CEYLON MERCANTILE UNION
v.
CEYLON FERTILIZER CORPORATION

SUPREME COURT.
SAMARAKOON, C.J., WANASUNDERA, J. AND WIMALARATNE, J.
S.C. APPEAL No. 10/83.
S.C. SPL. (L/A) No. 129/82 – S.C. No. 123/77.
L.T. No. 1/12804 TO 1/13305/75.
JULY 16 AND 17, 1984.

Contract – Contract of employment – Industrial Disputes Act, s. 48 – Definition of "employer" – Factors creating a contract of service.

The Ceylon Mercantile Union (appellant) made an application to the Labour Tribunal on behalf of 502 of its members alleging that the Ceylon Fertilizer Corporation (1st respondent) had unjustly terminated the services of the said 502 workers and asked for their reinstatement with back wages or in the alternative compensation and gratuity. The applicant Union named the Hunupitiya Labour Co-operative Society as the 2nd respondent as it alleged that wages were paid to the workmen by the 1st respondent through the 2nd respondent. The crucial question was whether the Fertilizer Corporation (the 1st respondent was the employer of these workmen ? The President of the Labour Tribunal held that the 2nd respondent had acted as agent for the supply of labour and that the workmen were employees of the 1st respondent corporation and ordered their reinstatement together with 6 months' wages or in lieu one year's wages. The Court of Appeal, on an appeal being preferred to it, held that the respondent was not the employer of the workmen. The applicant Union appealed to the Supreme Court.

Held (Samarakoon, C.J. dissenting) :

Although there was a written contract between the 2nd respondent Society and the 1st respondent Corporation 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 workmen.

Not a single workman was a member of the 2nd respondent Society. The workmen had much greater contact and involvement with the 1st respondent Corporation than with the 2nd respondent Society. It is unlikely that any respectable enterprise would have depended on casual labour for its essential work involving such a large number of employees without having some permanent arrangement. It was the first respondent who calculated and determined the wages and advances of the workmen, assigned the work and supervised and controlled its execution. These factors are sufficient to spell a contract of service between the workmen and the 1st respondent. The test of 'control' and the test of 'integration' the workmen being intrinsic to the working of the Corporation, support this conclusion.

Cases referred to :

(1) *Carson Cumberbatch & Co. Ltd. v. Nandasena (1973) 77 NLR 73.*

(2) *Shaw Wallace & Hedges Ltd. v. Palmerston Tea Co., Ltd. 1 Sriskantha's LR 14.*

(3) *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance [1968] 1 All ER 433, 439.*

(4) *Short v. J. & W. Henderson Ltd. (1945-1946) 62 T.L.R. 427, 429.*

(5) *Construction Industry Training Board v. Labour Force Ltd. [1970] 3 All ER 220.*

APPEAL from judgment of the Court of Appeal.

Faiz Mustapaha with N. M. Saheed for applicant-respondent-appellant.

Mark Fernando for 1st respondent-appellant-respondent.

Cur. adv. vult.

August 6, 1984.

SAMARAKOON, C.J.

The Ceylon Mercantile Union (hereinafter referred to as appellant) made an application to the Labour Tribunal on behalf of 502 of its members alleging that the Ceylon Fertilizer Corporation (hereinafter referred to as respondent) had unjustly terminated the services of the said 502 workers and asked for their reinstatement with back wages or in the alternative compensation and gratuity. The respondent denied that it was the employer of the workmen. The President, Labour Tribunal ordered their reinstatement together with 6 months' wages to each workman or in lieu thereof one year's wages to each workman. The respondent appealed to the Court of Appeal. That Court upheld the contention of the respondent that it was not the employer of the workmen and therefore allowed the appeal. The appellant has appealed to this Court on being granted Special Leave to appeal by this Court.

The contention of the respondent is that it is not an "employer" as defined by section 48 of the Industrial Disputes Act (Cap. 131). That definition is as follows :

> "employer" means any person who employes 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."

This deals with three types of persons :–

(i) any persons who employs a workman,

(ii) any person on whose behalf any other person employs any workman, and

(iii) any person who on behalf of any other person employs any workman.

