

Contract of Employment; A critical analysis

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Evolution of the concept of Labour

The concept of labour has undergone a catalytic change in recent years. We have traversed a long way from the days of absolute capitalism governed by the doctrine of *laissez faire* to the days of industrial democracy when labour and capital have come to be regarded as joint partners of production.

The origin of exploitation of Labour can be traced back to the days of slavery in the Roman period. Rome was founded by Romulus 753 BC. and was ruled by Kings until 510 BC. Thereafter the Republic was instituted together with Twelve Tables. Most of the Roman law known to us was codified by Justinian who died in 565 AD. Slavery was legally recognized under the Roman Law. Initially, slavery was an institution of the *ius gentium* by which man was subject to the ownership of another contrary to nature because they were captures in war. However, much of the law of slavery was *ius civile*¹ and was acquired by sale². The important point is that slave, under Roman Law, was subject to the ownership of another and was regarded as '*res*'³ The slaves had no rights even for their own lives in certain circumstances. In some of the American States and in South Africa, slavery in different forms continued even at the beginning of the 18th Century.

¹ Prichard, A.M. , LEAGE'S Roman Private Law, p. 65, MACMILLAN & Co Ltd, London,1961.

² Reason for such sale may be (a) for being caught in act of stealing, (b) for evasion of tax or military service, (c) non payment of debts, (d) to punish women for cohabiting with slaves (e) poor parents were allowed to sell their children in exceptional circumstances.

³ To the Romans, *res* was a chattel or thing capable of expression in pecuniary terms. The Roman definition of *res* was economic and not physical.

Impact of the Industrial Revolution

Vast economic and social changes were brought about by the Industrial Revolution which gradually transformed a medieval society into the modern industrial society. The revolution first began in England with the invention and adoption of new machines and the technological processes. The Industrial Revolution was a crucial event in the European and world history and from it we can date the advent of the machine age. Particularly in England, the inventions like Kay's Flying Shuttle (1733), Arkwright's Spinning Frame (1769), Hargreaves's Jenny (1770) and Cartwright's Power loom (1785) revolutionized the production of cotton textiles. With the growing use of iron the manufacture of machines and machines to make machines became easier. The new machines and the new processes became immensely more productive by the use of steam power. James Watt made the steam engine practicable (1785) and by the end of the 18th century steam engines practically superseded water mills. These developments had the effect of localizing industry in particular places which later became industrial towns.

The immediate effect of industrialization is the growth of boom towns where factories sprang up in numbers and depopulation of the country side with the workers from the village moving into the town areas seeking employment in the newly set up factories. All those who sought employment in factories could not be absorbed in the factories for the supply of labour far exceeded the demand. The Industrial Revolution itself had led to unemployment of many persons who were engaged in small or cottage industries. The owners of factories exploited this situation and paid very low wages and made maximum profits out of their investments.

The birth of the Capitalist Class and the Labour Class

The factory system led to the growth of a capitalist class along with a labour class in the society. The workers were ill-paid, ill-housed and were shabbily treated. Their hours of work were as high as eighteen hours in the day. Women and children of tender age were employed in factories and mines on lower wages than men. The wages and the hours of work were determined by the law of demand and supply. That was an age of “free contract” entirely left to the sweet will of the owners of the factories. There was no State interference in the running of factories. The Laissez faire doctrine (the doctrine of non interference by the State) governed the entire economic system. Thus, the “Industrial Revolution gave birth to its twins; the Capitalist Class and the Labour Class.

Right to Hire and Fire

The traditional theory of employment rested on the right to hire and fire. This theory looked at employment as a mere contractual relation between master and servant which either party could terminate at will, subject to the notice, in certain cases. The classical theory of contract of employment assumed that in the absence of physical restraint or other direct compulsion, parties were free not only to contract on whatever terms they wished (provided they were legal) , but also assumed at that time, quite erroneously, that they contracted on equal terms.

