for the purpose of selling the cigarettes or products of the FACTORY, the DEALER shall send his orders to the FACTORY plant in Parañaque, Metro Manila either in cash or on credit; Provided, however, that in cases of credit order the DEALER can only get or order the supply of cigarettes up to the amount of not more than FIFTY THOUSAND PESOS (P50,000.00) only at any given time during the existence of this Contract, unless allowed by the FACTORY to get more;

3. That the FACTORY shall supply the DEALER with a truck or panel delivery and all expenses shall be borne by the FACTORY; driver shall be borne by the DEALER;

4. That the DEALER shall not receive any commission from the FACTORY but the latter shall give the DEALER a discount for all sales either on consignment or in cash, and said discount shall be decided by the FACTORY from time to time;

5. That the FACTORY shall not be liable for any violation of any law, which the DEALER may commit, and that the DEALER alone shall be responsible for any violation;

6. The geographical area (hereinafter referred to as "Territory") covered by this Agreement in which the DEALER shall undertake the responsibilities provided herein is ILOILO. It is, however, agreed and understood that the FACTORY may from time to time, upon written notice thereof THE DEALER, change or subdivide the Territory as the business exigencies, and the policy of the FACTORY with respect thereto will dictate.

7. The DEALER agrees that during the term of this Agreement:

(a) He will diligently, loyally and faithfully serve the FACTORY as its DEALER and diligently canvass for buyers of the FACTORY's Products in the Territory;

(b) He shall not sell or distribute goods of a similar nature or such as would compete and interfere with the sale of the Products of the FACTORY in the Territory, either on his account or on behalf of any other person whatsoever;

(c) Furnish to the FACTORY every three (3) months a list of the buyers/customers in the Territory, specifying the names and address of such customers as well as their individual daily supply/stock requirements;

(d) He will faithfully and religiously abide by the FACTORY policy, rules and regulations, particularly with respect to the pricing of all Products to be sold and distributed by him;

(e) He will keep account of all his dealings hereunder and promptly liquidate his account with the FACTORY with respect to the Products sold by him in the Territory;

(f) He will not engage in any activity which will in any manner prejudice either the business or name of the FACTORY, such as, but not limited to, "black-marketing" operations;

(g) He will not withdraw cigarettes if the maximum volume allotted to him by the FACTORY has been exceeded;

8. That the DEALER shall sell the Products of the FACTORY at a price to be agreed upon between both parties;

9. That the DEALER shall hereby bind and obligate himself to furnish the FACTORY, within a week from the date of this Contract with Surety or Cash Bond in the amount of not less than FIFTY THOUSAND PESOS (P50,000.00). The surety bond should be issued by one or several bonding companies acceptable to and approved by the FACTORY to guarantee and secure complete and faithful performance of the DEALER and his obligations herein enumerated, particularly the payment of his financial obligations with the FACTORY. The bond may be increased as required by the FACTORY;

10. In the event that the DEALER should become incapacitated to discharge his undertakings and responsibilities under this Agreement, for any reason whatsoever, the FACTORY may designated, for the duration of such incapacity, a substitute to handle the sale and distribution of the Products in the Territory;

11. The FACTORY reserves its right to determine, from time to time, the amount of credit granted or to be granted to the DEALER with respect to the Products to be sold and distributed in the Territory;

12. This Agreement may be cancelled and/or terminated by the FACTORY should the DEALER violate its undertaking under this Agreement especially with respect to Paragraph 7(f) hereof. It is understood, however, that the failure of the FACTORY to enforce at any time or for any period of time, any right, power or remedy accruing to the FACTORY upon default by the DEALER of his undertakings under this Agreement shall not impair any such right, power or remedy or to be construed to be a waiver or an acquiescence in such default; nor shall the action of the FACTORY in respect of any default, or any acquiescence by it in any default, affect or impair any right, power or remedy of the FACTORY in respect of any other default.

