Intentionally Ambiguous or Flexible: Inside India's Employment Relationship Tests

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Abstract: The determination of whether an individual is an employee or not is vital to the determination of the rights of that individual and the obligations owed to them. However, in doing this determination, one has to ensure that the tests applied are not unnecessarily broad so as to not place an undue burden on employers, while also ensuring it sufficiently covers all employees that should be protected. In recent years, given the rise of gig work, this problem has once again come to light. This paper analyses the approach of Indian Courts regarding the test of employment and then proceeds to propose an alternative test, based on the ABC standard adopted in the United States.

Keywords: *Employer-Employee, Labour Law, Gig work*

1. Introduction

This paper aims to analyse the case of Union Bank of India v Mujahid Qasim, which dealt primarily with the issue of how Courts should determine if an employment relationship exists between two entities. It uses this case as a vantage point to analyse the jurisprudence surrounding how the presence or absence of employment relationships has been determined in the Indian context.

Union Bank of India v Mujahid Qasim was a case decided in 2020 by the Delhi High Court.[1] This case came before the Court as an appeal against two orders passed by the Central Government Industrial Tribunal ("**CGIT**"). In this case, the drivers serving several Executives of Corporation Bank, which later merged with the Union Bank of India, had approached the CGIT praying that they are recognised as employees of the Bank and have their service regularised.[2] The CGIT, after perusing the evidence on record noted several factors, such as the fact that the drivers had worked for more than 240 days in every calendar year, they would serve not only the Executives but would also help in the carrying out of

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[1]*Union Bank of India v Mujahid Qasim* 2020 SCC Online Del 1960.
[2]*ibid* at 2.

various other tasks such as the collection of cheques and that they were reimbursed for certain expenditures, to hold that they were employees of the Bank.[3] This order of the CGIT was later appealed by the Union Bank and after considering the arguments presented, the Delhi High Court applied the multi-factorial test to hold that the drivers were employees of the Union Bank and that their demand for regularisation was legal and valid.[4]

This paper argues that the approach that the Court took in this case is largely symptomatic of the manner in which the jurisprudence surrounding the tests to determine if an employment relationship exists has developed in India. It then proceeds to analyse the multi-factorial test from a law and economics perspective to submit that while the flexibility of the test might be a strength, it is simultaneously one of its biggest weaknesses. This paper concludes by exploring alternative options for determining the presence of employment relationships and advocates for a derivative of the ABC test to be adopted in India.

2. The Approach of the High Court Was Symptomatic of the Tests in Indian Jurisprudence Pertaining to the Determination of Employment Relationships

This section of the paper aims to utilise the Mujahid Qasim case as a vantage point to highlight the law in India pertaining to the determination of employment relationships. It begins by looking at the control test adopted in India, and then proceeds to analyse the landscape in which the multi-factorial test was formulated. It then looks at the decision in Balwant Rai Saluja v Air India,[5] which some scholars have contended, replaced the multi-factorial test and analyses the attempts to reconcile the decision in the same with the multi-factorial test.

A. Control Test

The first approach that appears to be taken by the Indian Courts largely mirrored the control test which existed in common law at the time.[6] Likely influenced by the principle of vicarious liability under tort law,[7] the control test as it existed in common law at the time viewed control over the manner of work as a key factor for the determination of an employer-employee relationship.[8] However, Indian courts adopted a modified version of this test in the

[3] ibid at 51.
[4] ibid at 59.
[5] *Balwant Rai Saluja v Air India* 2014 Indlaw SC 556.
[6] *Collins v Hertfordshire County Council* [1947] 1 All ER 633.
[7] David Neild, 'Vicarious Liability and the Employment Rationale', (2013) *Victoria University of Wellington Law Review* vol 44 <https://ojs.victoria.ac.nz/vuwlr/article/download/4973/4422/6899> accessed 5 August 2022 last accessed on April 5, 2024.
[8] *Halsbury's Laws of England*, (Hailsham edition, Vol 22) at 112.

case of Dharangadhara Chemical Works Limited v State of Saurashtra ("Dharangadhara").[9]

Despite the common law itself moving away from the control test at the time,[10] the Court in Dharangadhara, decided to adopt a liberalised form of the control test, by holding that even though some elements of control are missing, this does not indicate an absence of control altogether and the even in the absence of certain factors, an employment relationship could continue to exist.[11]

However, it was soon noted that the application of the control test, even the liberalised version, could not necessarily account for the social and economic realities that persisted in society, particularly with regard to professions wherein workers are given considerable autonomy such as in the case of doctors or lawyers. Therefore, as a result of the several shortcomings of the control test as adopted in the Dharangadhara case, the Indian court's approach to determining if an employment relationship existed changed to a test known as the multi-factorial test.