This definition read with the definition of "workman" in the same section postulates a contract. It is now settled law that an applicant must establish a contract of service with the employer. *Carson Cumberbatch & Co., Ltd. v. Nandasena* (1) and *Shaw Wallace & Hedges Ltd., v. Palmerston Tea Co., Ltd.* (2). Counsel for the appellant based his case entirely on the first limb set out above. What is a contract of service ? Various tests have been formulated and applied to discover a contract of service. In *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* (3) McKenna, J. stated that a contract of service exists if the following conditions are fulfilled :–

(i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.

(ii) he agrees expressly or impliedly that in the performance of that service he will be subject to the other's control in a sufficient degree to make the other the master.

(iii) The other provisions of the contract are consistent with its being a contract of service."

Lord Tankerton who delivered the judgment of the House of Lords in *Short v. J. & W. Henderson Ltd.* (4) recapitulated 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 method of doing the work.

(*d*) The master's right of suspension or dismissal.

These are by no means conclusive. Condition (iii) set out by McKenna, J. indicates that they are not even 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 be of such diversity that it is not possible to make the list of conditions exhaustive. In this context Justice Rodrigo's quotation from the judgment of Fisher, J. (who in turn quoted P. S. Atiyah, Vicarious Liability in the Law of Torts 1967, p. 38) bears repitition :

"In my judgment, it is really not possible, in Mr. Atiyah's words to lay down :

'. . . a number of conditions which are both necessary to, and sufficient for, the existence of . . . (a contract of service). The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy.' "

I now turn to the facts of this case. The Ceylon Fertilizer Corporation (respondent) came into existence in the year 1964. Its main function has been 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 it produced three to four thousand tons of fertilizer. In the year 1975 its output had reached fifty thousand tons. It then operated from warehouses at Hunupitiya, Meethotamulla and Ja-Ela. Conveyors and heavy machinery had been installed in 1972 for mixing, weighing and bagging. It also possessed a fleet of vehicles for transporting raw materials and distributing fertilizer to consumers throughout the island. 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 roll labour and those paid on a piece rate basis. The 502 persons on whose behalf the claims are made comprised casual labour, some on the check roll and some paid at the piece rate.

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 to 1969 one Somapala was the labour contractor and from 1970 to 1972 one Silva was the labour contractor. In August 1972 the second respondent, the Hunupitiya Labour Co-operative Society Ltd. (hereinafter called the Society) obtained the contract to supply labour. The Society entered into a written agreement with the appellant dated 21st August, 1972, (agreement marked R 6) for the supply of labour for 22.8.1972 to 31st December 1973. The President, Labour Tribunal has ignored this document in his order perhaps because he was of the view that this was a subterfuge by the appellant who was thereby "guilty of the exercise of an unfair labour practice of the worst order". Suffice it to state that this is an unwarranted and unjustified stricture on the appellant and its business methods. 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 of Sri Lanka. This 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. I propose to start with an examination of the agreement R 6 as this is the genesis of the transaction.

By a notice dated 1st November, 1971, the appellant called for tenders for the supply of *General Labour Services* at fertilizer loading and unloading points at Meetotamulla/Hunupitiya for a period of one year commencing 1st January, 1972, to 31st December, 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. The negotiations seem to have extended beyond 1st January, 1972. By letter dated 15.7.72

(R 3) the Society raised its rates by 10 cents. By letter dated 2.8.72 (R 4) the Society accepted the tender and the agreement R 6 was signed by both parties. It recited that the contractor was an independent contractor and that the appellant 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 appellant 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 payments agreed upon payable to the contractor. They were rates for loading and unloading and piece rates. The rate for a casual labourer was Rs. 6 per eight-hour shift. These were not the rates paid by the contractor to the labourers. They were different and lower in rate, the difference being the Society's profit. In terms of the agreement R 6 the contractor was obliged to supply to the appellant within one week of the commencement of work a list of the rates paid by him to the labourers. After the contract period expired the contract was not renewed in writing but it is accepted that the period was extended by mutual agreement and these terms and conditions *mutatis mutandis* were operative thereafter at the dates relevant to this dispute. On the 22nd April 1975 the appellant stopped the work of one of the checkroll labourers and these 502 labourers then went on strike. They chose to report for work again on 4th June, 1975 but the appellant refused to give them work. The Union (respondent) claims that the appellant thereby unjustly terminated their services.

