IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal
from a judgment of the
Civil Appellate High Court.

A.C.R. Wijesurendra.
No. 275, Wackwella Road,
Galle.
Applicant

S C APPEAL No. 99/2010
SC (HC) LA: 25/2010
HC Appeal No. HCALT 31/2007
LT Colombo No. LT/2/47/2004

Vs

Sri Lanka Insurance
Corporation Ltd.,
" Rakshana Mandiraya ",
No. 21, Vauxhall Street,
Colombo 02.
Respondent

AND BETWEEN

Sri Lanka Insurance
Corporation Ltd.,
" Rakshana Mandiraya ",
No. 21, Vauxhall Street,
Colombo 02.
Respondent Appellant

Vs

A.C.R. Wijesurendra.
No. 275, Wackwella Road,
Galle.
Applicant Respondent

AND NOW BETWEEN

Sri Lanka Insurance
Corporation Ltd.,
" Rakshana Mandiraya ",
No. 21, Vauxhall Street,
Colombo 02.

Respondent Appellant
Appellant

Vs

A.C.R. Wijesurendra.
No. 275, Wackwella Road,
Galle.

Applicant Respondent
Respondent

BEFORE : **S. Eva Wanasundera PCJ**
Sisira J De Abrew J &
Ani Gooneratne J.

COUNSEL : Sanjeewa Jayawardena PC with Charitha Rupasinghe for the Respondent Appellant Appellant.

Uditha Egalahewa PC with Hemantha Gardihewa for the Applicant Respondent Respondent.

ARGUED ON : 14.03.2017.

DECIDED ON : 28.06.2017.

S. EVA WANASUNDERA PCJ.

The Applicant Respondent Respondent (hereinafter referred to as the Applicant), A.C.R. Wijesurendra had joined Sri Lanka Insurance Corporation Limited as a professional Motor Assessor as he was found to be suitable to carry out inspections, assessments and investigations connected with motor insurance claims made by the customers to the Sri Lanka Insurance Corporation, the Respondent Appellant Appellant (hereinafter referred to as the Appellant). The Applicant joined the Appellant Corporation on the 1st of June, 2001. Two years later, on 18th June, 2003 the Appellant had terminated the services of the Applicant.

The Applicant sought relief from the Labour Tribunal on the basis that the termination was unjust and unreasonable. As usual, the Applicant prayed for reinstatement with back wages or in the alternative, compensation in lieu of reinstatement. The Appellant Corporation in its answer took up the position that the Applicant was an **Independent Contractor and not an Employee** of the Appellant. The Appellant prayed for a dismissal of the Application before the Labour Tribunal. The President of the Labour Tribunal made order that the Applicant was an employee of the Appellant Corporation. Furthermore it was held that the services of the Applicant had been unjustly and unreasonably terminated and that the Appellant should pay Rs. 480,000/- to the Applicant , assessed to be 24 months salary, as compensation.

The Appellant appealed from that order to the Civil Appellate High Court of the Western Province praying that the Order of the Labour Tribunal be set aside. The The Civil Appellate High Court affirmed the order of the Labour Tribunal at the end of hearing the Appeal on 22.04.2010. The Appellant Corporation was aggrieved by the Judgment of the Civil Appellate High Court and sought leave to appeal from this Court. Leave to Appeal was granted on four questions of law

raised by the Petitioner in paragraph 50 (a),(b), (d) and (e) of the Petition and one question of law was added by the Respondent. This Court has to decide on the said questions which are as follows:

a. Did the High Court fall into substantial error by misconstruing the contract entered into between the Appellant and the Respondent as a "Contract of Service" as opposed to a "Contract for Services" and thereby err in holding that the Respondent was an employee of the Appellant?
b. Did the High Court misinterpret and misapply the established tests formulated to distinguish between an "employee" and an "independent contractor" , as well as the particular circumstances of the instant case, especially in the light of the independent status of a Motor Assessor and the other multiple indicia?
d. Did the High Court fall into substantial error by failing to consider the application of the provisions contained in Sec. 131 of the Inland Revenue Act No. 38 of 2000?
e. Did the High Court and the Labour Tribunal err by failing to make an objective evaluation of the matters in issue? And

   ' Is the award of the Labour Tribunal supported by the evidence led before the Labour Tribunal?'

