

Nature of Employment and Labour Protection of the GI producers in Sri Lanka: A Legal Perspective

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Abstract— Production of goods with Geographical Indications (GI) involves skill and experience to a larger extent. Therefore, at a time where Sri Lanka loses its valuable domestic producers of GIs day by day, only a few producers who work under several businessmen still exist. Nevertheless, most of them are not entitled for the rights and benefits under Labour Law in Sri Lanka as the workmen or employees in other sectors. GI producers are not generally labelled as employees since they lack the element of 'contract of employment'. Hence, firstly this research aims to identify the nature of employment of GI producers in Sri Lanka. Secondly, it analyses the law relating to the determination of the contract of employment. Thirdly, this research evaluates the impact of the existence of a contract of employment on the GI producers. Lastly, this paper suggests proposals to bring Sri Lankan GI producers under the scope of employer-employee relationship with benefits. To this end, the black letter law approach was predominantly followed in this research. Hence, statutes and judicial decisions were utilised as the primary sources. Moreover, books, journal articles, reports, newspapers, conference proceedings and websites were extensively utilised as secondary sources. In supporting the black letter approach, the socio-legal approach was also followed and a number of interviews were conducted with the GI producers. The findings revealed that GI producers can also be taken under the purview of employees in order to grant them employee benefits. Therefore, it is recommended to consider the GI producers as having a contract of employment based on the factual circumstances. It is also recommended to introduce a mobile complaint handling mechanism in the areas where the potential GIs are produced in eliminating the difficulties which lie with the producers and to affirm proper and continuous welfare of them. Such labour protection of GI Producers would undoubtedly assist in preserving the GI products for the future.

Keywords— Nature of Employment, Geographical Indication Producers, Contract of Employment

I. INTRODUCTION

Protection of GIs undoubtedly creates increased employment in the industry involved. A GI could be identified as a product that originates in a particular geographical origin where qualities, reputation and characteristics arise essentially due to such origin. The products identified by GIs are largely linked to the rural economy (Williams, 2007). The producers involved in the production are working either individually or under one trader in the village. When the producers work under one person who sells the products identified by GIs in a larger scale, the nature of employment is not clear as to whether they work under a contract of employment or contract for service. In this background this research attempts to scrutinize the Sri Lankan law which can be applied to such GI producers.

II. RESEARCH METHODOLOGY

This research predominantly followed the black letter law approach. In identifying the prevailing law as well as the analytical comments on the existing law, the black letter law approach was indispensable. Hence, statutes and judicial decisions were utilised as the primary sources and as the secondary sources books, journal articles, reports, conference proceedings, websites, newspaper articles were utilised. In addition, the socio-legal approach was also followed in order to glean the empirical evidence. More importantly to pragmatically identify the nature of employment of the GI producers, this approach helped the research in a considerable manner. Interviews was the main research method employed in socio-legal approach. They were carried out based on open ended questionnaires.

III. IDENTIFYING THE GI PRODUCERS

As a consequence of the human factors and natural factors of a particular geographical origin, a product may obtain unique characteristics where if such product is produced in another place the same characteristics may

not be attached to the product. In the Sri Lankan context, only Ceylon Tea and Ceylon Cinnamon are recognized as GIs by the Intellectual Property Act No. 36 of 2003. Nevertheless, there are many other products which can be considered as potential GIs in Sri Lanka. Ceylon Sapphire, Ceylon Pepper, Dumbara Mats, Ambalangoda Masks, *Ruhunu* Curd, Hapuvuda Lacquer work (Laksha) and Sinharaja *Kitul* Treacle are some of the potential GIs existing in Sri Lanka. In each of these industry, there is a considerable amount of people working under the employers. The fact that GI production is based on the rural areas amounts to the existence of contracts for service instead of contract of service. Despite the fact that the producers work under the employers for a long period of time, they still have to rely on the wages on a daily basis. In some cases wages are paid on the production basis. A product qualifies for the status of a GI both due to human and natural factors. The skill of production generally comes from generation to generation. However, as evidenced in the field research, the families who are involved in production of potential GIs are reluctant to engage their children in the same industry. Moreover, rather than engaging individually in the industry, the workers tend to work under one person who runs a business relating to such product. This is where the issue arises as to whether such skilled people must be considered as 'permanent employees' who contribute to the main operation of the business of GI production or 'casual employees'.

