1978 *Present:* **Pathirana , J. and Sharvananda, J.**

M. D. JAMIS APPUHAMY Appellant *and* T. P. SHANMUGAM, Respondent.

S.C. 69/76 — L.T. 17/3681

Labour Tribunal – Termination of services – Taxi driver – Master and servant – Contract of service – Contract for services.

The appellant who was running a taxi service employed the respondent as a taxi driver. Respondent was not paid any regular salary or wages, but was paid only a one-third share of the day's profit out of the total earnings from the taxi driven by the respondent. The appellant terminated the service of the respondent. Respondent made application to the Labour Tribunal for relief. Appellant took up the position that the respondent is an independent contractor and denied that the respondent was his servant.

HELD:

That the respondent is an employee of the appellant and a workman within the meaning of the Industrial Disputes Act and not an independent contractor.

APPEAL from an order of the Labour Tribunal.

A. J. I. Tilakawardena with *Dudley Fernando* for the Respondent-Appellant.

Siva Rajaratnam for the Applicant — Respondent

Cur. adv. vult.

March 8, 1978. SHARVANANDA, J.

The applicant-respondent filed application before the Labour Tribunal alleging that he was employed by the respondent-appellant (hereinafter referred to as the appellant) as a taxi-driver and that his services were terminated by the appellant without reasonable or probable cause. The appellant, while admitting that the applicant used to drive his taxi, denied that the applicant was his servant on a contract of service. He stated that the applicant was not paid any regular salary or wages but was paid only a one-third share of the day's profits out of the total earnings from the taxi driven by the applicant.

The point in controversy on which a decision in this case turns is : What was the nature of the relationship between the appellant and the applicant? Was it that of master and servant, or bailor and bailee of the appellant's taxi-cab, of which the applicant was the driver, or of partners in a joint enterprise? A decision on this appeal does not in any way touch the question of liability of the cab proprietor to third parties for the acts of the driver, for, though the relationship between the taxi-cab owner and his driver *inter se*

may be that of a bailor and bailee, the driver may still, *qua* third party, be treated as the agent of the proprietor authorised to ply for hire and the proprietor be thereby rendered liable for the acts of the driver which were within the scope of the latter's authority.

On the evidence, it would appear that the applicant was paid at the end of the day a one-third share of the day's income earned on the taxi when driven by the applicant, after deduction of the immediate expenses – for petrol and oil. The cost of repairs, replacements and general maintenance of the vehicle was always borne by the appellant, but the applicant was liable to pay all fines in respect of traffic offences committed by the applicant. The Tribunal has reached the conclusion that the applicant was in the employ of the appellant as one of his drivers in the taxi service carried on by him, that the applicant's period of service under the appellant was from 1966 to 1973 and that the applicant's services had been unjustifiably terminated by the appellant. It has ordered the appellant to pay the applicant compensation in respect of the summary termination of his contract of employment. The appellant has appealed to this Court from the said order.

In appeal, it was contended, on behalf of the appellant, that the contract between him (the proprietor) and the applicant (the driver) was only for the day on which the taxi-cab was taken out and that the applicant was not paid anything in the nature of wages or salary and that the driver was accountable to the proprietor for 75 percent of the day's profits, his own remuneration being a sum equal to 25 percent of the profits out of the day's takings. Appellant's Counsel submitted that this mode of remuneration tends against and not in favour of the view that the applicant is a servant; and that the proprietor exercises no control over the driver who was at liberty to go when and where he pleases. On the other hand, applicant's Counsel urged that the mere fact that the driver was remunerated in this way would not by itself prevent the employment being treated as an ordinary contract of service. It is unfortunately not clear from the evidence on record what were the precise terms of the contract between the parties – whether the driver was or was not bound to report for work every day, and if he did come whether the proprietor was or was not bound to let him have the taxi-cab. The testimony of the applicant, which has been accepted by the President, was however that he was required to transport the appellant's children to school and back daily. This would tend to show that it was obligatory on the applicant to report for work daily at least during the school sessions.