Unionization of Labour

Combination or association of labour for better status was a taboo. Unionisation was prohibited by law. The Government was indifferent to the conditions of labour just as the employers were hostile to the labourers. Amidst of oppression and suppression the workers started unionization in 1824. The labour became

politically effective in England after 1867 and with the formation of the Labour Party (1889) by the British Trade Union congress, labourers attained political importance. A parallel though later, development occurred in all the countries in world and the labour organizations became an integral part of industrial life. In this connection the contribution of Karl Marx's socialist doctrine towards the unification of labour of the world cannot be ignored. Karl Marx called upon the workers of the world "to unite" and told them in unambiguous term that "they had nothing to lose but their fetters, while they had a world to gain." The role played by the ILO and the UNO after the 2nd World War helped to change the attitude of towards Labour throughout the world.

State Intervention in Contract of Employment

The expansion of welfare and social functions of the State had led to the state intervention in the common law contract of employment by introducing legislation modifying or adding the contract of employment in order to minimize the gap between the formal freedom of contract between the workman and the employer. The labour legislation introduced in this country for the past one hundred and fifty years has severely restricted the freedom of contract between the parties. New conceptions of law developed and created social and public concern in the protection from exploitation of economically weaker members of the society by regulating the terms and conditions of labour.

State intervention in contract of employment and the legislation introduced to date can be categorized in to several areas of laws;

1. Terms and Conditions of Employment.
2. Employment of Women, Young Persons and Children.
3. Occupational Safety, Health and payment of Workmen's Compensation.
4. Social Security.

5. Labour Relations.
6. Foreign Employment.
7. Miscellaneous legislation with regard to Estate Labour enacted pre independence.

Contract of Employment today

The Legislature has interfered with, in many ways, in the freedom of contract in employment contracts as aforesaid. However, it should be remembered that, the foundation of the contract of employment is still the Common Law of Sri Lanka which is Roman Dutch Law. There are areas in a contract of employment that the legislature has not interfered and as such the Common Law applies. The Common Law completely governs the question whether a relationship of employer and employee exist between two persons.⁴ The law relating to vacation of post is also the common law of Sri Lanka. In *Wijenayake v. Air Lanka*⁵ the Supreme Court held that the duty of the employer to grant a hearing in a case of vacation of post was governed by Roman Dutch Law. Though statutory intervention to Common Law are too great and Labour Tribunals are entitled to grant relief notwithstanding anything to the contrary in any contract of service,⁶ Labour Tribunals and courts still recourse to common law principles specially with regard to disciplinary terminations and cases of vacation of post. The freedom of contract between the parties has not been interfered with in respect of period and conditions of Probation to.

However, whatever may the terms and conditions of employment agreed upon between the parties and incorporated in the contract of employment, save and except the areas referred to above⁷ the rest, where applicable, are subject to the

⁴ S.R. De Silva, *The Contract of Employment*, page 23, No. 4 – (Revised Edition); *Employers' Federation of Ceylon*. 1998.

⁵ [1990] 1 Sri Lanka Law Reports, 293.

⁶ Industrial Disputes Act, section 31 B (4)

⁷ Areas such as disciplinary control, clauses in restraint of Trade and clauses similar to Probation.

provisions of collective agreements, awards of labour courts and Arbitrators as well as to statutory provisions. Therefore a contract of employment in today's context may comprise of;

1. The Common Law.
2. Contractual terms not covered by legislation (eg. Period of Probation)
3. Statutory Provisions,
4. Collective Agreements between the Employer(s) and Workmen.
5. Awards of Labour Courts (including Labour Tribunals, Industrial Courts & Arbitration Awards)
6. Custom or usage and practices in the work place.

Recent Trends

The legislative interference has been justified on the basis that that the traditional hire and fire concept created an unfair contract between the employer and employee. Many employers complain today that the contract of employment, with its numerous statutory interventions, has created an imbalance where the employer has been placed in a disadvantages situation. In many countries, the contract of employment is viewed as a fair contract, especially with strong trade unions as the workers have a stronger bargaining power. In *Ackermann-Goggingen Aktiengesellschaft v Marshing*⁸ the South African Supreme Court observed that the employees are no longer automatically regarded as being in an unfavourably unequal bargaining position after the advent of trade unionism and collective bargaining.