In Ceylon tea plantation, tea leaves are selectively plucked by the tea pluckers to ensure the maximum flavour of Ceylon tea which involves human skill whereas if the plucking was done by a non-skilled labourer the expected taste of Ceylon tea may not come out. The tea plucking skill is developed with long term employment in the tea industry. Nevertheless, in terms of the data gathered from the field research, there are privately owned tea estates and factories where the labourers work as casual employees for a long period of time without being entitled for the formal employee benefits such as EPF, ETF, Gratuity and workmen's compensation which is a lacuna in the practical application of stipulated law.

Moreover, the unique quality and reputation are acquired by Ceylon sapphire as a result of the skill and experience exercised by the gem miners. Despite the labour intensive nature of the industry, the gem miners enter into verbal agreements with the mine owners. The reason to engage in the industry for those workers is that they have no alternative or they have specialized skill in

the industry. This shows that despite the skilled labour which add value to Ceylon sapphire, the nature of employment of the workers is at a wretched degree. Such workers have worked in the industry for nearly 10-11 years without entering into a valid contract of service (Observer, 2016). Hence they were not provided with the labour benefits that should have been available to them if they had proper contract of employment.

In the case of Dumbara mats, there are only a few weavers for the whole village who engage in the industry. Nevertheless, they have been engaged in the industry since their younger age. Currently, even though they are employed under mat sellers in the village their service is not considered as formal employment which deprives a larger amount of benefits entitled by such weavers.

The above examples depict that the producers engaged in the GI related products largely belong to the informal sector. The fact that the potential GI products are given due recognition would not straight away maximize the welfare of the GI producers. It is of great importance to scrutinize the legal framework applicable to such producers and what rights would be deprived for them in the absence of contract of employment and formal employment status.

IV. SRI LANKAN LEGAL FRAMEWORK ON THE DETERMINATION OF CONTRACT OF EMPLOYMENT

As discussed above the GI production entails a large number of workers who belong to the informal sector or they are considered as casual workers in some trades. Consideration of GI producers as 'casual employees', is an erroneous notion. Theoretically, based on the needs arising, such workers are employed as casual workers. The casual workers possess unskilled labour and they do not have regular hours of work. A casual employee is one employed by chance on no contract to employ, e.g. a window cleaner employed at irregular intervals when the owner of the house thinks that the windows require cleaning (De Silva, 2012). Mostly, the casual workers are employed to carry out the ancillary task to accomplish the primary activities. Hence, the employer does not expect the worker to report to work on a daily basis and the worker too does not have a duty to report to work on a daily basis. According to SR De Silva (De Silva, 2012), there are two main causes for the disparities arising pertaining to casual workers. First reason is the absence of a tool to separately identify the casual workers from other workers. The second reason is the tendency of the

employers to consider many workers as casual workers despite the fact that they cannot be considered under such category. However consideration of GI producers as casual employees by their respective employers who engage in the primary trade of producing/selling potential GIs in Sri Lanka cannot be taken as a correct labelling of employment since the nature of causal employment derives from an ancillary status and GI producers do not work ancillary to main business.

In terms of the Establishment Code of Sri Lanka, the 'casual' status is recognized in the government sector. Therefore, a casual worker could be considered as a person employed to fulfil the vacancy (permanent or temporary) on a daily wage basis and for a short period. This shows that in the government sector a casual worker is employed in a temporary position.