I will now consider whether the necessary conditions have been satisfied to establish a contract of service. The first condition is the payment of a wage agreed to between employer and worker. There is no such agreement. On the other hand the agreement by the appellant is to pay the Society the scheduled rate. The Society pays the labourer a lower rate keeping a rake off for itself. This is in pursuance of an agreement between the Society and the labourer. Furthermore this contractor agreed not only to pay a stipulated sum to the welfare fund in respect "of each employee of the contractor" but also to comply with all laws, rules and regulations relating to employment of labour. The first condition has not been satisfied.

Counsel for the appellant made much of the element of control which is the second condition. "Control by itself is not always conclusive" (Atiyah ibid p. 38). There is no doubt that the respondent assigned the work to the labourers and stipulated the proportions for mixing and also indicated the mode of distribution. This had necessarily to be done if its business was to be properly conducted. Apart from this the respondent could do nothing else. Disciplinary action was in the hands of the Society. 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 letter R 16 to the Society is revealing. It states that some labourers had been detected demanding gratification in respect of loading of lorries. It states "several complaints have been received of not only demanding of such gratification but threats made to owners of lorries so (sic) do not agree to make such gratifications. I have brought this to your notice by my letter of 9.4.1974 and on several other occasions. But I regret to state that this matter has not been rectified by the Corporation (sic). I would therefore request that steps be taken to safeguard the good name of the Corporation by seeing that the service to the clients of the Corporation be carried out without disruption." Clearly disciplinary control was not in the hands of the respondent. It could not take action necessary to safeguard its own reputation. It had to look to the Society for such action. When labourers refused to work "half way and gone back" it was the Society that was surcharged the loss incurred by way of warehouse charges (R 10). Allotment of labour for various ships was done by the Society and not the respondent (R 11). The Society appointed its own Supervisors who kept a record of the labour supplied. It was the Society that chose the labourers to be sent for work. Overall control especially disciplinary control was in the Society and not the respondent.

There are other factors which militate against a finding that this was a contract of service with the respondent. A fund for the welfare of the labourers was maintained by the Society. This was a term of the contract and money for this purpose was paid by the respondent to the Society in respect of each labourer. All negotiations on behalf of the labour were conducted, and all claims for enhancement of rates were made, by the Society with the respondent. Two labourers were put on the check roll by the respondent's Manager but they were accounted in the check roll as the Society's labourers. The Society

was so informed and their rates were paid direct to the Society in terms of the agreement. Furthermore there is no guarantee of employment or continuity of work.

In view of the above I am of the opinion that there was no contract of service with the respondent. Rodrigo, J. has cited the case of *Construction Industry Training Board v. Labour Force Ltd.* (5). That case decided that there was no contract of service between the worker and the Construction Industry Training Board. Cooke, J. added –

> "I think that there is much to be said for the view that, where A contracts with B to render services exclusively to C, the contract is not a contract for services, but a contract sui generis, a different type of contract from either of the familiar two." (p. 225).

We are not considering such a situation in this case. Two other matters need comment. The President, Labour Tribunal expressed the view that these 502 labourers were "intrinsic to the working" of the Corporation and therefore an "integral part of the organisation". I can only repeat the comment of McKenna, J. in reference to the dictum of Denning, L. J. who said that the test of being a servant "depends on whether the person is *part and parcel of the organisation.*" His comment was as follows :

> "This raises more questions than I know how to answer. What is meant by being 'part and parcel of an organisation' ? Are all persons who answer this description servants ? If only some are servants, what distinguishes them from the others if it is not their submission to orders ? Though I cannot answer these questions I can at least invoke the dictum to support my opinion that control is not everything."

The President, Labour Tribunal also observed that the only conclusion he can come to is that the Society "acted more as an agent for the supply of labour and not as an independent contractor". It is not a question of more or less. It is a question as to whether it was or was not. An agent merely brings the two together and leaves all the

other terms of the contract to the two – the labourer and the would be employer. He collects his agency commission and that is all. His part of the work ends there. The position in this case is just the contrary. The Society far from being passive, actively engaged in working and putting into practice the terms of its contract R 6. I am therefore unable to agree that the Society was merely an agent.

I dismiss the appeal with costs.