13. That either party may terminate this Contract without cause by giving to the other party fifteen (15) days notice in writing but without prejudice to any right or claim which as of that date may have accrued to either of the parties hereunder, however, in the event of breach of this Contract, the FACTORY may terminate this Contract without notice to the DEALER.

14. That it is hereby finally stipulated and agreed that in case of litigation arising out of or in connection with this Contract, the Municipal Court of Parañaque or the Court of First Instance of Rizal, as the case may be, shall be the competent court wherein to file such action or actions.

15. That this Contract shall supersede any Contract which the DEALER may have with the FACTORY.

IN WITNESS WHEREOF, these presents are signed at Pasay City, Philippines on this 8 day of March 1977.

TELENGTAN BROTHERS & SONS, INC.
(La Suerte Cigar & Cigarette Factory)
FACTORY

By:

(SGD.) LIM HAN ENG
Assistant Manager
Sales Department

(SGD.) JOSE TAN SIU KEE, JR.
Dealer
TAN 5976-397-9

SIGNED IN THE PRESENCE OF:

(SGD.) ILLEGIBLE (SGD.) ILLEGIBLE"
(Acknowledgment omitted)

The records embody standard copies of the Dealership Supplementary Agreement which We also quote hereunder:

“DEALERSHIP SUPPLEMENTARY AGREEMENT

KNOW ALL MEN BY THESE PRESENTS:

‘This Supplementary Agreement, made and entered into this 14th day of February, 1975 in Pasay City, Philippines, by and between:

> TELENGTAN BROTHERS & SONS, INC., a corporation duly organized and existing under the laws of the Philippines and doing business under the business name and style of “LA SUERTE CIGAR & CIGARETTE FACTORY”, with principal place of business at Km. 14 South Super Highway, Parañaque, Rizal, represented in this act by its duly authorized Manager, Mr. ROBERT UY, hereinafter referred to as COMPANY;
>
> *-and-*
>
> MR. PURISIMO EMBING, of legal age, married, Filipino and with postal address at 3047 Lawaan, UP II, Parañaque, Rizal, hereinafter referred to as DEALER,

WITNESSETH: That

For and in consideration of the mutual covenants and agreements made herein, by one to the other, the COMPANY and the DEALER, by these presents, enter into this Supplementary Agreement whereby the COMPANY will avail of the services of the DEALER to handle the sale and distribution of its cigarette products, consisting of MARLBORO REGULAR, MARLBORO KING SIZE, MARLBORO 100’S; PHILIP MORRIS REGULAR, PHILIP MORRIS FILTER KING, PHILIP MORRIS 100’S MENTHOL, PHILIP MORRIS 100’S REGULAR; ALPINE 100’S; MR. SLIM 100’S REGULAR, MR. SLIM 100’S MENTHOL, subject to the following terms and conditions:

1. The COMPANY hereby constitutes and appoints the DEALER as its authorized dealer for the sale and distribution of the COMPANY's products as enumerated above, (hereinafter referred to as "Products") and the DEALER hereby accepts such appointment, all upon the terms and conditions herein contained.

2. The geographical area (hereinafter referred to as "Territory") covered by this Agreement in which the DEALER shall undertake the responsibilities provided herein is GREATER MANILA AND SUBURBS. It is, however, agreed and understood that the COMPANY may from time to time, upon written notice thereof to the DEALER, change or subdivide the Territory as the business exigencies, and the policy of the COMPANY with respect thereto will dictate.

