
(1996) 09 BOM CK 0009
In the Bombay High Court
Case No : Writ Petition No. 4366 of 1991

Sangli District Co-operative Bank Ltd.	APPELLANT
Vs	
D.K. Patil and Others	RESPONDENT

Date of Decision : 20-09-1996

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 3(13), 42(4)

Citation : (1998) 3 LLJ 1083

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Advocate : B.R. Naik, Y.R. Naik and Prashant Naik, for the Appellant; P.P. Chavan, for the Respondent

Final Decision : Allowed

Judgement

B.N. Srikrishna, J.—Despite the formidable bulk of this Writ petition, the legal issue thrown up for consideration by the Writ Petition is narrow.

2. By this Writ Petition under Article 226 of the Constitution of India, the Petitioner impugns an order of the Labour Court, Sangli dated August 8, 1990 made in Application (BIR)No. 8 of 1989 as affirmed in Appeal by the order of the Industrial Court, Kolhapur dated September 17, 1991 made in Appeal (IC) No. 28 of 1990, both under the provisions of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as "the Act").

3. The Petitioner is a Co-operative Society carrying on banking business in Sangli District at different branches, all of which are amenable to the provisions of the Act. At the material time, the 1st Respondent was employed as Deputy Manager (Agriculture, Technical and Development Cell) at Sangli. By a resolution passed by the Board of Directors of the Petitioner on July 22, 1989, it was resolved that the services of the 1st Respondent should be terminated with immediate effect. An order of termination of service dated July 22, 1989 was served on the 1st Respondent terminating his service. The said order recited as under :

"The Board of Directors has today i.e. July 22, 1989, resolved in the meeting to terminate with immediate effect your employment as Bank's Deputy Manager (Agriculture and Technical Cell) in accordance with the Bank's service Rule No. 6 and Standing Order No. 22. You are hereby given three months wages inclusive of all allowances amounting to Rs. 8,085 and inclusive of all your earned salary for July 1989 amounting to Rs. 1,250.33. You are entitled to a sum of Rs. 9335.33 which has been credited into your Account No. 14 in the Miraj Road Branch of this Bank according to the usual procedure and your accounts as to pay and allowances have been accordingly settled.

As aforesaid, you are hereby relieved from service with effect from today July 22, 1989 at the end of office working hours."

4. After complying with the provisions of Section 42(4) of the Act, the 1st Respondent moved Application (BIR) No. 8 of 1989 before the Labour Court, Sangli, seeking the relief of reinstatement in service with continuity and full back wages. The application was contested by the Petitioner on various grounds, including the contention that the application was not tenable as the 1st Respondent was not an "employee" within the meaning of Section 3(1) of the Act. The 1st Respondent had urged another contention, namely, that the termination of his service was contrary to the provisions of Section. 10(2A) of the Act since he was a "protected employee" at the material time. This contention, however, was given up during course of the hearing before the Labour Court.

5. The Labour Court tried the application and by the impugned order dated August 8, 1990 allowed the application by holding that the 1st Respondent was an "employee" within the meaning of Section 3(13) of the Act and that the case as alleged on merits was made out. The Labour Court directed reinstatement of the 1st Respondent on his original post with full back wages and continuity of service.

6. The Petitioner carried the matter in appeal by its Appeal (IC) No. 28 of 1990. The Labour Court's order under appeal was affirmed and the appeal was dismissed. Hence, the Petitioner is before this Court by the present Writ Petition.

7. After having heard the learned Counsel of both sides, it appears to me that the most important question on which the fate of this Writ Petition hinges is whether the 1st Respondent is an "employee" within the meaning of Section(13) of the Act. If the answer is in the affirmative, then the orders of the two Courts below are liable to be affirmed and, if not, they are liable to be quashed and set aside.

8. An application u/s 79 read with Section 78 of the Act is maintainable before the Labour Court only if it is made by any of the parties to the dispute, inter alia. We are not concerned with the other contingencies enumerated u/s 79 of the Act which do not apply here. Obviously, in the instant case, the application would be tenable if it had been made by an aggrieved employee. The expression "employee" has been defined in Section 3(13) of the Act, as under :

"3(13) "employee" means any person employed to do any skilled or, unskilled work for hire, or reward in any industry, and includes - but does not include -

(i) a person employed primarily in a managerial, administrative, supervisory or technical capacity drawing basic pay (excluding allowance) exceeding one thousand rupees per month.