WANASUNDERA, J.

The applicant-union made this application to the Labour Tribunal on behalf of 502 of its members, alleging that the 1st respondent, the Fertilizer Corporation, their employer, had unjustly terminated the services of these workmen. It asked for their reinstatement with back wages or in the alternative compensation and the payment of a gratuity. The applicant had named the Hunupitiya Labour Co-operative Society as the 2nd respondent, as it alleged that wages were paid to the workmen by the 1st respondent through the 2nd respondent.

The 1st respondent-corporation in its answer stated that the 2nd respondent Co-operative Society had entered into a contract with the 1st respondent whereby the 2nd respondent became a contractor to supply labour services to the 1st respondent. The members of the applicant-union, though they did work for the 1st respondent under the above mentioned contract were however never employees of the 1st respondent. They were employed by the 2nd respondent. The 2nd respondent Co-operative Society neither filled answer nor took part in the proceedings.

The crucial question in this case is : Was the Fertilizer Corporation, the 1st respondent, the employer of these workmen ? The President of the Labour Tribunal, after a full inquiry in a carefully considered order, stated that the only conclusion he could come to was that the 2nd respondent had acted as an agent for the supply of labour Applying the generally accepted criteria, he concluded that the evidence clearly pointed to the existence of an employer-employee relationship between the workmen and the 1st respondent.

• In appeal, the Court of Appeal reversed the findings of the Labour Tribunal. The Court of Appeal said that the President, when he applied the "generally accepted criteria" for determining the relationship between employer and employee, had not adequately considered the oral and documentary evidence, which indicated a contrary state of affairs. The Court of Appeal added that the control or supervision test applied by the President was not relevant in this case, as none of the workers had been interviewed nor a lettter of appointment given to them by the 1st respondent. Their names were also not found in the books relating to the permanent staff of the 1st respondent. Mr. Mustapha for the appellant has canvassed these views before us.

The Judgment of the Court of Appeal had discussed at length both the oral and documentary evidence relating to the contract R6 between the 1st respondent and the 2nd respondent "for the supply of labour services". Undoubtedly this contract embodies features consistent with a contract to supply labour services. But evidence had been adduced before the President, without objection, showing that in actual practice the 1st respondent had dealt with these workmen in a way inconsistent with and at variance with the tenor of this agreement. The complaint against the 1st respondent is that it had tried, as far as it was possible, to distance itself from its employees by formulating a contract in this form to evade its due responsibilities and liabilities under the labour laws of the country.

While due regard should be given to R 6, its terms and conditions cannot be conclusive of this matter. For, in the case before us, the fact in issue is not so much the interpretation of R6 or the relationship between the Fertilizer Corporation and the Labour Co-operative Society, which no doubt are relevant to our inquiry, but primarily the relationship of the members of the applicant Union to the Corporation. We are here called upon to examine not a bilateral agreement but a tripartite situation.

Now these workmen–using the word in a neutral sense–were not signatories to R6, nor was 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 shows that their only nexus with the Labour Co-operative Society was that the payments due to the them from the Fertilizer Corporation 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 evidence also shows that the Labour Co-operative Society has not claimed them as its workers but had sought to disown them at every stage. Two of the workmen have stated that, when they had approached the Labour Co-operative Society for advances and increase in salary, the Co-operative Society had denied responsibility for them and directed them to the Fertilizer Corporation for relief. The 2nd respondent on the other hand, while exercising a real control and supervision over these workmen, had taken pains to see that its acts in relation on them were given the appearance of being in conformity to R 6. The Labour Co-operative Society, the 2nd respondent, has also declined to participate in these proceedings and has chosen not to have its position clarified or explained either in relation to the workers or the Fertilizer Corporation.

Let us now turn to the relationship of the workers with the Fertilizer Corporation. The President, Labour Tribunal, found as a fact that notwithstanding the contract (R6), most of the workers had been working for the 1st respondent prior to the formation of the Labour Co-operative Society, the 2nd Respondent, and since then there have been even some instances of direct recruitment of some workmen by the 1st respondent. Such recruits have not even been members of the 2nd respondent at that time, but after recruitment the 1st respondent would inform the 2nd respondent of such recruitment. The President also found that the 1st respondent had exercised the right of determination of wages, the assignment of work, the exercise of supervision and control in the execution of work, disciplinary control, and the payment of advances and compensation. Even the final termination of their services, it is alleged, was by the 1st respondent and the 2nd respondent had no hand in the matter.