Therefore, it is important or the legislature to now strikes a balance in the contract of employment to make the parties to the contract equal in bargaining power. Our courts have often viewed the contract of employment as an unfair contract for employees and interpreted the relationship using the English Law and English case law though the law applicable to a contract of employment is

⁸ 1973 (4) SA 62 at 72-73

the Roman Dutch Law as stated earlier. This has led to serious issues in modern Human Resource Management.

Employer and Employee relationship

The Industrial Dispute Act defines a 'workman' as "any person who has entered into a contract or works under a contract in any capacity....." This definition should be read with the definition of the term 'employer' as given in the said Act.

"employer means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person who on behalf of any other person employs any workman."

The most important aspect in this definition is that there must be a contract of employment to create an employer-employee (master-servant) relationship.

The courts have developed several tests to identify an employer-employee relationship. They are 'Control Test', 'Integration Test' and the 'Economic Reality Test'. Of these the oldest and the most important test is the Control Test, which attempts to see whether there is a visible right to control the workman in employment by the other party in which event the party controlling becomes the employer. The second one is to ascertain whether the two parties are doing the same business or two different businesses. If they are engaged in the same business and perform as part of such business, in all probabilities there is an employer-employee relation. The third test is intended to see whether both parties run the risk of investment or whether the economic risk is borne by only one party. If only one party bears the losses and profits it indicates that the other party is only a servant of the party running the risk.

Control Test

As decided in *Ready Mixed Concrete Vs Minister of Pensions*⁹ the control test was used to evaluate whether the employee is providing a contract of services or contract for services. In this matter the rights of the employer to control the employee including the right to chose the employee, paying wages, control of his conduct, disciplinary control and the termination was taken in to consideration

In the English case of *Short Vs. Henderson*¹⁰ the Court introduced a yard stick to ascertain whether relationship is one of contract of service or of contract for service. The court said that whoever who takes the responsibility of the following has also taken up the responsibility of being the employer.

1. Selection of the required workmen;
2. Right to order with regard the manner in which the work should be done.
3. Right to control;
4. Payment of wages; and
5. Right to dismiss.

Integral part of the business

In *Market Investigations Ltd v. Minister of Social Security*¹¹ Cook J., according to the test referred to as “Integrel part of Business” summarised the position thus:

“the obversations of Lord Wright, of Dennings L.J. and of the Judge of the Supreme Court suggest that the fundamental test to be applied is this: is the parson who had engaged himself to perform these services performing them as a person in business on his own account? If the answer to the question is ‘Yes’ then the contract is a ‘contract for services.’ If the answer is ‘No’ then the contract is a ‘contract of service. No exhaustive test have been compiled, and perhaps no exhaustive test can be compiled, of the considerations which are relevant in

⁹ [1968] 2 QB 497 at 512

¹⁰ [1973] 174 TLR

¹¹ [1968] 3 AER 732

determining the question, nor can strict rules be laid down as to the relative weight which which the various considerations should carry in particular cases."

In *Montreal Vs. Montreal Locomotive Works Ltd*¹² Lord Wright said ;

"in earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control (2) ownership of the tools (3) chance of profit (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the ship owner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it , or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

In *United States of America Vs. Silk*¹³ the question was whether certain men were "employees" and the Judges of the Supreme Court decided 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."

The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that the fundamental test to be applied was this: "is the

¹² [1947] 1 DLR 161 at p 161

¹³ [1946] US 331 - 704

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. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight.