(ii) any other person or class of persons employed in the same capacity as those specified in Clause (i) above irrespective of the amount of the pay drawn by such persons which the State Government may, by notification in the Official Gazette, specify in this behalf."

By the exclusory clause of the definition, a person employed primarily in a managerial, administrative, supervisory or technical capacity and drawing basic pay excluding allowances in excess of Rs. 1000 per month, has been excluded from the purview of the definition.

9. It is not in dispute that, at the material time the 1st Respondent's total salary inclusive of all allowances was Rs. 2,695 and the 1st Respondent was drawing a basic wage exclusive of allowance of Rs. 1,425 per month. It is also not in dispute that the designation held by the 1st Respondent was Deputy Manager (Agriculture and Technical Cell). In these circumstances the Labour Court naturally had to go into the nature of work actually carried out by the 1st Respondent and the nature of the powers and duties invested in him in order to ascertain whether the 1st Respondent was employed primarily in a managerial, administrative, supervisory or technical capacity. Unfortunately, the Labour Court seems to have lost sight of the evidence on the issue and was purely impressed by the fact that, in the order of termination, there is express reference to the Standing Orders. Because in the effecting termination of service of the 1st Respondent, it was stated that the order No. being passed under Standing Order No. 22 the Labour Court held that the Petitioner was estopped from contending that the 1st Respondent was not an "employee" as defined u/s 3(13) of the Act. Barring this reasoning, there does not appear to be any other reason which appears to have appealed to the Labour Court to hold that the 1st Respondent was an "employee" within the meaning of Section 3(13) of the Act.

10. The Industrial Court, while deciding the appeal, went into the evidence meticulously and after careful scrutiny of the evidence on record, came to a near conclusion,".... if we see the facts shown by Mr. Gunde, from the date of appointment of the applicant and duties done by him till the termination, it appears that all his duties were mainly managerial, administrative, supervisory and technical in nature and in addition to that he was getting basic salary of more than Rs. 1000 per month. From the record it goes to show that many times, the applicant was engaged in duties as Manager. So far as the question of fact is concerned, my mind is tilting to call "the applicant as excluded employee from the definition of employee under the B.I.R. Act. Therefore, from the point of facts the Complainant cannot be considered as an employee...." I may

mention here that apart from the different types of duties done by the 1st Respondent, which have been noticed by the Industrial Court the 1st Respondent was also required to write the confidential reports of 19 persons employed in the Agriculture and Technical Cell, which the 1st Respondent admitted to have done. In the face of the clinching evidence, therefore, the Industrial Court was justified in the factual finding made by it. Unfortunately, however, despite such a conclusion, the Industrial Court also accepted the contention urged on behalf of the 1st Respondent that inasmuch as the order of termination made a reference to Standing Order of the Petitioner must be deemed to have treated the 1st Respondent as an "employee" within the meaning of Section 3(13) of the Act and must be estopped from contending to the contrary. It is only on this reasoning that the Industrial Court has held against the Petitioner.