Thereby it is evident that GI producers who have worked on a daily basis for a continuous period without any break cannot be considered in the same scale of casual employees.

The court in responding to the cases where the workers have been labelled as casual workers, is reluctant to accept such label as exclusive evidence. The following cases elaborate how the court has responded to the situations when the workers have been labelled as casual workers.

In the case of *All Ceylon Commercial & Industrial Workers Union v. Peiris* [ID 58 C.G.G. 11,471] workers were appointed to make buses and lorries using chassis. Their names were entered in the list of salaries and the salary was paid on a daily basis. However, if such a person could not come to work for a long period of time the name is removed from the list of salaries. In this case, when one such worker's service was terminated the court had to consider whether his employment was casual in remedying the person. The court considered the nature of the employment, how he reported to work and how salary has been paid to him. Even though salary was allocated on a daily basis, it has truly been paid fortnightly. Moreover, they have worked for many years in the business. The court having considered the size of the business, size of the labour force employed and nature of the business, decided that the employment of such persons is not casual.

The case of *Ceylon Ceramics Corporation v. Weerasinghe* [1978] too illustrates the court's approach towards casual worker. A female worker was recruited as a marketing

trainee in Ceylon Ceramics Corporation. At the end of the training period, she was appointed as the in charge of the marketing outlet, as a casual worker on a daily wage basis. Later, she was twice transferred. However, her employment was terminated suddenly and she went before the Labour Tribunal. Ceylon Ceramics Corporation stated that she was a casual worker and her service is no longer needed to the corporation and therefore, her service was terminated. The Labour Tribunal decided that she is not a casual worker in the corporation. The corporation appealed against the decision of the Labour Tribunal. The Supreme Court in the end decided that she is not a casual worker and confirmed the decision of the Labour Tribunal. The court held that her nature of employment is permanent. Because, the corporation has first trained her. Then, even though she has been paid on a daily basis the amount paid has been gradually increased by the corporation. Also, the salary has been paid at the end of every month. The responsibility of the place she worked has completely been on her. Moreover, since she was in-charge of finance, she had a guaranty of Rs.1000.00. The letter issued to her regarding her employment did not mention that she is a casual worker. In the letter of termination only it was mentioned that she is a casual worker. Therefore even though the employer argued that she had knowledge that she is casual worker, the court held her employment is permanent in nature.

In addition to the above cases, the case of *Sinnathamby v. Ranaweera* [1966] has also decided that even though the workers have been labelled as casual, by analysing the facts of the case, the true nature of employment might sometimes become permanent. In the case of *Ratnasabapathy v. Asilin Nona* [1960] it was held that nature of employment is a question of fact to be determined by considering, not only the nature of the work but also the way in which the wages are paid, the amount of wages paid, the period of time over which the employment extends and indeed all the facts and circumstances of the case.

Moreover, in *All Ceylon Commercial & Industrial Workers' Union v. Fernando & Sons Ltd* [ID 168 CGG 12,087] it was pointed out that variability in the attendance of an employee does not in itself or by itself establish the casualness of a workman's employment. In Sri Lanka, with regard to potential GIs, a number of people are employed as casual workers. However, they have been working in such industries for a long period of time due to the skilled labour possess. Such producers have the skill to produce goods which if produced by another

person would not receive the same quality, reputation and characteristics. Therefore, if such persons are only considered as casual workers they would lose a number of benefits granted by the law.

V. ARE THE CASUAL WORKERS DEPRIVED OF ANY RIGHTS?

To obtain a remedy under Labour Law, a person must have a contract of employment. The permanent employment is considered to be an entry point for a larger number of industrial rights and benefits (Stiftung, 1997). There is a tendency by the employers to recruit workers under the category of casual employment and they are not given the remedies under Labour Law despite their legal entitlement. This law has been recognized in the judicial decisions as well. The case of *Merril J Fernando and Co. v. Deimon Singho* [1988], decided that a casual employee is not entitled for reinstatement as there is no former position in which he can be restored and he is not entitled to compensation in lieu of reinstatement under Labour Law. It maintains the fact that if GI producers are continued to be considered as casual employees they are deprived of their job security and also they are disentitled of the compensation if there is a termination by the employer.