3. The DEALER agrees that during the term of this Agreement:

   (a) He will diligently, loyally and faithfully serve the COMPANY as its DEALER and diligently canvass for buyers of the COMPANY's Products in the Territory;

   (b) He shall not sell or distribute goods of a similar nature or such as would compete and interfere with the sale or the Products of the COMPANY in the Territory, either on this account or on behalf of any other person whatsoever;

   (c) Furnish to the COMPANY every three (3) months a list of the buyers/customers in the Territory, specifying the names and address of such customers as well as their individual daily supply/stock requirements;

   (d) He will faithfully and religiously abide by the COMPANY policy, rules and regulations, particularly with respect to the pricing of all Products to be sold and distributed by him;

(e) He will keep account of all his dealings hereunder and promptly liquidate his account with the COMPANY with respect to the Products sold by him in the Territory;

(f) He will not engage in any activity which will in any manner prejudice either the business or name of the COMPANY, such as, but not limited to, "Black marketing" operations;

(g) He will not withdraw cigarettes if the maximum volume allotted to him by the COMPANY has been exceeded.

5. The DEALER shall put up a bond, or additional bond, with the COMPANY in such amount or amounts, as in the judgment of the COMPANY, will be satisfactory. It is agreed that the COMPANY can apply against said bond or additional bond, such damages as may be suffered by the COMPANY by reason of breach on the part of the DEALER of any of the latter's undertakings under this Agreement.

6. In the event that the DEALER should become incapacitated to discharge his undertakings and responsibilities under this Agreement, for any reason whatsoever, the COMPANY may designate for the duration of such incapacity, a substitute to handle the sale and distribution of the Products in the Territory;

7. The COMPANY reserves its right to determine, from time to time, the amount of credit granted or to be granted to the DEALER with respect to the Products to be sold and distributed in the Territory.

8. This Agreement may be cancelled and or terminated by the COMPANY should the DEALER violate its undertaking under this Agreement especially with respect to Paragraph 4(f) hereof. It is understood, however, that the failure of the COMPANY to enforce at any time or for any period of time,

any right, power or remedy accruing to the COMPANY upon default by the DEALER of his undertakings under this Agreement shall not impair any such right, power or remedy or be construed to be a waiver or an acquiescence in such default; nor shall the action of the COMPANY in respect of any default, or any acquiescence by it in any default, affect or impair any right, power or remedy of the COMPANY in respect of any other default.

(9) In the appropriate cases, this Agreement shall constitute as a supplement, revision or modification of any agreement between the company and the DEALER now existing. However, should there be a conflict between the provisions of this Agreement and any such existing agreement between the COMPANY and the DEALER, this Agreement shall prevail.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed at the place and on the date hereinabove written.

TELENGTAN BROTHERS & SONS, INC.
(La Suerte Cigar & Cigarette Factory)

By:

(SGD.) ROBERT UY — Manager
(SGD.) PURISIMO EMBING — DEALER"

(Signature of Witnesses & Acknowledgment Omitted)

Following the rule in the Mafinco case that in a petition for certiorari, the issue of whether respondents are employees or independent contractors should be resolved mainly in the light of their peddling contracts, so must We likewise resolve the status of the 14 members of the local union involved herein mainly on their dealership agreements for verily, "a different approach would lead this Court astray into the field of factual controversy where its legal pronouncements would not rest on solid grounds." We must stress the Supreme Court is not a trier of facts.

Accordingly, after considering the terms and stipulations of the Dealership Contracts which are clear and leave no doubt upon the

intention of the contracting parties in establishing the relationship between the dealers on one hand and the company on the other as that of buyer and seller, We find that the status thereby created is one of independent contractorship, pursuant to the first rule in the interpretation of contracts that the literal meaning of the stipulations shall control. (Article 1370, New Civil Code)

From the plain language of the Dealership Agreement, We find that the same is premised with the prefatory statement "the factory has accepted the application of (name of applicant) and therefore has appointed him as one of its dealers." Its terms and conditions include the following: that the dealer shall handle the products in accordance with existing laws and regulations of the government (par.); that the dealer shall send his orders to the factory plant in cash in any amount or on credit up to the amount of not more than P10,000.00 only at any given time (par. 2); that the factory shall supply the dealer with a truck or a panel delivery and all expenses for repairs shall be borne by the factory (par. 3); and that the dealer shall not receive any commission but shall be given a discount for all sales and said discount shall be decided by the factory from time to time. (par. 4)