The Applicant Respondent Respondent (hereinafter referred to as the Applicant) , Wijesurendra filed an Application before the Labour Tribunal on 17.12.2003, praying for reinstatement with back wages or compensation in lieu of reinstatement due to the reasoning that the employer, Sri Lanka Insurance Corporation Limited terminated his services on 18.06.2003 unreasonably and unjustly. He submitted that he was employed by the employer on a salary of Rs.20000/- per month from the date of appointment on 01.06.2001, as an Assessor of damages to Motor Vehicles which are subject to motor vehicle accidents at the time the said vehicles are under a valid Insurance Policy granted by the Appellant. The Appellant Corporation filed answer on 12.01.2004 and submitted that there never existed an employer – employee relationship and/or any contract of employment between the Applicant and the Appellant and prayed that the Application be dismissed.

The stance of the Applicant was **that he was employed as an Assessor** by the Appellant. The stance of the Appellant was that the Applicant was **an "independent Contractor" and not a workman** within the meaning of the Industrial Disputes Act.

The President of the Labour Tribunal heard the evidence of all the witnesses of the Appellant and the evidence of the Applicant and delivered his Order on 28.02.2007 in favour of the Applicant holding in the said Order that the Applicant was a workman who was employed by the Appellant, his services had been unreasonably and unjustly terminated and therefore he should be paid compensation amounting to Rs. 480000/- . The Appellant appealed to the Civil Appellate High Court and argued that the Applicant was not an employee.

The Applicant had applied for the post of Assessor. The Appellant had held an interview. The Applicant was selected. The Appellant had issued a letter dated 15th May, 2001 which was marked as **A4** which is at page 332 of the Labour Tribunal brief. The wording in the first paragraph reads as " We are pleased to enroll you to our Panel of Motor Assessors of the Sri Lanka Insurance Corporation Ltd. with effect from 01.06.2001 for a period of one year." The renewal after one year is " at the discretion of the Insurance Corporation ". The letter further states that " The Management reserves the right to renew your assignment and also reserves the right to terminate your assignment without assigning any reasons for such termination." This letter states further that "Your report should reach the Manager/Motor Department as stipulated in AGM/M Circular No. AGM /2000/03 and the guidelines given therein should be strictly followed when inspecting vehicles."

It is interesting to note that the third paragraph of this letter enrolling him as a Motor Assessor reads thus. " Please note that **in the execution of your duties as a Motor Assessor you are expected to safeguard the interests of the Corporation at all times."** According to this wording, the Applicant was duty bound to keep in mind the "interests of the Corporation at all times". What is meant by "the interests of the Corporation" could be analyzed. The main business of the Appellant is insurance of vehicles. When the vehicles get damaged on the road due to whatever reason, the insurer has to pay the insured if the policy is valid on that day the damage occurred and if it covers the said reason for the incident. The Motor Assessor is an integral part of the business. The assessment should be done

immediately or as soon as possible. The Assessor cannot do his work at leisure or at the times that he opts to do. He has to be ready and willing at all times. He has to be mindful of the amount the Insurance Corporation has to pay to the insured vehicle. The Assessor cannot favour the owner of the vehicle and / or assess the damage at his own discretion. He has to be careful in calculations so that it will not be a loss to the Corporation. He has to submit the same to the Corporation which is the final authority. **If his recommendation is against the interests of the Corporation, the Corporation can terminate his services for that very reason** because it is specifically stated in the letter by which he was appointed as an Assessor. The calculations are to be done according to certain guidelines as per Corporations' Circulars. **The letter of appointment points at the position taken up by the Applicant that his employer was the Appellant.**

The Appellant, Insurance Corporation has argued that the letter appointing the Assessor is a "contract for services" entered into by the Appellant with the Assessor Applicant. It was submitted that the specific guidelines imposed by that letter serves to ensure that an efficient and expeditious service was provided to the customers of the Appellant, by way of the quick processing of Insurance claims. The Appellant further argued that the task of the Panel of Assessors who were hired on the basis of 'contract for services' was **to advise** the Appellant Corporation on the condition of the damaged vehicle and the quantum that the Appellant would be liable to pay. However I fail to see any substance in the said argument of the Appellant in the light of the clause in the letter appointing the Applicant Assessor, which reads that " if the recommendation is against the interests of the Corporation, the Corporation can terminate the services ".