B. The Multi-Factorial Test

The first major case to part ways from the control test adopted in Dharangadhara was the case of Silver Jubilee Tailoring House v Chief Inspector of Shops and Establishments ("Silver Jubilee").[12] In the said case, the Indian Courts rejected the control test as a whole. It began with a review of common law cases to exhibit the hesitancy in adopting control being the only factor.[13] It then went on to reject the application of the test, citing its inability to account for the evolving social and economic reality in which employers need not necessarily bring both technical knowledge as well as mechanical knowledge to the table. In doing so, the Court suggested that the control test is a product of its time and is unable to be applied effectively outside a feudal society.[14]

Instead, given the heterogeneity of the different sectors within the labour paradigm, the Court adopted a test which provided judges with a great degree of flexibility to come to a conclusion based on the facts on record in the given case.[15] Notably however, the Court did not discount the fact that control is an important factor in considering if an employment relationship exists, but rather said that this would be one of the factors which the Court is to

[9] *Dharangadhara Chemical Works Limited v State of Saurashtra* AIR 1957 SC 264.
[10] *Stevenson, Jordan Harrison Ltd v MacDonald &Evans* [1952] 1 TLR 101.
[11] *Dharangadhara* (n 9) at 16.
[12] *Silver Jubilee Tailoring House v Chief Inspector of Shops* AIR 1974 SC 37.
[13] *ibid*, at 20-26.
[14] *ibid*, at 27.
[15] *ibid*, at 29.

consider.[16]

Another significant decision in the development of the multi-factorial test is that of Sushilaben Indravadan v New India Assurance Company Limited.[17] In this case, the Court considered the context of the legislation to be a relevant factor to consider while the Court is weighing factors in the balancing test. The Court went on to say that if the legislation can be considered as a beneficial one that is being applied to a weaker section of society, it will tilt the balance in favour of holding that a contract of service will exist.[18] However, it is important to note that the reason for the introduction of this 'shifting of balance' was premised on the understanding and acknowledgement that the balancing test may often not yield a clear result in certain situations hinting at a potential shortcoming of the test,[19] a proposition revisited in a subsequent part of the paper.

C. Balwant Rai Saluja: Replacing or In Harmony with the Multi-Factorial Test?

Despite the presence of the multi-factorial test, there appeared to be an apparent shift back to a form of the control test in the case of Balwant Rai Saluja v Air India Limited ("Balwant Rai").[20] In this case, the Court appeared to consider the economic reality of independent contractors in the present case to provide for the creation of two distinct groups – individuals who have ultimate/primary control over the alleged employee and those who have secondary control over the same and held that only the alleged employee would be considered as an employee only of the first group.[21]

The larger implication of this decision on the test of employment in the Indian context remains largely ambiguous. While the decision does appear to suggest an alternative conception of employment relationships, the Supreme Court[22] and several High Courts[23] have attempted to integrate this within the multifactorial test, including the Mujahid Qasim decision.[24] The Courts attempt to do so by taking the reasoning that factors and list present in Silver Jubliee as inclusive and not exhaustive. Therefore, the considerations of control, highlighted in the Balwant Rai were incorporated as one factor which the Court was to consider in the determination of the case.

[16] *ibid*, at 30.
[17] *Sushilaben Indravadan Gandhi v New India Assurance Co* (2020) Indlaw SC 282.
[18] *ibid* at 25.
[19] *ibid* at 25.
[20] *Balwant Rai Saluja v Air India* 2014 Indlaw SC 556.
[21] *ibid* at 39.
[22] *Bharat Heavy Electricals v Mahendra Prasad Jakhmola* (2019) 13 SCC 82.
[23] *Jatin Rajkonwar v Management of Oil and Natural Gas Corporation Limited* (2015) Indlaw GUW 156.
[24] *Union Bank of India v Mujahid Qasim* 2020 SCC Online Del 1960 at 48.

However, in every attempt at reconciliation and the subsequent reasoning of the Court, there is an underlying presumption about the legitimacy of the multi-factorial test and that the same is the ultimate standard for the determination of employee-employer relationships. However, this may not be entirely true and the following section of the paper aims to challenge this very assumption.

3. The Multi-Factorial Test May Be Too Vague and Flexible

While many have viewed the flexibility of the multifactorial test as a strength as it provides courts with a powerful tool particularly when entities deliberately try and skirt the law, it is submitted that its flexibility is one simultaneously of its greatest weaknesses. This segment of the paper adopts a law and economics perspective to demonstrate how the flexibility of the multifactorial test may be too vague and increase ambiguity in the law.