Clearly the manner in which the 1st respondent has dealt with the workmen is more in line, as the President says, with the Labour Co-operative Society being in the nature of a mere agent to supply labour, while the 1st respondent itself became the employer of such labour. Two other factors reinforce this view, namely, that not a single workman concerned in this case is a member of this Labour Co-operative Society and the only nexus between these workmen and the Labour Co-operative Society was the making of payments by the 1st respondent to the workmen through the Labour Co-operative

Society. It would appear that these workmen had much greater contact and involvement with the 1st respondent than with the 2nd respondent.

The other factor is that these workmen were intrinsic to the functioning of the Corporation and would have normally constituted its work force. When this Corporation began work in 1964 its turn over had been about 3 – 4 tons of fertilizer. From about the beginning of 1970 its work expanded rapidly and in 1975 it was handling about 50,000 tons of fertilizer. Its main work involved loading, unloading, mixing, bagging, and the distribution of the fertilizer. This was hard physical work involving unskilled labour. The permanent staff consisted of only 161 employees, of whom about 100 consisted of the drivers, welders, turners, motor-mechanics, electricians etc., and there remained only a handful of permanent employees to do the large amount of unskilled physical labour. More than 300 labourers are required daily for such work. It is therefore unlikely that any respectable industrial enterprise would normally have depended on casual labour for any appreciable period of time for this type of essential work involving such a large number of employees without having some permanent arrangement.

Mr. Mark Fernando's main submission was that the President had wrongly applied the 'control' test, because such a test should not be applied unless there is a contract in existence between the parties. He relied on the judgment of Tennakoon, J., in *Carson Cumberbatch & Co., Ltd. v. Nandasena (supra)*. If Mr. Fernando means that the control test should only be applied where a prior contractual relationship of employer and employee between the parties is already in existence, then this would be to beg the question. Such an argument, apart from being tautologous, also ignores the implications contained in the definition of the word 'workman', which refers to a contract "in any capacity expressed or implied, oral or in writing. . . . .", leaving it open to imply a contract from the circumstances of a case. The need for an antecedent agreement therefore would have the effect of nullifying this definition.

The case of *Carson Cumberbatch & Co., Ltd. v. Nandasena (supra)*, relied on by counsel, dealt with an entirely different situation. In that case, the applicant who was the Manager of a Farm had been appointed to that post by a letter signed jointly by a principal and its agent. The applicant, while admitting that the principal was his employer, sought to make the agent also liable as employer. He sought to give an artificial and extended meaning to the word 'employer' so as to include the agent. It is in this context that Tennakoon, J. said :

". . . . . Having regard to the factual context in which the question of who is or are the employers of the 2nd respondent arises in this case, it must be noted that the definition of the word employer contains no reference to control or supervision or management exercised by one person over another, so that it certainly does not have the effect of including cases in which a person not the contractual employer; may by reason of the control, supervision or management exercised over a workman give only the *appearance* of being the employer."

Even if we were to assume that Mr. Fernando's argument is correct on this point, namely the need for a prior contractual relationship between the parties, his submission is not supported by the findings of both the Labour Tribunal and the Court of Appeal which have admitted the existence of a contractual relationship between the workmen and the 2nd respondent. On this matter the Court of Appeal said :

" . . . . the facts in the present case do not point to a contract of service between the appellant and the workmen. The kind of arrangement referred to under which these workmen had worked for the Corporation appears to me to be a contract *sui generis vis a vis* the Corporation. As for the arrangement under which the workmen worked for the Society, the Society apart from paying the workmen when sent for work appears to have had no control over the work done by them in the Corporation warehouses. The evidence is not satisfactory as to the terms of any contract they had

with the Society. Though in the Agreement there is a reference to the workmen as servants of the Society, the Agreement is one between the Society and the Corporation and the workmen were not parties to the Agreement. They were not even members of the Society. All that is clear is that the workmen had some kind of arrangement with the Society to do work for a third party, the Corporation. It is not a question of the Society lending the services of its employees to the Corporation, because the workmen, according to the evidence, had not rendered their services to the Society. Since the sole issue for determination is whether the appellant is the employer of these workmen, we need not pronounce on the character of the relationship of the workmen involved with the Society in all the circumstances of the case."

