

(2001) 12 CAL CK 0054
In the Calcutta High Court
Case No : Writ Petition No. 18482 (W) of 2001

Tapas Kumar Bindu and Others

APPELLANT

Vs

Syndicate Bank and Others

RESPONDENT

Date of Decision : 14-12-2001

Acts Referred:

Citation : (2002) 2 CALLT 510

Hon'ble Judges : Dilip Kumar Seth, J

Bench : Single Bench

Advocate : Asoke De, Amit Kumar Pan and Sarathi Sarma, for the Appellant; Rajaswara Rao and Manoj Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Seth, J.—The petitioners who were collecting agent under a scheme for pigmy deposits of the Syndicate Bank were parties to a reference along with similar persons of various other Banks in respect whereof a reference was made. Similar such references, being MP No. 116/84, MP No. 117/84 and MP No. 154/86 all in ID No. 14 of 80 were disposed of by a common award. Initially eleven Banks were involved and subsequently another thirty seven Banks were also included. By a common award, the dispute was resolved. The reference that was made for determination of the dispute reads thus :

"Whether the demands of the commission agents or as the case may be deposit collectors employed in the Bank listed in the annexure that they are entitled to pay scales, allowances and other service conditions available to regular clerical employees of those Banks is justified? If not, to what relief are the workmen concerning entitle and from which date?"

2. The Tribunal proceeded on the basis that the petitioners, the collecting agents, were claiming regularisation or absorption. But in course of the proceedings which ultimately culminated in a decision of the Apex Court, learned counsel for the workman had pointed out that they had never asked for absorption or

regularisation. At the same time the reference was also not for absorption or regularisation. It is specifically pointed out that the demand of the collecting agents were that they were entitled to pay scales, allowances and other service condition available to regular clerical employees of the Bank. Therefore, it is their claim with regard to the pay scales, allowances and other service condition but not of regular absorption. However this could have been confused or misunderstood until clarified by the learned counsel. However, the second clause was that if the demand is not justified, in that event to what relief the workmen concerned were entitled to and from which date?

3. Learned counsel for the petitioners points out that initially the petitioners in this writ petition were being paid commission at the rate of 3% which was enhanced to 3.5% subsequently. But this commission was never the subject matter of the reference. It was neither colateral nor incidental question involved in the reference. Even if assuming that it was colateral or incidental question involved, still then it was not directly and substantially in issue and as such the principle of *res judicata* would not be applicable in the present case. In support of his contention, he had relied on the decision in the case of *Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others*, . He then contends that the principle of merger in the present case will not affect the jurisdiction of this Court since the question which was not called upon to be decided by the Tribunal on the reference could not be said to be merged in the Apex Court decision which has modified the order of the Tribunal accepting the modification as made by the Andhra Pradesh High Court and that the question of merger could be distinguished in a given facts and are accepted principle as laid down in *Kunhayammed and Others Vs. State of Kerala and Another*, . According to him, this is a case where the distinction laid down in this decision is applicable and the decision of the Apex Court on account of the question of merger will not affect the jurisdiction of this Court since a new cause of action has arisen by reason of the notification issued by the respondents allegedly founded on the decision of the Apex Court which has the effect of curtailing the existing facilities enjoyed by the petitioners. He had contended that on a reference even if some decision is arrived at, the existing benefits cannot be curtailed not the condition of service which is contractual can be changed even by a decision of the Court. In support of his contention he had relied on the decision in *Indian Banks Association v. Workmen of Syndicate Bank* reported in (2001) 3 SCC 36. According to him, the petitioners were getting 3% commission which is being sought to be reduced to 2%. In paragraph 22 of this writ petition, he has given a break up as to how the petitioners' entitlement have since been reduced if the demand is made in terms of the circular impugned in this writ petition. According to him, the Apex Court in the judgment had never intended to reduce in respect of entitlement of the petitioners. Therefore it is open to this Court to examine the situation and come to a conclusion without affecting, altering, modifying or clarifying the order of the Apex Court. According to him, even accepting the decision of the Apex Court as it is, this Court has still jurisdiction to examine the

question and can go into it and this case should be decided on affidavits and the interim order should be granted as has been granted by various other Courts to which he had referred to.

4. Mr. Rao, learned counsel for the respondent Bank on the other hand points out that in view of the principle of *res judicata* including the principle of constructive *res judicata*, the question that has been raised in the writ petition cannot any more be gone into. This Court can neither clarify nor modify nor alter the letters and spirit of the decision of the Apex Court. The reference that was made has travelled to the High Court which had modified the same and when it reached the Apex Court, the High Court's order was accepted by reasoned judgment and thus the order of the Tribunal that had merged in that of the High Court of Andhra Pradesh, has since merged in the decision of the Apex Court by reason of the doctrine of merger. It is the last Court's order that is effective. As such, High Court can neither interfere nor alter nor modify the order. The only remedy available to the petitioners is to approach the Apex Court either for clarification or modification of the order, whatever it is, which they may be advised. He further contends that in the present case the reference that was made related to the entitlement of the commission agents to the pay scales, allowance and other service condition as available to regular clerical staff of the Bank. The residuary clause of reference was that if they were not entitled to the pay scales, allowance and other service condition as available to regular clerical staff, to what other relief they were entitled to and from which date. The reference is clear and unambiguous. It covers the whole issue. The reference is made on the basis of the dispute between the parties. According to him, the dispute related to the dispute raised not only by the workmen but also by the employer inasmuch as the employer was going to abolish the scheme. Thus there were two conflicting versions; one that the workmen are entitled to the alleged benefit as they demanded and on the other hand the employer contended that they do not want to continue the same and abolish the same. It is a dispute between the two parties which is referred. It cannot be an one sided affair. This was sought to be decided by the Tribunal and it was so decided by the Tribunal by making distinction by putting cut off age as on the date of reference, namely, below 45 and above 45, making the two categories. The Andhra Pradesh High Court did not accept the decision of the Tribunal and observed that there cannot be but one category. The High Court has also observed that the commission agents cannot be equated with regular staff and therefore they can neither be absorbed nor can be given the same scale as that of the regular staff since there was distinction of the works discharged by the commission agents and the regular staff. Therefore it was only the second part of the decision given by the Tribunal which was accepted for one and all and this had merged in the Apex Court's order. Therefore, there is no scope for reopening the said case once again before this Court and this Court, in view of the principle as enunciated, cannot go into the question since it has no jurisdiction with regard thereto. On the other hand, by reason of Article 144, it is the duty of all High Courts to come in aid for