It also provides that the dealer alone shall be responsible for any violation of any law (par. 5); that the dealer shall be assigned to a particular territory which the factory may decide from time to time (par. 6); that the dealer shall sell the products at the price to be agreed upon between the parties (par. 7); and that the dealer shall post a surety bond of not less than P10,000.00 to guarantee and secure complete and faithful performance. (par. 8)

Either party may terminate the contract without cause by giving 15 days notice in writing; however, in the event of breach or failure to comply with any of the conditions, the factory may terminate or rescind the contract immediately. (par. 9 and 10)

The Dealership Supplementary Agreement reiterates that the Company "hereby constitute and appoints the DEALER as its authorized dealer for the sale and distribution of the COMPANY products" and "the DEALER hereby accepts such appointment" (par. 1). It also provides that the geographical area in which the dealer shall undertake his responsibilities is Greater Manila and Suburbs.

However, the Company may change or subdivide the territory as the business exigencies and the policy of the Company will dictate. (par. 2)

Under said supplementary agreement, the dealer undertakes to: (a) diligently canvass for buyers of the Company's products; (b) refrain from selling or distributing goods of similar nature; (c) furnish the Company every 3 months a list of buyers/customers, specifying their addresses and individual daily supply; (d) abide by the Company policy, particularly with respect to pricing; (e) keep account of all his dealings and promptly liquidate his accounts; (f) refrain from engaging in any activity which will prejudice the Company from withdrawing cigarettes beyond the maximum volume allotted to him. (par. 3.)

In case of incapacity of the dealer, the Company may designate a substitute (par. 6). The Company also reserves the right to determine, from time to time, the amount of credit granted or to be granted to the dealer. (par. 7)

It is likewise immediately noticeable that no such words as "to hire and employ" are present. The Dealership Agreement uses the words "the factory has accepted the application of (name of applicant) and therefore has appointed him as one of its dealers"; whereas the Dealership Supplementary Agreement is prefaced with the statement: "For and in consideration of the mutual covenants and agreements made herein, by one to the other, the COMPANY and the DEALER by these presents, enter into this Supplementary Agreement whereby the COMPANY will avail of the services of the DEALER to handle the sale and distribution of the cigarette products". Nothing in the terms and conditions likewise reveals that the dealers were engaged as employees.

Again, on the basis of the clear terms of the dealership agreements, no mention is made of the wages of the dealers. In fact, it specifies that the dealer shall not receive any commission from the factory but the latter shall give the dealer a discount for all sales either on consignment or in cash. (par. 4)

Considering the matter of wages, the term "wages" as defined in Section 2 of the Minimum Wage Law (Rep. Act No. 602) as amended, is as follows:

> "(g) 'Wage' paid to any employee shall mean the remuneration or earnings, however designated, capable of being expressed in terms of money, whether fixed or ascertained on a time, task, piece, commission basis, or other method of calculating the same, which is payable by an employer under a written or unwritten contract of employment for work done or to be done or for services rendered or to be rendered, and includes the fair and reasonable value, as determined by the Secretary of Labor, of board, lodging, or other facilities customarily furnished by the employer to the employee."

Section 10(k) of the same law also provides:

> "(k) Notification of wage conditions. - It shall be the duty of every employer to notify his employees at the time of hiring of the wage conditions under which they are employed, which shall include the following:
>
> (1) The rate of wages payable;
>
> (2) The method of calculation of wages;
>
> (3) The periodicity of wage payment; the day, the hour and place of payment; and
>
> (4) Any change with respect to any of the foregoing items."

Then, par. (h) of Sec. 10 of said law provides that such "wages" must be paid to them periodically at least once every two weeks or twice a month. Considering the foregoing, the dealer's discount lacks the foregoing characteristics of the term "wage". Since it varies from month to month depending on the volume of the sales, it lacks the characteristic of periodicity in the manner and procedure contemplated in the Minimum Wage Law.