It is interesting to analyse the facts of *Y. G. de Silva v The Associated Newspapers Ltd*¹⁴ where the Court of Appeal applied the above tests to a news paper correspondent. The applicant was a Group correspondent in Kandy to the Respondent Newspaper Company from 1958 and a District Correspondent from 1969 upto February 1974. He was paid a monthly "retainer" and at pieces rates for news columns and news-pictures and portrait-pictures. The Applicant's employment had been on fixed term contracts and when the last of such contracts expired it was not renewed. The termination of the employment was therefore not by the employer but a consequential termination at the end of an agreed period. When the contracts subsisted the applicant had to attend office every day and report to the Kandy News Editor of the respondent company who detailed him on exacting assignments in the Kandy District and nearly all of its suburbs. There was surveillance of his work from the Colombo office of the Company also. Although he was not prohibited from doing other work, the applicant had no time for any other work.

The court held;

It is not possible to formulate principles and tests of universal validity to determine the question as to what is contract of service. The case merely indicates a number of indicia or factors which are relevant. The presence or absence of any one of such factors is not conclusive since a decision depends on the combined effect of all relevant factors.

¹⁴ [1983] BLR 118

The common tests are:- control, ownership of tools, chance of profit, risk of loss, performance of the work by the seroant himself and not by his delegate, carrying on of business by the party for himself and not merely for a superior, payment of wages but these tests are not always conclusive. A modern test is – is the work done an integral part of the business or merely and accessory to it ?.This is the integration test. Is the person part and parcel of the organisation?

When one looks at the facts of the above case, is it fair or legally sound to state that a area correspondent to a news paper is an employee? These are areas we need to revisit either by judicial pronouncements or by legislative interventions.

Modern trends & Issues;

Should there be legislative intervention in the contract of employment?

Outsourcing

The term “Out-sourcing” in employment although has become popular as a terminology in the area of Human Resources Management today in Sri Lanka , it appears that, it has either been misconceived or misunderstood by our Human Resources Managers. They appear to have mixed up this with ‘Contract Labour’ which is recruitment through an agent.

Outsourcing in the context of contemporary commercial activity and labour relations has been the subject of much concern.

A precise definition of outsourcing has yet to agree upon. The term is used inconsistently. However, outsourcing is often viewed as involving the contracting out of a business function – commonly one previously performed in-house- to an external provider¹⁵. Outsourcing refers to a company that contracts

¹⁵ An Introduction to Outsourcing –Overby, S –
(<http://www.chnsourcing.com/article/Article/abc/142820070625101847.html>)

with another company to provide services that might otherwise be performed by in-house employees. Many large companies now outsource jobs such as call-centre services, e-mail services, payroll, transport, printing, mail, security services, janitorial services, revenue collection, packing, legal services, recruitment and training processes etc. Most of the companies in Sri Lanka have outsourced services or functions such as janitorial services, security services, Warf services etc and correctly shifted the responsibilities of the employer to the service supplier. There are many reasons that companies outsource various jobs/activities, but the most prominent advantage seems to be the fact that it often saves money. Many of the companies that provide outsourcing services are able to do the work for considerably less money, as they don't have to provide benefits to their workers and have fewer overhead expenses. The company that outsources the function expect the company to be freed from the liabilities of being an employer.

The concept of outsourcing ensures you get what you want at an economical rate and without you having to invest on such services or jobs. When you outsource, you need not employ people; you have better control over the end result; you can demand and get the quality you need. It saves cost, time and effort.

In outsourcing two organizations may enter in to a contractual agreement involving an exchange of services and payments. Organizations that outsource are seeking to realize benefits or address the issues such as cost savings, focus on core business, cost re-structuring, improve quality, knowledge, operational expertise, access to talent, capacity management, risk management tax benefit, liability etc. The expression 'outsourcing', was probably originally used not in the human resource area but in the supply of accessories or components in large manufacturing concerns such as manufacturing of motor vehicles, where the

main producer obtains certain accessory units or components for the main product from outside sources.

Outsourcing Vs Contract Labour

Since late we find that the human resource managers using new expressions and words for old concepts. Outsourcing never meant to outsource individual employees to fill vacancies in the regular workforce. What they are referring to as 'outsourcing' is probably recruitment through an agent which is called 'contract labour'. The system of contract labour is not covered by any special law in Sri Lanka. Unlike in India we have no law covering this mode of employment. By resorting to contract labour, the main objective of the business community is to avoid the responsibilities of being an employer and avoid labour law specially the law relating to termination and terminal benefits.'