This passage is in line with Cooke, J's analysis of the facts in the *Construction Industry Training Board v. Labour Force Ltd. (supra)* referred to in the judgment. That case also dealt with a tripartite situation. In that case the respondents were engaged in supplying labour to the construction industry. When building contractors require labour, the respondents agreed with the contractors to supply workmen at certain rates payable by the contractors to the respondents. The workmen were paid by the respondents on the basis of information relating to the times worked provided by the contractors, but the respondents had no control over the work carried out by the workmen for the contractors and the contractors had the right to terminate any workmen's engagement. On being allotted to particular contractors, the workmen received from the respondents an 'Information Card', containing terms and conditions of employment, on the back of which was a declaration made by the workmen, which in each case contained the following terms :

- "I hereby certify that I am engaged by (the respondents) on a Sub-Contract basis. I further declare that I shall be responsible for my own and any of my employees' P.A.Y.E., Income Tax Returns, National Insurance Contributions and Holiday with Pay payments or stamps."

The court held that the respondents did not act as an employment agency because the worker had a written agreement with the respondents to work for them and to be paid for it. The Court said :

> ". . . it is plain that when the workman agreed to work on a particular site at a particular rate of pay, he was agreeing so to do with the respondents as principals. That in my judgment is sufficient to dispose of the view that the respondents were merely acting for the workman as an employment agency. They were contracting with the workmen as principals. "

The court also held that the workman was paid by the respondents at the rate agreed between him and them, and the profits of the respondents were derived from the difference between the sums they paid to the workman and the sums which they received from the contractor.

In the case before us the position is materially different. The workman had the most tenuous contact with the 2nd respondent and in truth and in fact it was the 1st respondent who calculated and determined the wages and advances to the workmen and not the 2nd respondent which acted as a 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 2nd respondent functioned only as an agent for the supply of labour. Further, in the *Labour Force Case*, it was specifically agreed between the parties that the workman was engaged by the Labour Force. There was a certificate signed by the workman to the effect that he was engaged by the Labour Force on a Sub-Contract Basis. That was a most significant item of evidence and we have nothing like that in the present case. In the light of these facts, the limited supervision that was enjoyed by the contractor in that case was found insufficient to spell a contract of service between the workmen and the contractor. But in the case before us the governing factors are quite different.

In that case the Court faced the situation of being confronted with the express terms of contract. That did not preclude the Court from inquiring into the true nature of the contract. This is how the Court approached the matter :

"The tribunal was asked to consider the nature of the contracts entered into by a large and indeterminate group of workmen in the industry. It was entitled, as it seems to me, to use its own knowledge of the undoubted fact that many of the workmen in the industry are self-employed. The tribunal referred to the declaration signed by the workman in which he purports to certify that he is employed on a sub-contract basis. Quite rightly, in my judgment, the tribunal held that this did not preclude it from enquiring into the true nature of the contractual relationship."

Later the Court said :

"In my view, the fact that the parties have in express terms sought to make a contract of a particular kind, while it does not bind the courts to hold that they have succeeded, is a factor which can be considered in determining the true nature of the contract."

Both for the above reasons and in view of the existence of contractual relations of the workmen with both the 1st respondent and the 2nd respondent, I think the President was right in examining all possible factors, including the control test as bearing on the relationship between the parties.

The Court of Appeal has examined the material and has sought to come to its own independent conclusion which is at variance with the findings of the President. The Court of Appeal give the following justification for this exercise :

"The generally accepted criteria for determining the relationship of employer and workman as mentioned in the passage referred to earlier in the order of the President has not been balanced against oral evidence indicating the contrary or against the documentary evidence referred to or considered in their totality notwithstanding a bare statement in the order that the totality of evidence was being considered."

The balancing operation contemplated by the Court of Appeal is the balancing of all the possible factors that may have a bearing in resolving the issue of employment. The Court of Appeal in the above passage was no doubt having in mind the following excerpt from Fisher, J's judgment in the *Labour Force Case* which it quoted with approval :

> "In my judgment, it is really not possible, in Mr. Atiyah's words to lay down :
>
> '. . . . . a number of conditions which are both necessary to, and sufficient for the existence of . . . . . (a contract of service). The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. The plain fact is that in a large number of cases the Court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy'."