Respondents, in effect, admit the clarity of the terms and conditions of the agreements which covenant that the relationship between the dealers and the Company is one of buyer and seller of La Suerte products, and therefore, one of an independent contractorship when they claimed that the dealership arrangement as established under the Dealership Agreement and the Dealership Supplementary Agreement is essentially a legal cover, cloak or disguise to hide the continuing Employer-Employee relationship established prior to 1964. (Respondents' Joint Memorandum, p. 34).

Precisely, there was need to change the contract of employment because of the change of relationship, from an employee to that of an independent dealer or contractor. The employees were free to enter into the new status, to sign or not to sign the new agreement. As in the Mafinco case, the respondents therein as in the instant case, were free to reject the terms of the dealership but having signed it, they were bound by its stipulations and the consequences thereof under existing labor laws. The fact that the 14 local union members voluntarily executed with La Suerte formal dealership agreements which indicate the distribution and sale of La Suerte cigarettes signifies that they were acting as independent businessmen.

We ruled earlier that the terms and stipulations of the dealership agreement leave no room for doubt that the parties entered into a transaction for the distribution and sale of La Suerte products whereby the distributor/seller or dealer assumes the status of an independent contractor. We note that the applicant who is appointed dealer "is willing and able to do as such for the main purpose of extensively selling the products of the FACTORY in the said territories under certain expressed terms and conditions" among them: "1. That the DEALER shall handle for sale and distribution cigarette products of the factory;" "2. That for the purpose of selling cigarettes or products of the factory, the dealer shall send his order to the factory plant in Parañaque, Metro Manila either in cash or on credit;" "4. That the dealer shall not receive any commission from the factory but the latter shall give the dealer a discount for all sales either on consignment or in cash;" "7. (b) He shall not sell or distribute goods of a similar nature or such as would compete and interfere with the sale of the products of the factory in the territory,

either on his account or on behalf of any other person whatsoever;" "8. That the dealer shall sell the products of the factory at a price to be agreed upon between both parties."

It is not disputed that under the dealership agreement, the dealer purchases and sells the cigarettes manufactured by the company under and for his own account. The dealer places his order for the purchase of cigarettes to be sold by him in a particular territory by filling up an Issuance Slip. The Issuance Slip is approved by the Sales Manager and after the sale is approved, a Sales Invoice is then issued to the dealer. On the basis of the approved Issuance Slip and the Sales Invoice, the dealer secures the delivery of his order from the warehouse of the company and upon delivery of the cigarettes from the warehouse, the dealer has the obligation to pay whether the cigarettes are disposed or not. The dealer on his own account sells the cigarettes in any manner he deems best without constraint as to time. The dealers do not devote their full time in selling company products. They are likewise engaged in other livelihood and businesses while selling cigarettes manufactured by the company.

The sales to the dealers are either on cash or credit basis. Where it is on cash basis, the amount is paid immediately upon the delivery of the products from the company's warehouse. If it is on credit, the dealer would usually settle his account within one week from the time the credit is extended to him. Upon payment of the purchase price, a company official receipt is issued to him.

Private respondents contend that there are essential differences between the dealership agreement and that in actual practice and operation, then proceeded to point them in the attempt to prove the control of La Suerte over the sales effort of the dealers. They also contend that the dealership agreement, as stated earlier, is essentially a legal cover, a cloak or disguise to hide the continuing employer-employee relationship established prior to 1964.

We reject both contentions as being without merit.

In the first place, We cannot accept nor consider evidence varying the terms of the agreement other than the contents of the writing itself

pursuant to Section 7, Rule 130 of the Revised Rules of Court, which provides that:

> Section 7. Evidence of written agreements. — When the terms of an agreement have been reduced to writing, it is to be considered as containing al such terms, and, therefore, there can be, between the parties and their successors in interest, no evidence of the terms of the agreement other than the contents of the writing except in the following cases:
>
> (a) Where a mistake or imperfection of the writing, or its failure to express the true intent and agreement of the parties, or the validity of the agreement is put in issue by the pleadings.
>
> (b) When there is an intrinsic ambiguity in the writing.