The question of the applicant's status, on the facts stated above, thus comes up for decision. Was the applicant an employee under a contract of service or an independent contractor on a contract for services? A contract of service is simply another name for a contract of employment under which the parties are master and servant in the strict sense. A contract for services, on

the other hand, is a contract under which an independent contractor agrees to render services to another in circumstances in which the relationship of master and servant is not created. A servant is one who is bound to obey any lawful orders given by the master as to the manner in which his work shall be done. The master retains the power of controlling him in his work and may direct not only what he shall do but how he shall do it. An independent contractor, as opposed to a servant, is one who carries on an independent employment in the course of which he contracts to do certain work. He may, by the terms of his contract, be subject to the directions of his employer. But, apart from the contract, he is his own master as to the manner and time in which the work shall be done. In *Collins v. County Council*[1] Hilbery, J. summarised the distinction in this way:

> "In one case the master can order or require what is to be done; while in the other case he can, not only order or require what is to be done, but how it shall be done."

In *Times of Ceylon Ltd. v. Vurthiya Samithiya*[2] after referring to certain decisions both in England and India, T. S. Fernando, J. concluded that "the ultimate test to be applied is whether the hirer had authority to control the manner and execution of the act in question or . . . whether there exists in the master a right to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do, but also the manner in which he shall do his work." In *Cassidy v. Ministry of Health.*[3] Lord Justice Somerville however pointed out that the test of control is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done. A chauffeur, though under a contract of service, has in certain instances, to exercise his own judgment uncontrolled by anybody. However, the circumstances that the work to be done involves the exercise of a particular art or special skill and the other party cannot in fact control or interfere in its performance is not decisive against a contract of service. The duties to be performed may depend so much on the special skill or knowledge of the employee that very little room for direction or command may exist. But that is not the point; what matters is the lawful authority to command or direct if only even in incidental or collateral matters. An artiste, though he may give a unique and individualistic performance by which he expresses his personality may still be under such control by his employer as to make him a servant. Superintendance and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. In such cases, there can be no question of the employer telling the employee how to do the work; therefore, the absence of control and direction cannot be an infallible test. The indicia which point to the essential attributes of a

[1](1947) K.B. 598 at 615.
[2](1951) 1 All E.R. 74 at 579.
(1951) 2 K.B. 343.
[3](1962) 63 N.L.R. 126.

contract of service were identified by Lord Thankerton in *Short v. J. E. W. Henderson Ltd.*[4] to be 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 method of doing the work; and (d) the master's right of suspension."

Lord Thankerton then went on to say:

> "Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted in to an independent contractor that, if and when appropriate cases arose, it will be incumbent on this House to reconsider and restate the indicia . . . The statement . . . that selection, payment and control are inevitable in every contract of service is clearly open to reconsideration."

Thus, it would appear, notwithstanding the absence of the indicia referred to above, circumstances may arise in which no one could reasonably suggest that the relationship is other than that of the contract of service.

In the Privy Council judgment in *Montreal Locomotive Works Ltd. v. Montreal and A.G. of Canada,*[5] Lord Wright suggested a more relevant and realistic criterion:–

> "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 the issue of tortious liability on the part of master or superior. In the more complex conditions of modern industry, more complicated tests have often 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 or 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's owner, though the charterer can direct the employment of the vessel. Again, the law often limits the employer's right to intefere 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.**"

[4][(1947 174 Law Times, 417 at 421)]

[5](1947) 1 D.L.R. 161.

The last sentence in the above quotation provides in my view, the key to the solution of the question whether the applicant in the present case is a servant or an independent contractor. The applicant's position is that the appellant was carrying on a taxi service employing cab-drivers, of whom he was one, to operate his taxi-cabs. The appellant admits that he had a fleet of five taxi-cabs, of which two were owned by him and the other three by one Mrs. Jayawickrema, who appears to be a sleeping partner in the taxi business, and that in connexion with that business drivers were engaged on the following basis of remuneration: one-third share of the day's profits earned on the respective cab less the cost of petrol and oil.