There is nothing in the order of the President to show that he has not considered all the relevant factors pro and con, nor in any way failed to evaluate the documentary evidence. On the other hand, what the Court of Appeal has done is to give undue stress to the provisions of the bilateral agreement R6 to which these workmen were not parties while ignoring the actual conduct of the 1st respondent in its relations with the workmen.

I am unable to say that the President has been unreasonable either in the approach he had adopted or in regard to his findings on what are essentially questions of fact. The two other matters – the question of termination and the computation of compensation – mentioned by Mr. Fernando had not been in issue between the parties at any stage until it was mentioned before us. We do not think that they could be raised at this stage.

In the result, I would allow this appeal with costs both here and in the Court of Appeal and restore the order of the President, Labour Tribunal. The workmen could be entitled to back wages until the date of reinstatement or in the alternative until the date of payment of compensation.

WIMALARATNE, J.

I have had the benefit of reading the judgments prepared by the Chief Justice and by Wanasundera, J., where the facts are set out.

Wanasundera, J. after discussing the manner in which the workmen have been dealt with by the Fertilizer Corporation concludes that the function of the Hunupitiya Labour Society was to act as mere agents to supply labour to the Corporation, whilst the Corporation became the employer of the labour so supplied.

The Chief Justice is unable to agree that the Society was merely an agent, for the reason that the Society was actively enagaged in working and putting into practice the terms of its contract R6 with the Corporation. Implicit in the judgment of the Chief Justice is the conclusion that the Society and not the Corporation is the employer of these workmen.

The instant case is similar to a situation where a contractor regularly brings labour to the employer's workplace to perform work in the regular course of the business of the employer, and the employer directs how the work is to be performed, and even calls upon the contractor not to employ particular persons from among the workforce. In that situation, my view is that there is no contract of employment between the contractor and the workmen. This situation is different to one where a person enters into a contract with another to construct a building, and that other (the contractor) employs labour for the purpose. In that case it may not be difficult to establish the employer-employee relationship between the contractor and the workmen, since the employment of the workmen is on behalf of the contractor, and not on behalf of the person with whom the contractor has contracted to build.

On the question as to whether a contract of service exists between the Corporation and the workmen, the Chief Justice takes the view that the evidence shows that there is no such contract, mainly because (*a*) of the absence of any agreement regarding the payment of wages between the Corporation and the workmen, whilst there is on the other hand, an agreement between the Corporation and the Society as embodied in document R6 ; and (*b*) the overall control, especially disciplinary control, was not in the hands of the Corporation, but in the hands of the Society.

Wanasundera, J. takes the view that on the facts of this case the relationship of employer and employee between the Corporation and the workmen has been established not only by an application of the test of "control", but also by the test of "integration", that is that the workmen were intrinsic to the working of the Corporation.

I am in agreement with the views of Wanasundera, 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 work, even the Chief Justice has no doubt that it was the Corporation that assigned the work, stipulated the proportions of mixing and indicated the mode of distribution. What appears to have influenced the Chief Justice is that disciplinary control was in the hands of the Society. There is, however a strong finding of fact by the President that "it is absolutely clear that the supervision and control of the workmen were exercised not by the 2nd respondent (the Society) but by the 1st respondent (the Corporation)." I cannot see sufficient reason to disturb that finding of fact.

The Court of Appeal has erred, in my view, on two other matters. They are :–

(*a*) that too much reliance has been placed on the agreement R6, which was an agreement between the Corporation and the Society, to which the workmen were not parties. It is doubtful whether they were even aware of the existence of R6. The existence of such an agreement cannot act to their detriment if the facts establish a relationship of employer and employee between the Corporation and themselves.

(b) the fact that "none of the workmen had been interviewed prior to appointment, nor was a letter of appointment given to them or the name of any person entered in the Corporation books maintained for the permanent staff". A common law contract of service can yet be implied even without any or all of these circumstances.

For these reasons I agree to the order proposed by Wanasundera, J.

Appeal allowed.