*Moosajees Limited Vs. Eksath Enginaru Saha Samanya Kamkaru Samithya*¹⁶ is a classic case of misapplying the concepts of outsourcing to contract labour. This was an application for a Writ of Certiorari made by Messrs. Moosajees Limited seeking to quash the order made by the Commissioner of Labour under the provisions of section 6 of the Termination of Employment of Workmen (Special Provisions) Act requiring the petitioner to reinstate ten workmen belonging to the Respondent Union.

The main ground relied upon by the petitioner was that the company was not the employer of any of these ten workmen and that it had not terminated the services of the workmen and that in these premises the Commissioner of Labour had no jurisdiction to make any order under section 6 of the said Act. The respondents to this petition are the union which represented the workmen and the Labour Officials. The 2nd respondent was one Mr. Upasaka Appu who according to the petitioner an independent contractor providing for the company

¹⁶ [1979] 1 NLR 285

the services of these workmen for unloading, baling and loading of coconut fibre for export. According to the petitioner payment was made on the basis of piece rate. Per Rajaratnam J :

We have perused the findings of the Assistant Commissioner of Labour (p. 43), the 4th respondent in this application and the reasons set out therein. On the documentary and oral evidence led, the evidence was overwhelmingly convincing that the petitioner company was the employer. The Works Manager of the company has suspended even Upasaka Appu's son from work. The General Manager and the Director have sent letters of warning to the workmen with copies to the Works Manager and all the evidence shows that the workmen were under the direct supervision and disciplinary control of the management of the petitioner Company. Upasaka Appu did not appear to know why he was paid Rs. 75 a week by the company. The notice terminating the services of K. Hemapala the son of Upasaka Appu who claims to be the employer of his son was proved to have been sent by Moosajees Ltd., although signed by the father. There is an admission in the written submissions furnished on behalf of the employer that the work place was made out of bounds for Upasaka Appu (vide p. 6). At every turn "there is evidence that every incidence of employment was by Moosajees and that Upasaka Appu was a puppet. It appears fairly clear that this was a device adopted by the petitioner to escape the liabilities of an employer. The findings of the labour authorities were justified on the evidence led and we see no error on record. We are of the view that the averments in the affidavits filed in this application with regard to the employment of these workmen cannot be accepted. It is evident on the material before us that Moosajees Ltd. employed Upasaka Appu to serve as a tool in their hands to themselves escape liabilities of employment. The pleadings in their petition and affidavit do not contain a full disclosure of the real facts of the case and to say the least the petitioner has not observed the utmost good faith and has been guilty of a lack of uberrima fides by a suppression of material facts in the pleadings. It was neither fair by this Court nor by his counsel that there was

no full disclosure of material facts. Learned counsel for the petitioner acted very properly when he did not pursue a certain line of argument when we referred him to certain documents and facts which he was not aware of and which were elicited in the course of the inquiry before the Labour Officials.

However, outsourcing Human Resources Services is possible but it is entirely different from recruiting the workmen required for the main business from an outside source which is called contract labour. "As organizations are facing stiff competition and are downsizing their manpower, outsourcing HR Services may be the most preferential alternative for them. This leaves them enough room to place stiff demands upon the company's HR Team for providing solution to complex business problems. Organizations seek cost reduction in non-core administrative jobs, but look different and motivate ideas and strict confidentiality while outsourcing the HR Services.

HR Outsourcing thus is an extremely challenging task and its success largely depends upon both the organizations as well as on the competency of the agency"¹⁷

Contract Labour

The system of employing contract labour is prevalent in most industries in different occupations including skilled and semi skilled jobs. It is prevalent in agriculture and allied operations and to some extent in the service sector. A workman is deemed to be employed as Contract Labour when he is hired in connection with the work of an establishment by or through a contractor. Contract workmen are indirect employees; persons who are hired, supervised and remunerated by a contractor who, in turn, is compensated by the establishment. According to Indian Contract Labour Regulations, contract labour has to be employed for work which is specific and for definite duration. Inferior

¹⁷ 'Nagaraj D.R - Outsourcing HR –IPM Journal-Vol.1 No.1 99 at page 108-2006

labour status, casual nature of employment, lack of job security and poor economic conditions are the major characteristics of contract labour. While economic factors like cost effectiveness may justify system of contract labour, considerations of social justice call for its abolition or regulations.