Law and economics as a school of thought attempt to analyse legislations and decisions provided by the judiciary in the context of the transaction costs it presents to society at large. Transaction costs have been defined as the costs a party would be obligated to undertake to identify, negotiate and enforce any agreement made between them and another party.[25] This in practise would include tangible costs such as legal fees as well as intangible costs such as time investment.[26] While this may appear abstract and theoretical, in the context of labour legislations, its importance cannot be overstated. Keeping potential employees in a state of limbo regarding what their rights are, could potentially have detrimental impacts given the relationship between labour and livelihood. This concern is deepened in the Indian context, wherein owing to social and economic constraints, individuals may be unable to seek legal redressal even when they have the right to do so.[27]

An additional issue that inadvertently crops up with regard to the multi-factorial test is the inconsistency in its application. It is common practise for Courts not only to extend the factors which they consider pertinent based on the facts of the case, but also to focus on a few factors alone to hold the presence or absence of an employment relationship.

This is best exhibited by the manner in which the Netherlands and the United Kingdom Courts approached the question of whether Deliveroo drivers would be considered as employees of the Deliveroo or not. While both the Netherlands and the United Kingdom

[25] Pierre Schlag, 'The Problem of Transaction Costs' (1989) *62 S California Law Review* 1661, 1673-75.
[26] Rober Moog, "Delays in the Indian Courts: Why the Judges Don't Take Control" *The Justice System Journal* vol 16, no 1 (1992) pp 19-36 at 27.
[27] *ibid.*

courts applied the multifactorial test to determine if an employment relationship existed, the factors the Courts looked at were very different. While the judges in Netherland appear to have placed emphasis on the control that Deliveroo exercised over its employee through the usage of algorithms,[28] the judges in the United Kingdom appear to have placed emphasis on factors such as the right of substitution.[29]

Therefore, the inconsistency in the application of the multi-factorial test has resulted in a great deal of ambiguity in the law, and the field could potentially benefit from the introduction of a more decisive test, as explored in a following section.

It is important at this stage, to clarify that merely because a law is flexible does not automatically make the same vulnerable to the criticism that it increases transaction costs and therefore should be replaced. For any sort of legislature to be effective, an optimal balance between rules and standards must be adopted. A rule, would involve a concrete standard leaving little to no scope for ambiguity, while a standard is significantly more open-ended and allows for the exercise of discretion through the provision of broad guidelines alone.[30] It is submitted that the adoption of either of these two approaches would have detrimental consequences in the context of labour laws.

Should a pure rule-based approach be taken, potential employers could take steps to prevent them from falling within the ambit of an employee employer relationship, thereby defeating the purpose of labour law. Additionally, a rule-based approach would have required the legislative to intervene at every new development in the field, therefore leaving room for delays and high decision costs. Alternatively, a standard based approach, would leave potential employees in a state of limbo regarding the status of their rights, thereby once again defeating the purpose of labour law. Therefore, any approach that is to be taken would have to walk the line between the requirement for rules and for standards. The following segment of this paper aims to propose such a standard, primarily based on the ABC test as present in certain states in the USA.

4. Potential Alternative Test to Be Adopted

This segment of the paper aims to provide an alternative approach to determining if an employment relationship exists. It first examines the ABC test adopted by the Californian

[28] Amsterdam Court of Appeal, ECLI:NL:GHAMS:2021:392 (Netherlands).
[29] *The Independent Workers Union of Great Britain v The Central Arbitration Committee v Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952, [77] (United Kingdom).
[30] G Davidov, *A Purposive Approach to Labour Law* (Oxford: UP 2016) ch 7.

Courts as a starting point, and then, keeping in mind the differences between the US and Indian landscape, explores the changes that would have to be made to adopt the test in India.

A. The ABC Test

The Californian Supreme Court in the case of Dynamex Operations West v Superior Court of Los Angeles County,[31] rejected the multifactorial test on the grounds that the vagueness that it presented posed serious concerns. Instead, the Court developed the ABC test which had two parts – a presumption of employment, and an exhaustive list of 3 factors which could be used to rebut this presumption. These three factors were:

(a) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(b) The worker performs work that is outside the usual course of the hiring entity's business; and

(c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed[32]

The primary advantage that this test has over the multi-factorial test is the degree of certainty that it brings to the law. With a presumption of employment being made and three clear criteria, all of which would have to be proved to rebut this presumption, it has significantly improved the predictability the law for an individual employed would be able to, at the very least, have a strong inclination of whether or not they fall within the ambit of employment relationship, for the mere presence of even one of the three factors would imply with certainty that such a relationship exists.

Beyond the degree of certainty that the law brings in, it is submitted that it balances both the requirements for rules and standards effectively. While prima facie the exhaustive list of factors the test posits may hint at the test being a rule based one, this is not necessarily true. A perusal of all three factors, would reveal that any determination of the same would require the consideration of multiple factors itself.[33] For instance, the determination of whether a worker is free from the control of the hiring entity, a number of factors would have to be looked into, including but not limited to the right to appoint/dismiss, payment structure and so on. Therefore, it is submitted that the flexibility that the multi-factorial test still exists in a form

[31] *Dynamex Operations West Inc v The Superior Court of Los Angeles Count* 4 Cal 5th 903 (Cal 2018) (United States of America).