11. A scrutiny of the pleadings before the trial Court, which are annexed to this Writ Petition, does not indicate that the 1st Respondent had raised a plea of estoppel against the Petitioner. It was neither pleaded, much less was it established by evidence, that there was any continuous course of conduct on the part of the Petitioner of treating all Deputy Managers, or at least the 1st Respondent, as an "employee" governed under the Standing Orders. The record does not show that any evidence was let in to show that, barring the instance of the order of termination dated July 22, 1989, there were any other orders issued against the 1st Respondent purportedly in exercise of the Standing Orders. Mr. Chavan, learned Counsel appearing for the 1st Respondent fairly conceded this position, but emphasised the provisions of Section 40-A of the Act and contended that Standing Orders are determinative of the relations between the employer and the employee with regard to industrial matters enumerated in Schedule I of the Act. This is no doubt true. However, this agreement in my view, is but a *petitio principii*. By Virtue of Section 40 of the Act, Standing Orders - Certified or Model have been made binding on the industrial relations between employers and employees undoubtedly. But, then, unless a person is an "employee" it cannot be postulated that because of Section 40 that Standing Order would apply to him *Proprio Vigore*. We thus come back to the first question whether the 1st Respondent is an "employee" within the meaning of Section 3(13) of the Act. In order to decide whether a person is an "employee" within the meaning of Section 3(13) of the Act, the Court is required to apply the test postulated in the definition of the expression "employee" u/s 3(13) of the Act and see whether the person falls within the main body of the definition. Even if he does, the Court is required to see whether he gets excluded from the definition by the exclusory part. In the instant case, as the Industrial Court has rightly held, there is overwhelming evidence on record which points out that the 1st Respondent was excluded from the definition of the expression of the term "employee" as defined u/s 3(13) of the Act by reason of the exclusion in Clause (i) thereof. In the absence of any evidence as to a course of conduct indicating that the Petitioner employer had treated the Deputy Managers, or at least the 1st Respondent, as an "employee", it is difficult to accept the reasoning of the two Courts below that

the Petitioner should be estopped from contending that the 1st Respondent is not an "employee". In my view, both the Courts below have lost sight of the fact that the office order of termination dated July 22, 1989 significantly refers both to the Service Rules as well as the Standing Order. In these facts and circumstances, I am of the opinion, that both the Courts below erred in taking the view that because of the solitary reference made in the office order of termination, the Petitioner was estopped from contending that the 1st Respondent was an "employee" u/s 3(13) of the Act.

12. Mr. Chavan, learned Counsel for the 1st Respondent, brought to my attention a judgment in *The Workmen and Others Vs. Hindustan Lever Ltd.*, and urged that the judgment supported the proposition canvassed by him. In my view, this judgment is of no help to the 1st Respondent. In the facts of the case before their Lordships of the Supreme Court, it was clearly established that the employer had by a continuous course of conduct over a period of time accepted a certain agreement as binding upon the workmen and, therefore, their Lordships were of the opinion that the employer ought not to be permitted to contend to contrary in all future disputes. The said judgment does not in any way advance the case of the 1st Respondent.

13. In the peculiar facts and circumstances of the present case, I am of the view that the evidence on record overwhelmingly established that the 1st Respondent was a person employed primarily in managerial, administrative, supervisory or technical capacity and drawing basic pay (excluding allowances) exceeding Rs. 1000 per month. There was also no material to support the plea of estoppel taken up by the 1st Respondent to preclude the Petitioner from urging the contention that the 1st Respondent was not an "employee". In the facts and circumstances of the case, I am of the opinion; that the two Courts below erred in holding that the 1st Respondent was an "employee" within the meaning of section 3(13) of the Act. The Appeal filed before the Industrial Court ought to have been allowed and the Application filed before the Labour Court ought to have been dismissed.

14. Mr. Chavan after realizing that there is no factual evidence on record to support the plea of estoppel made before the two Courts below, made a desperate attempt to persuade me to give him such an opportunity at this stage. I decline to do so. The litigation is one of 1989 vintage. It is time that the litigation comes to an end now atleast in 1996.

15. In the result, the Petition is allowed. The impugned order of the Labour Court, Sangli dated August 8, 1990 made in Application (BIR) No. 8 of 1989 and the order of the Industrial Court, Kolhapur dated September 17, 1991 made in Appeal (IC) No.28 of 1990 are hereby quashed and set aside. The Application of the 1st Respondent made to the Labour Court, as Application (BIR) No. 8 of 1989, is hereby dismissed as untenable by holding that he is not an "employee" within the meaning of Section 3(13) of the Act.

16. The Petitioner was directed to pay certain amounts under the interim order of this Court dated October 21, 1991 pending hearing and disposal of the Writ Petition. Though the Petition has been allowed at the final hearing, the Petitioner shall not recover the amounts that are already paid over to the 1st Respondent under the said interim order.

17. Rule accordingly made absolute with no order as to costs.