The condition of contract labour in India was studied by various Commissions, Committees and also Labour Bureau, Ministry of Labour, before independence and after independence. All these have found their condition to be appalling and exploitative in nature. The Supreme Court in India in the case of Standard Vacuum Refinery Company vs their Workmen¹⁸ observed that contract labour should not be employed where:

- (a) The work is perennial and must go on from day to day;
- (b) The work is incidental to and necessary for the work of the factory;
- (c) The work is sufficient to employ considerable number of whole time workmen; and
- (d) The work is being done in most concerns through regular workmen

The concern for providing legislative protection to this category of workers, whose conditions have been found to be abysmal, resulted in the enactment of the Contract Labour (Regulation and Abolition) Act 1970 by the Government of India. Accordingly Contract Labour in India is governed by this Act. The Indian Act was brought on the Statute Book to regulate the employment of Contract labour in certain establishments and to provided for its abolition in certain circumstances and for matters connected therewith. In Sri Lanka there is no such special legislation for Contract Labour and therefore the mechanism of 'Contract Labour' cannot be used in Sri Lanka in the way that it is

¹⁸ 1960 –II-ILJ page 233 (<http://www.indiankanoon.org/doc/1582051/>)

adopted in India. Indian Act restricts application of this law 'To every establishment in which 20 or more workmen are employed or were employed on any day on the preceding 12 months as contract labour and to every contractor who employs or who employed on any day of the preceding 12 months 20 or more workmen. It does not apply to establishments where the work performed of intermittent or seasonal nature. An establishment wherein work is of intermittent and seasonal nature will be covered by the Act if the work performed is more than 120 days and 60 days in a year respectively.

. Apart from the regulatory measures provided under the Act for the benefit of the contract labour, the 'appropriate government ' under Sec.10(1) of the Act is authorized, after consultation with the Central Board or State Board, as the case may be , to prohibit by notification in the official gazette, employment of contract labour in any establishment in any process, operation or other work. The Act also applies to establishments of the Government and Local Authorities as well. The establishments covered under the Act required to be registered as principal employer with the appropriate authorities. Every contractor is required to obtain a license and not to undertake or execute any work through contract labour except under and in accordance with the license issued in that behalf by the licensing officer. The licence granted is subject to such conditions as to hours of work, fixation of wages and other essential amenities in respect of contract labour as laid down in the rules.

The Act provides for many protective provisions for the well being of the contract labour. Contract workers need to be paid as per minimum wages Act. For the health and welfare of contract labourers certain provisions have been made mandatory by the Contract Labour Act such as safe drinking water, canteen facilities , first aid facilities etc. Social security covers in terms of provident fund benefits and medical facilities need to be also given to the contract employees. If the contractor fails provide these benefits and facilities,

the responsibility falls on the principal employer. However, there is no master-servant relationship between the contract labour and the principal employer.

The *Ceylon Mercantile Employees Union Vs. Ceylon Fertilizer Corporation*¹⁹ in my view appears to have given us some indication complexity of issues involved in determining who is the employer, the User Enterprise or Employment Agency. The facts of this case are that the Ceylon Fertilizer Corporation established in 1964 (hereinafter called the CFC) needed some casual workers to cope with the increased production. Their main function was to import raw materials, make the appropriate mixture of fertilizer, bag such mixture and sell them to the consumers in various parts of the island. At the commencement of it produced three to four thousand tons of fertilizer. By the year 1975 their output had reached fifty thousand tons. It had a permanent staff as well as casual labour. The former consisted of the clerical staff, skilled workers and a few unskilled workers. The latter category consisted of casual labour. They were of two kinds - check role labour and those paid on apiece rate basis. The 502 persons on whose behalf the claims are made comprised casual labour.