The term 'agreement' includes wills."

If there are changes by reason of actual practice and operation, certiorari is not the proper proceeding or remedy therefor.

In the second place, petitioner's claim that respondent local union relies heavily on evidence dehors the record or extraneous evidence found in cases other than the one at bar, as the testimony in the Limarez case, NCR Case AB-3-4960-80 cited extensively (pp. 63, 64, 65-66, 66-67, 68-69, 70-72, 73-76, 77-83, 84-85, 86-87, 89, 90-94, 97-98, 107, Comment of Local Union) and that practically all the appendages to the Comment of Local Union constituting the main bulk thereof (Annexes 1 to 52) were evidence introduced in other cases and not in the case at bar, is meritorious. We reject said evidence dehors the record and the appendages raised for the first time on appeal as extrinsic, beyond the scope of this review.

Private respondents contend that under the dealership agreement, the totality of the powers expressly reserved to the company, respecting essential aspects or facets of the sales operation of the dealers, clearly establish company control over the manner and details of performance. And they cite the following: "(1) The dealer shall be assigned to a particular territory which the factory shall

decide from time to time (par. 6); (2) The dealer shall handle for sale and distribution cigarette products of the company . . . without however incurring any expense in doing so, without previous written consent of the factory being first had and obtained (par. 1); (3) In cases of credit order, the dealer can only get or order the supply of cigarettes up to the amount of not more than P10,000.00 only at any given time during the existence of this contract, unless allowed by the factory to get more (par. 2); (4) The company shall give the dealer a discount for all sales . . . and said discount shall be decided by the factory from time to time (par. 4); (5) It is however agreed and understood that the company may, from time to time, upon written notice thereof to the dealer, change or divide the territory as the business exigencies and policy of the factory with respect thereto will dictate (par. 2, Annex 10); (6) Each dealer will faithfully and religiously abide by the company policy, rules and regulations, particularly with respect to pricing of all products to be sold and distributed by him (par. 3, sub-par. (d), Annex 10); (7) The dealer shall put up a bond or additional bond with the company in such amounts as in the judgment of the company may be satisfactory (par. 5, Annex 10); (8) In the event that the dealer should become incapacitated for any reason whatsoever, the factory may designate for the duration of said incapacity a substitute to handle the sale and distribution of the products in the territory (par. 6, Annex 10); (9) The company reserves the right to determine, from time to time, the amount of credit granted or to be granted the dealer (par. 7, Annex 10); (10) This agreement may be cancelled and/or terminated by the company should the dealer violate its undertaking under this Agreement, especially par. 7(f) hereof (par. 8, Annex 10); (11) That either party may terminate this contract without cause by giving to the other party 15 days notice in writing (par. 9, Annex 9); and (12) In the event of breach of this contract, the company may terminate this Contract without notice to the dealer (proviso in par. 9, Annex 9)."[1]

Disputing private respondents' above contention that the company exercises company control over the manner and details of the sales operation of the dealers and not merely over the result of the work of each dealer, petitioner maintains that:

1. The allocation of a definite territory to be assigned to dealer or distributor is standard practice in dealership

agreements, whether international or domestic. Allocation of area responsibility and territorial and customer restrictions are common features of dealership agreements. Thus, a company may be appointed exclusive distributor or dealer of a product in the Philippines, the Asian region or in the Far East in the same way that some Philippine manufacturers appoint exclusive dealers for the United States or Canada;

2. In the Shriro case, the expenses for handling and delivery of the goods to the customers are all for the account of the company (See Social Security System vs. Hon. Court of Appeals & Shriro (Phil.) Inc., 37 SCRA 579) and there, the Supreme Court did not consider the facts as indicia of an employment relation;