The ownership of the taxi and the incidence of the financial risk (the chance of profit or the risk of loss on the total investment) are all factors relevant to determine the true relationship between the appellant and the applicant. The applicant neither owns the assets nor bears the risk of loss on the investment. On the other hand, the appellant owns the equipment. The importance of the provision of the taxi-cab by the appellant lies in the simple fact that in most circumstances where a person hires out a piece of work to an independent contractor, he expects the contractor to provide all the necessary tools and equipment; whereas if he employs a servant, he provides them himself. "The essence of a contract of service is the supply of work or the skill of a man." – per Dixon, J. in *Humberstone v. Northern Timber Mills.*[6] In the instant case, the applicant does not supply the equipment; he supplies his skill and service to operate the appellant's taxi-cab.

Based on the decision in *Smith v. General Motor Cab Co. Ltd.*[7] and *Doggett v. Waterloo Taxi Cab Co. Ltd.*[8] it is claimed that under the English Common Law, a taxi driver who drives a taxi owned by another on the terms that he is to account for a proportion of the takings is an independent contractor and not a servant. An examination of these cases however shows that they were not cases where the services of the driver were hired. On the other hand, they were cases where drivers, plying their own trade, hired out taxis from cab proprietors on the terms of share of profits. "The contract was an ordinary contract of *locatio rei.*"– per Lord Shaw ((1911) A.C. 188 at 192). The driver himself was providing a taxi service with a hired vehicle, the hire being represented by a share of the day's profits. The driver was carrying on the business on his own behalf and for his own benefit only. The facts in the instant case are the converse of the facts in the aforesaid English cases and differ fundamentally from them. The applicant in this case did not hire the appellant's cab for the purpose of his own business. On the other hand, the appellant hired the services of the applicant to operate his taxi-cabs; The applicant carried on no business of his. Section 220(2) of the American Re-statement–Agency has the following relevant comment:–

"The ownership of instrumentalities and tools used in the work is of importance. The fact that a worker supplies his own tools is some

[6](1949) 79 C.L.R. at 404. [7](1911) A.C. 188. [8](1910) 2 K.B. 336.

evidence that he is not servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is the master. This act is however only of evidential value."

As Cook, J. stated in *Market Investigations Ltd. v. Minister of Social Security*[9]

"The fundamental test to be applied is this: Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to 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."

Denning L. J. , in *Stevenson Jordon and Harrison Ltd. v. MacDonald and Evans*[10] emphasised this aspect when he stated:

"One feature which seems to run through the instances is that, on a contract of service, a man is employed as part of the business and his work is done as an integral part of the business. Whereas, under a contract for services, his work, although done for the business, is not integral to it, but is only an accessory to it."

On the facts in the present appeal, it would appear that the person who was carrying on the taxi business was not the applicant but the appellant. The taxi service was provided by the appellant, and for the functioning of that service he engaged the applicant and the other drivers. The applicant's work as a taxi-driver was done as an integral part of the appellant's business. For the purpose of that business, the appellant engaged the services of the applicant, who thus became part and parcel of the appellant's organisation.

On this view of the facts, it cannot be said that the applicant was a bailee of the taxi-cab belonging to the appellant; nor could it be said that the appellant and the applicant were partners in the taxi-cab business. Mere participation in the profits does not make a person a partner. Section 2(3) of the English Partnership Act, 1890, which represents our law also, stipulates that, though the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, the receipt of such a share does not of itself make him a partner in the business, and in particular, a contract for the remuneration of a servant by a share in the profits of the business does not of itself make the servant a partner in the business. The taxi business in respect of which the question arises is not the business of the appellant and the applicant. There was no joint business between them; there was only the business of the appellant in which the applicant was employed. The arrangements as to the division of the day's earnings was merely a mode of paying the wages of the driver that was resorted to for the purpose of

[9](1968) 3All E.R. 732 at 737.

[10](1952) 1 T.L.R. 101.

guarding against the idleness or fraud of the driver. This method of remuneration was a device to provide an incentive to the applicant to earn as much money as possible for the mutual benefit of the master and the servant.

I agree with the Tribunal that the applicant is an employee of the appellant and a workman within the meaning of the Industrial Disputes Act and not an independent contractor, nor a partner, nor bailee.

The appeal is dismissed with costs.

PATHIRANA, J. – I agree.

Appeal dismissed.