The mode of engaging casual labour was on a contract basis. They are commonly known as contract labour. They were workers supplied by labour contractors. From 1967 - 1969 and 1969 to 1972 two different contractors supplied the labour. From 1972 the 2nd Respondent Hunupitiya Labour Co-operative Society Ltd (hereinafter referred to as 'the Society') obtained the contract to supply labour

Such labour was obtained on a contract basis from a private labour supplier. They were commonly known as contract labour. In 1971 CFC called for tenders for the supply of General Labour Services at fertilizer loading and

¹⁹ [1985] 1 SLR 401

unloading points for a period of one year commencing January 1972. The prospective tenderer was informed that he must be ready to supply sufficient labour at short notice at all points for a total daily tonnage 1000- 1500 tons but during certain days there may be no handling at all. The Society tendered stipulating their rates and this tender was accepted and an agreement was signed both parties. It recited that the contractor was an independent contractor and that the appellant (CFC) was in no way bound to provide regular work or any work whatsoever. The contractor undertook to supply labour at short notice (2 hours notice) and be liable in damages if the CFC was compelled on account of the contractor's failure to supply labour, to engage other labour at higher rates.. The Schedule to the agreement sets out the rates of payment agreed upon payable to the contractor. These rates given are as per labourer. The rates paid to the workmen by the contractor are very much less than the rate agreed in the agreement, the difference being the Society's profit. At the end of each month CFC sends the total sum payable to the society in terms of the agreement computed on the basis of the number of workmen supplied by the society during the month together with another sum equivalent to the employer's contribution to the Employees Provident Fund. The society pays the individual workmen according to the rates agreed between the Society and the workmen. The employee's contributions to the EPF were deducted by the Society at the time of the payment and send the total contribution to the EPF under the Society's name.

At a certain point of time CFC asked the Society not to send any men thereafter. The entire work force was discharged by the Society. The CMU on behalf of the workers made application to Labour Tribunal against both CFC and the Society for unfair and wrongful termination of employment by the CFC. The CFC denied not only the termination but even the very employment of the said workers. The position taken up by the CFC was that the workers belonged to the Society and the employment and the termination of the workmen had been by the Society and therefore the real employer of the applicant workers should be

the Society and not the CFC. In the circumstances CFC urged that they be discharged from the case. The Society did not deny these facts. The contract signed between the CFC and the Society 'for the supply of labour services' was produced in court. The Labour Tribunal held with the applicant Union that the employer of these workmen was the CFC and directed the CFC to pay compensation to the 500 odd employees. The order was challenged in the Court of Appeal and the Labour Tribunal order was reversed by the Court Appeal and then it finally came before the Supreme Court.

The Supreme Court²⁰ by majority decision²¹ observed that the manner in which the CFC has dealt with the workmen is more in line with the Society being in the nature of a mere-agent to supply labour, while the CFC itself became the employer of such labour. The Chief Justice dissented from this view and held the Society to be the employer.

One factor which influenced the court for its (majority) decision was that these workmen were intrinsic to the functioning of the Corporation and would have normally constituted its workforce.

The Supreme Court ultimately held that "although there was a written contract between the Corporation and the Co-operative Society for the supply of labour services, in practice the Society acted as a mere conduit for the transmission of the payment of wages to the workmen. This was the only nexus between the Society and the workman."

Wanasundara J ²²delivering the majority judgment observed;

²⁰ Samarakoon, CJ, Wanasundara J and Wimalaratne J

²¹ Wanasundara J and Wimalaratne J.

²² [1985] 1 SLR 401 at p 410

“Now these workmen –using the word in a neutral sense – were not signatories to R6, nor were any of them a member of the Labour Co-operative Society. They are therefore entitled to claim that they be considered as an independent third party in this matter. The evidence show that their only nexus with the Labour Co-operative Society was that the payments due to hem from the Fertilizer Co-operation were paid to them through the Labour Co-operative Society. Apart from that, they do not appear to have any other connection with the Labour Co-operative Society.”