3. In limiting a credit order for cigarettes up to the amount of P10,000.00 only at any given time during the existence of the contract, unless allowed by the factory to get more, the company merely controls the result of the work of the dealer. The credit order is limited because in a dealership contract, the transaction is one of buy and sell and once an order is made, specially a credit order, the risk of loss is passed on to the dealer;

4. In the Mafinco case, the peddlers are given also a discount and the Supreme Court held that the peddling contract is not a contract of employment but signifies an independent contractor relationship.

5. The change or division of the territory to which a dealer is assigned as the business exigencies and policy of the factory with respect thereto will dictate from time to time is no indicia of company control over the means and methods for in the Mafinco case the peddlers are also assigned definite area routes or zones.

6. That the dealers shall abide with the company policies and rules, particularly in pricing of products is a standard practice in dealership agreements and more so in

franchising agreements. The fact that a person has to conform with standards of conduct set by the company does not declassify such a person as an independent contractor so long as he can determine his own day to day activities. In independent contracts, there is always the element of control as to what shall be done as distinguished from how it should be done.

7. The posting of a surety bond under par. 8 of the Dealers Agreement is similar to the giving of a cash bond under par. 7, Peddlers Contract in the Mafinco case wherein it is ruled that the Peddlers Contract involved therein is not an employment agreement.

8. The right to designate a substitute dealer in the event of the incapacity of the regular dealer is no indication of an employer-employee relationship. It is just business prudence to provide for substitute dealers in case of the regular dealer's incapacity.

9. That the company may determine from time to time the amount of credit granted or to be granted the dealer is more a control over the result rather than the means as in Shriro case where the company even reserves the right to approve or reject a sales order, whether on cash or on credit basis.

10. The power to cancel or terminate should the dealer violate its undertaking under the agreement on the basis of the company's opinion that the dealer must engage in any activity which will in any manner prejudice either the business or name of the factory is a standard practice in dealership agreements.

We agree with the petitioner. We hold further that the terms and conditions for the termination of the contract are the usual and common stipulations in independent contractorship agreements. In any event, the contention that the totality of the powers expressly reserved to the company establish company control over the manner and details of performance is merely speculative and conjectural.

There are indeed striking similarities between the Peddler's Contract in the Mafinco case and the Dealer's Agreement and Supplementary Dealer's Agreement in the case at bar. Thus:

1. Use of company facilities — La Suerte provides dealers with truck or panel delivery (par. 3, Dealer's Agreement) whereas in Mafinco, the company also provides peddler with delivery truck (par. 1, Peddling Contract);

2. Salary of drivers — Dealer in this La Suerte case pays salary of driver (par. 3, Dealer's Agreement). In Mafinco the salary of drivers is for peddler's account (par. 2, Peddling Contract);

3. Expenses of operation and maintenance — La Suerte pays for expenses and repair pertaining to the truck or panel delivery (par. 3, Dealership Agreement). In Mafinco, the company furnishes gasoline and oil to run trucks and bear costs of maintenance and repair (par. 4, Peddling Contract);

4. Profit Margin — In instant La Suerte case, no commission given. Company gives a sales discount (par. 4, Dealership Agreement). In Mafinco, no commission is also given. Peddler given a sales discount (par. 6, Peddler's Contract);

5. Collateral — Dealer in La Suerte gives a surety bond (par. 8. Dealer's Agreement). In Mafinco, peddler gives a cash bond (par. 7, Peddler's Contract);

6. Payment — Dealer required to promptly liquidate account (par. 3, (e), Supplementary Dealer's Contract). In Mafinco, peddler liquidates everyday at the end of each day, otherwise his cash bond shall answer for unliquidated account (par. 8, Peddler's Contract);