Even though the Appellant submitted that there was no master – servant relationship between the Applicant and the Appellant, I find that the Assessors had to sign daily when they reported to work; had to provide reasons if they got late to work and the time of arrival is later than 9.30 a.m. every day; they were not given assignments if they got late; they had to report to the superior officer who gave the assignments every day before 9.30 a.m.; they were given equipment by the Appellant subsequent to them having used their own equipment initially; they were paid travelling expenses and they were also paid for the printed photographs taken by them of the damaged vehicles.

If any kind of work has to be performed independently, there cannot be any time restrictions and there cannot be superior officers under whom the worker has to perform. Any 'contract for services' has to be only for the work to be done by a person alone, using his talent or capability as regards the particular kind of work, within his limits and within his freedom. An independent professional performs his work with his expertise in the job and the person who hires him on a 'contract for services' does not have any strings hung on him. The services are appreciated and paid for, due to his capability to do the job which he was hired to do. There cannot be any control whatsoever, if there is only a **contract for service**. An independent Contractor frequently carries on , an independent business whereas under a **contract of service**, a man **sells his labour and service to the enterprise of another.** In the case in hand, the Applicant sold his service and labour to the Appellant. The Appellant in this case has had many controls over the Applicant and thus it points at the stance taken up by the Applicant that the Appellant was his employer.

In the case of **Y.G.De Silva Vs The Associated Newspapers Ceylon Ltd., Bar Assn. Law Journal 1983, Vol I Part III ,** the Supreme Court stated thus:
" It is not disputed that an independent contractor cannot seek relief from a Labour Tribunal. Under Section 31 B (1) of the Industrial Disputes Act only a workman or a Trade Union on behalf of a workman who is a member of that Union alone can make an Application to a Labour Tribunal for redress. Thus , it is fundatamental to the jurisdiction of a Labour Tribunal that the Applicant should have been on a contract of employment under which the parties were in a relationship of master and servant. Unless a person was thus employed there can be no question of his being a 'workman' within the definition of the term set out in the Act."

In the case of **Jayasuriya Vs State Plantations Corporation 1995, 2 SLR 379** the Supreme Court analyzed what is meant by the wordings contained in Sec. 31 D of the Industrial Disputes Act No. 43 of 1950. The Industrial Disputes Act No. 43 of 1950 states in Sec. 31 D that the **Order of the Labour Tribunal shall be final and shall not be called in question in any Court except** on ***a question of law***. The Supreme Court stated that ;

" While Appellate Courts will **not intervene with pure findings of fact** ……..yet if it appears that the Tribunal has made a finding ,

a. Wholly unsupported by evidence or which is inconsistent with the evidence and contradictory of it or
b. Where the Tribunal has failed to consider material and relevant evidence or
c. Where the Tribunal has failed to decide a material question or
d. Where the Tribunal has misconstrued the question at issue and directed its attention to the wrong matters or
e. Where there was an erroneous misconception or
f. Where the Tribunal failed to consider the documents and/or misconstrued them or
g. Where the Tribunal failed to consider the version of one party or his evidence or erroneously supposed there was no evidence ,

then, **the finding of the Tribunal is subject to review by the Court of Appeal."**

The President of the Labour Tribunal has to go through the evidence carefully and make a decision which is just and equitable. In case law regarding similar matters such as this matter before this Court now, it has been held that the Court hearing the Appeal, has to examine **whether the Labour Tribunal has considered the evidence, having in mind the rights and interests of the workman as well as the position of the alleged employer,** the Appellant Corporation. If the Tribunal has not done so properly, then the order made by it, can be taken as perverse. If the Tribunal has considered the evidence heard by it and then had made the order, then it cannot be categorized as perverse.