“The workmen had the most tenuous contact with the 2nd Respondent (the Society) and in truth and in fact it was the 1st Respondent (CFC) who calculated and determined the wages and advances to the workmen and not the 2nd Respondent which acted as mere conduit for the transmission of the payment. The 2nd Respondent, as the President says, had merely undertaken to supply labour and not to perform any specific services. It is in this context that the President compared the work of the labour Co-operative Society to the old Kangany system and held that the 2neRespondent functioned only as an agent for the supply of labour.”

per Wimalratne J²³ ;

“ I am in agreement with the views of Wanasundara J. The payment of wages by the Society was only a physical act of handing over the wages in the capacity of agent of the Corporation. One has to remember that it was the Corporation, and not the Society that determined the wages of each category of workers –check roll as well as piece-rate workers. As regards control of the work, even the Chief Justice has no doubt that it was the Co-operation that assigned the work stipulating the proportions of missing and indicted the mode of distribution. What appears to have influence the Chief Justice is that disciplinary control was in the hands of Society? There is, however, a strong finding of fact by the

President that 'it absolutely clear that the supervision and control of the workmen were exercised not by the Society but by the Corporation.' I cannot see sufficient reason to disturb that finding of fact."

Dissenting judgement by Samarakoon CJ;

The Chief Justice in his dissenting judgment relies on the following facts to hold the Society as the employer. When a labourer was inefficient the Society was asked not to send the particular labourer for work. In case of misconduct the Society was asked to take action. The Society appointed its own Supervisors who kept a record of the labour supplied. A fund for the welfare of the labourers was maintained by the Society and that was a term of the contract and money for this purpose was paid by the respondent to the Society in respect of each workman. It was the Society that chose the labourers to be sent for work. Overall control especially disciplinary control was in Society and not the CFC. When the majority relied heavily on the control test and the integration test the Chief Justice on the basis of the above considerations of facts appeared to have come to the conclusion that the workmen were employed not by the Fertilizer Co-operation but rather by the Corporative Society. It appears that another factor that had influenced the Chief Justice is that the prevalence of this type of arrangements elsewhere in the industry. He states²⁴ " *Labour contracts have been known in the agricultural field for decades. The Kangany of the estate supplied the labour in return for a payment then known as "pence money". This practice has ceased. Labour contracts were well known in stevedoring in the ports. The practice still persists in some of the minor ports. Labour contracts are still prevalent in the industrial field and it is that practice that the appellant has adopted.*"

²³ Ibid page 419

²⁴ Ibid at p 405

The Chef Justice observed that the definition of “employer” read with the definition of “workman” in Sec.48 of the Industrial Dispute Act postulates a contract. It is settled law that an Applicant must establish a contract of employment with the employer. Samarakoon CJ quoted with approval from the judgment of Lord Thankerton who delivered the judgment of the House of Lords in *Short Vs Handerson Ltd.*²⁵ recapulated the four indicia of a contract of service as follows:-

- (a) The master’s power of selection of his servant.
- (b) The payment of wages or other remuneration.
- (c) The master’s right to control the manner of doing the work.
- (d) The master’s right of suspension or dismissal.

Samarakoon CJ however, observed referring to above conditions that these are no means conclusive or definitive, other factors not named can affect the issue and it is well to keep in mind that in the vast field of industrial relations such factors can vary from industry to industry and of such diversity that it is not possible to make the list of conditions exhaustive.

As discussed above, the time has come to revisit the contract of employment in the light of economic downfall of most countries and high competition in relation to trade. Workman is no longer a weaker party to a contract. Furthermore, the trade and commerce have developed and has moved away from employing workmen within premises. The massive developments in the information technology has paved way for many people to carry on their duties and tasks from home and also to work for more than one employer. Thus the time has come to deviate from the traditional contract of employment and also the several tests applied for the determination of the relationship between the entrepreneur and the service provider.

²⁵ (1946) 62 T.L.R. 427 at 429