7. Termination — In La Suerte case, no fixed period but either party may terminate after 15 days written notice (par. 9, Dealer's Contract). In Mafinco, the contract is for one year

but either party may terminate earlier upon 5-day written notice (par. 9, Peddler's Contract);

8. Government licenses — Dealers secure own municipal license and Mayor's permit (Annexes 23 to 24, Comment of Local Union). In Mafinco, peddler secure own licenses to peddle (Committee Report, 70 SCRA 157);

9. Working hours — Dealers have to get quotas daily but no fixed time. In Mafinco, peddlers get their trucks in the morning and have to report daily (Report of Committee, 70 SCRA 154-156). No fixed time;

10. Territory — Dealer assigned a particular territory (par. 6, Dealer's Agreement). In Mafinco, peddlers have a fixed territory in Manila, see whereas clause of Peddler's Contract, subject to pre-arranged routes, areas and zones agreed upon by Peddler's Association (Committee Report, 70 SCRA 156);

11. Supervision — Supervisors also for market analysis in La Suerte case. In Mafinco, Liaison Officer or Supervisors for market analysis (Committee Report, 70 SCRA 156);

12. Basic Agreement — In the instant La Suerte case, the dealer is "appointed" (not hired as in employment contract) "to handle" products without commission but with sales discount through sales invoices which state "sold to" dealer (Annex B, Petition; Annex D, Petition). Payments duly receipted (Annex E, Petition). In Mafinco, the peddler is "desirous of buying and selling" (70 SCRA 143).

On the second issue — whether or not the withdrawal of 31 union members from NATU affected the petition for certification election insofar as the 30% requirement is concerned, We reserve the order of the respondent Director of the Bureau of Labor Relations, it appearing undisputably that the 31 union members had withdrawn their support to the petition before the filing of said petition. It would be otherwise if the withdrawal was made after the filing of the petition for it would then be presumed that the withdrawal was not

free and voluntary. The presumption would arise that the withdrawal was procured through duress, coercion or for valuable consideration. In other words, the distinction must be that withdrawals made before the filing of the petition are presumed voluntary unless there is convincing proof to the contrary, whereas withdrawals made after the filing of the petition are deemed involuntary.

The reason for such distinction is that if the withdrawal or retraction is made before the filing of the petition, the names of employees supporting the petition are supposed to be held secret to the opposite party. Logically, any such withdrawal or retraction shows voluntariness in the absence of proof to the contrary. Moreover, it becomes apparent that such employees had not given consent to the filing of the petition, hence the subscription requirement has not been met.

When the withdrawal or retraction is made after the petition is filed, the employees who are supporting the petition become known to the opposite party since their names are attached to the petition at the time of filing. Therefore, it would not be unexpected that the opposite party would use foul means for the subject employees to withdrawal their support.

In recapitulation, We hold and rule that the 14 members of respondent local union are dealers or independent contractors. They are not employees of petitioner company. With the withdrawal by 31 members of their support to the petition prior to or before the filing thereof, making a total of 45, the remainder of 3 out of the 48 alleged to have supported the petition can hardly be said to represent the union. Hence, the dismissal of the petition by the Med-Arbiter was correct and justified. Respondent Director committed grave abuse of discretion in reversing the order of the Med-Arbiter.

With the above pronouncements, the resolution of the third issue raised herein is unnecessary.

WHEREFORE, IN VIEW OF ALL THE FOREGOING, the Resolution dated January 15, 1980 of respondent Director of the Bureau of Labor Relations and the Resolution dated November 18,

1980 are hereby **REVERSED** and **SET ASIDE**, and the petition for certification election is ordered dismissed.

No costs.

SO ORDERED.

Makasiar, *J.*, *(Chairman)*, Concepcion, Jr., Abad Santos and Escolin, *JJ.*, concur.
Aquino, *J.*, in the result.
De Castro, *J.*, is on leave.

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[1] Annex 9 refers to the Dealership Supplementary Agreement; Annex 10, to the Dealership Agreement.