[32] *ibid* at 42.

[33] Guy Davidov and Alon-Shenker, 'The ABC Test: A New Model for Employment Status Determination?',*Industrial law Journal* vol 51(2) (2020).

within the ABC test itself.

Furthermore, from a practical standpoint, the requirement for employers to provide prove all three of the factors in order to rebut the presumption of employment, eases the burden on workmen, who are often times in a weaker position to prove certain factors (such as the usual course of business of the organization). Therefore, while an employer would have to conclusively prove all three factors in order to rebut the presumption, the mere absence of a single factor would enable the worker to conclusively be classified as an employee. This however, necessarily implies that each factor of the test warrants examination to ensure that labour protection ought to be granted in cases where the standard is not met, an analysis undertaken in the following section.

This test was developed in the context of the United States and has often been criticised for being overbroad. Therefore, the following sub-section of the paper aims to analyse the potential changes that would need to be made to adopt the test in the Indian context, by analysing each prong.

B. Adoption of the ABC Test in India

The first prong to rebut the presumption would be to show that the worker is free from the control of the potential employer. The requirement for this prong, seems to stem from the idea that control implies some form of subordination and therefore, warrants providing protection in labour law.[34] However, the question then arises: what degree of control would fail meeting this prong. As emphasised in the previous parts of this paper, owing to the current economic reality, control can often be seen as a question of degree and not as a binary (present or absent). In cases where there is clear and apparent control, this question does not arise and the prong would be failed. However, it is submitted that in cases where the control is indirect or not clearly apparent, the Courts should instead place a greater deal of reliance on the other prongs of the other prongs of the test to aid in the determination of whether the presumption is overturned or not, particularly in light of the expanded second factor. This in turn would minimize the potential for misclassification while also ensuring that merely because a party exercises ‘secondary control’ as was formulated in the Balwant Rai decision, that individuals in need of protection, lose out on the same.

The second prong deals with the usual course of the hiring business entity. It is submitted that this prong of the test results in the over inclusion and therefore, should be substituted by an

[34] *ibid.*

organisational control test. By focusing on the work being performed, the test appears to make a distinction between the core and periphery work of the organisation. In doing so, the test appears to create a hierarchy wherein only those who are performing the core functions of the business warrant the protection of labour law, a hierarchy which can inadvertently exclude individuals in need to protection from labour laws. It is submitted that a better approach would be to analyse if the worker is integrated into the hierarchy of the organization and therefore, subject to organizational control. Doing so would break down this core-periphery dichotomy, and allow the Courts to extend the benefits of labour protection to all those who need it. Additionally, it would reduce the probability of overinclusion of individuals such as freelancers merely because they fall within the same course of business as the hiring entity.

Finally, the third prong appears to be included to protect those who would be economically dependent on the employer and therefore seems to have some forms of justification in labour law jurisprudence.[35] Additionally, in the Indian context, there has already been an attempt to consider the economic dependency and reality to determine if an employment relationship exists,[36] and therefore, it is unlikely to face any real challenges in being applied to the Indian context.[37]

5. Conclusion

Despite the abundance of literature and decisions on the topic, the question of how to conclusively determine if a relationship of employment exists, still remains uncertain in India. While the multi-factorial test provided for a broad direction to determine the same, the decision in Balwant Rai posed an interesting challenge as to how to reconcile what appeared to be a test based on control with the multi-factorial test. Several courts, including the court in Mujahid Qasim attempted to do just that by attempting to bring the control test posited within the folds of the multi-factorial test itself, a trend largely seen since the Balwant Rai decision and this paper evaluated the general trend of the Indian judiciary with regards to the same.

Furthermore, this paper questioned the application of the multi-factorial test and argued that

[35] K Cunningham-Parameter, 'Gig-Dependence: Finding the Real Independent Contractor of Platform Work' (2019) 39 *Northern Illinois U L Rev* 379 at 414.
[36] *Hussain Bhai v Alath Factory Employees Union* (1978) 4 SCC 257.
[37] It is also apt to provide a caveat to the above-mentioned approach. The derivative of the ABC suggested is merely a preliminary outline and would require the incorporation of opinions of relevant stakeholders, particularly with regards to exceptions, if any.

owing to the vague nature and inconsistent application of the same, employees were being kept in a state of limbo regarding their rights, therefore, compromising the legal health of the nation. It instead suggested an alternative approach, based loosely on the ABC test to provide for a model which began with a presumption of employment and three factors [control over performance; organizational control; and independently established] which would need to be proved to rebut this presumption.