In the case of **Ready Mixed Concrete Vs Minister of Pensions 1968, 2 QB 497,** the control test was used to evaluate whether the employee was providing a **contract of service** or **contract for services.** It was observed by Mackenna J that "It may be stated that whether the relation between the parties to the contract is that of master and servant or otherwise, is a conclusion of law dependent **upon the rights conferred and the duties imposed by the contract.** If these are such that the relation is that of master and servant, it is **irrelevant** that the parties have declared it to be **something else**." The contract in this case had contained a declaration that the man named Latimer was an independent contractor. Yet, the evidence had shown that he was an employee of the company, Ready Mixed Concrete.

In the case of **Market Investigations Ltd. Vs Minister of Social Security 1968, 3 A.E.R. 732 ,** it was held that " Control, although a matter for consideration, was not decisive; the fundamental test in determining whether a person was performing services under a 'contract of service' or ' a contract for services' was whether the person engaged to perform those services was performing them **' as a person in business on his own account' and thus under a contract for services** but that no exhaustive list of the relevant considerations or their weight could be compiled." In the same case , it was held that the **right given to the worker to work for others** is **not being inconsistent with the existence of a contract of service** and was accordingly **an employment**. In the said case, Cook J had summarized the conclusion in this way; " The Supreme Court suggests that the fundamental test to be applied is this: Is the person 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'. " It was further decided that no exhaustive test can be compiled of the considerations which are relevant in determining the question and no strict rules can be laid down as to the relative weight which the various considerations should carry in particular cases.

The Labour Tribunal has analyzed the evidence given by the Applicant and the evidence given by three others on behalf of the Appellant Corporation. The evidence has proved that the Assessor's work with regard to motor vehicle accidents is an integral part of the income earned by the Appellant. It is an essential service granted to the Appellant by the Applicant. Without these particular Assessors, the damages caused to insured vehicles in motor vehicle accidents cannot be brought to the books and if that job is not done properly by the Assessor, the Appellant would not be able to earn such a lot of income in that regard. The work of an Assessor is an integral part of the Insurance Corporation.

The learned President of the Labour Tribunal has quoted in his order the case of **Stephenson, Jordan and Harrison Ltd. Vs Mc. Donald and Evans 1952 A.T.L.R. 101.**

In the said case, Lord Denning formulated the test for identifying a servant workman by asking whether the person in question was part of the other's organization. He said thus: " It is often easy to recognize a contract of service

when you see it, but difficult to say wherein the difference lies. (meaning as against a contract for service). A ship's Master, a chauffer and a reporter on the staff of a newspaper are all employed under a **contract of service**: but a ship's pilot, a taxi-man and a newspaper contributor are employed under **a contract for service**. 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 work, although done for the business , is not integrated into it but is only accessory to it. "

The Civil Appellate High Court had also agreed with the Labour Tribunal when the President had analyzed the evidence pointing to the fact that the **Applicant was employed as part of the business and the work done is done for the business of the Appellant.** The Appellant's business was insurance. The Assessor worked in the specific area of 'assessing the amount of money to be paid to the insured , keeping in mind the interests of the Appellant at all times' as directed by the letter appointing him as the Assessor. His work was surely not an accessory to the business but was integrated into the business of the Appellant.

Having gone through the evidence and the judgment of the Civil Appellate High Court as well as the order of the Labour Tribunal, I fail to find that the analysis was perverse. I hold that the decisions are just and equitable. I answer the questions of law enumerated at the commencement of this Judgment in favour of the Applicant Respondent Respondent and against the Respondent Appellant Appellant. I uphold the judgment of the Civil Appellate High Court.

This Appeal is dismissed. I order no costs.

Judge of the Supreme Court

Sisira J. De Abrew J.
I agree.

Judge of the Supreme Court

Anil Gooneratne J.
I agree.

Judge of the Supreme Court