On the other hand, due to non availability of a complaint handling mechanism to monitor whether the GI producers enjoy labour rights, they are deprived of such rights. Therefore establishment of a mobile complaint handling mechanism would facilitate proper enjoyment of labour rights.

VI. GI PRODUCERS - CASUAL OR PERMANENT WORKERS?

As discussed above, the producers of products identified by GIs possess skilled labour. These producers are different from the casual workers who possess low skill variety (Wilson, Brown, & Cregan, 2008). The products receive qualities, reputation and other characteristics only because of such producers. Therefore, they engage in the primary activities of the business. In this sense, they cannot be considered as casual workers of the business. Besides, there are only a few new comers to the industry and the producers who have been in the business for a long period of time, continue to remain in the industry. Therefore, even though they do not acquire the rights and benefits received by the permanent

workers, their nature of employment implies a worker beyond a casual worker.

VI. RECOMMENDATIONS

It is evident that the nature of employment of GI producers requires formal scrutiny in order to determine their labour rights. However it should not lead to the conclusion that their work is of casual in nature. Due to this connotation, GI producers have been left without any labour right. Therefore it is recommended to recognize GI producers who are working under an employer within the meaning of the term 'workman' indicated in Employees Provident Fund Act No. 15 of 1958, Employees Trust Fund Act No. 46 of 1980 and Payment of Gratuity Act No. 12 of 1983.

Moreover mobile complaint handling mechanism should be established in the areas where potential GI producers live and their employment facilities should be continuously and properly monitored.

In the long run a welfare benefit scheme separated from EPF and ETF can be established as an initiative motivation for the GI producers which would help in attracting the successors of the GI producers

VII. CONCLUSION

The survival of GI products does not rely only on the protection given to such products. It is also accompanied by a number of other factors. The employee rights of the producers is one crucial aspect which would safeguard the human factors of a GI product. Therefore, GI producers should be protected not only in terms of the uniqueness of the goods they produce but also in terms of their employment rights. As discussed above, the GI producers should no longer be a set of casual workers without employee benefits. Hence statutory amendments, to recognize the GI producers who fall under the employee category and to enable them to come forward to seek their rights would ultimately result in ushering them robust employee benefits.

1. References

All Ceylon Commercial & Industrial Workers Union v. Peiris , ID 58 C.G.G. 11.

All Ceylon Commercial & Industrial Workers' Union v. Fernando & Sons Ltd , ID 168 CGG 12.

Ceylon Ceramics Corporation v. Weerasinghe, SC 24/76 - SC Minutes of 15 July 1978.

De Silva, S. R. (2012). *The Contract of Employment*. Colombo: The Employers' Federation of Ceylon.

Gem industry growth hit by worker shortage. (2016, August 14). Sunday Observer.

Merril J Fernando and Co. v. Deimon Singho , 2 Sri LR 242 (1988).

Observer, S. (2016, August 14). Gem Industry Growth Hit by Worker Shortage. Sunday Observer.

Ratnasabapathy v. Asilin Nona , 61 NLR 548 (1960).

Sinnathamby v. Ranaweera , 67 NLR 512 (1966).

Stiftung, F. E. (1997). *Handbook of Industrial Relations*. Colombo: Author.

Williams, R. M. (2007). Do Geographical Indications Promote Sustainable Rural Development. Degree of Master of Natural Resource Management and Ecological Engineering, Lincoln and BOKU Universities.

Wilson, A., Brown, M., & Cregan, C. (2008). Job Quality and Flexible Practices: An Investigation of Employee Perceptions. *The International Journal of Human Resource*, 473-486.