implementation of the decision of the Apex Court. As such this writ petition should be dismissed. He further contended that there being nothing prima facie case, this Court should not entertain the writ petition which should be thrown out in limine.

5. In reply Mr. De had sought to make distinction and elaborately pushed through all the points. The matter was heard at length on merit as to the question whether this Court can entertain the writ petition in view of the facts and circumstances of the case.

6. I have heard the learned counsel for the respective parties at length.

7. The question that has been raised is not dependent of facts. The question that emerges for decision is purely a question of law. Whether this Court should entertain this writ petition on the basis of the facts as disclosed on the basis of the pleadings made before this Court without disputing anything else. Therefore it is not necessary to call for any affidavits and the matter may be decided on the basis of the materials already on record.

8. It has been pointed out from the decision of the Tribunal as well as that of the High Court and the Apex Court that the Bank had taken the stand that they were attempting to abolish the scheme on the ground that it was unremunerative. Thus there is no dispute from the end of the Bank that they are not eager to continue the scheme and were about to abolish the same. On the other hand, the workmen had claimed that they are entitled to the pay scales, allowance and other service condition as that of regular clerical staff. Industrial dispute as defined in the Industrial Dispute Act includes a dispute between the workmen and the employer. In a dispute there is always two versions; one might be claiming and the other might defend the same without claiming anything. At the same time there might be a kind of case where one is claiming one thing and the other is claiming the other thing and both are conflicting each other. Inasmuch as when one is claiming certain relief and the other is defending the same by counterclaim, there the dispute cannot be one sided affair. It has two sides. When the Court is called upon on reference to decide the dispute, it has to decide the dispute raised by each other. Thus the ultimate result binds the parties when the dispute is resolved by a decision of the appropriate forum.

9. It appears from the decision of the Tribunal as well as that of the High Court and the Apex Court that these two disputes were being decided which were referred to. The expression used in the reference are also clear and unambiguous. The workmen had demanded that they are entitled to pay scales, allowance and other service condition as available to regular clerical employees. Now whether this demand was justified was the question that was referred to. The incidental clause that was incorporated was that if their claim or demand was not justified, then what relief they were entitled to and from which date. The other clause was inserted in view of the fact that the Bank was eager to discontinue the claim. Therefore, this was a question which was a completed

answer of the dispute raised by the workmen which is confronted by the Bank in the form of a dispute raised by it with regard to discontinuation of the scheme. Thus when the dispute is resolved and it is decided that the relief as specified in the award is the entitlement of the workmen, then it cannot be said that the commission part would not be an incidental or collateral matter involved in the dispute. In fact it was entitlement which includes remuneration of commission received by the commission agents. It is the terms of the commission agent which was a question that was the subject matter of the reference. Admittedly the commission agents were receiving the commission at a particular rate. They might be receiving some other amount as travelling allowance or conveyance allowance as the case may be. But it is their entitlement which was the subject matter on the basis whereof they were claiming pay scales as that of regular clerical employees. Thus it cannot be said that the question of commission was only incidental or collateral; on the other hand it was directly and substantially in issue viz. whether they are entitled to pay scales or they are entitled to continue in the same commission or otherwise. But if the second clause was not there and in that event if it was held that their demand was not justified and they were not entitled to the scales, then the matter could have acquired a different complexion. But as soon as the second clause was answered, to what relief they were entitled to, it clinches the issue. If they were not entitled to the pay scales and allowance, in that event they are entitled to the relief as specified in the award. Therefore, this question cannot be said to be outside the scope and ambit of the issues involved since it was substantially and directly the common issue in the reference itself.

10. When the award of the Tribunal was challenged in the Andhra Pradesh High Court and the Andhra Pradesh High Court had dealt with and came to a particular decision that they were not entitled to be absorbed as regular employees and there should be only one category. Thus the first part of the relief granted in the award was set aside and that of the second part was upheld with the observation that all of them will be treated in one category without there being any distinction in out off age of 45, below or above, then it was a specific answer to the question as referred to. Thus by reason of the principle of doctrine of merger, the award has merged with that of the Andhra Pradesh High Court's order. However, the matter travelled to the Apex Court and the Apex Court had decided the matter after giving reasoned judgment. So the principle of doctrine of merger is applicable. We may refer to the relevant portion of the award and the decision of the Andhra Pradesh High Court and the Apex Court in order to appreciate the situation. In the award the relief that was given, runs as follows :

"69. In the result, I answer the reference in ID No. of 14 of 1980 as follows :

1. All these deposit collectors and agents who are below the age of 45 years on 3.10.1980 (the date of the first reference of this industrial dispute) shall be considered for regular absorption for the post of Clerks and Cashiers if they are matriculates and above including qualified Graduates and Post Graduates. They

may be taken to Banks service as regular employees, if they pass the qualifying examinations conducted by the Banks. Those who are absorbed shall be treated on par with regular clerical employees of the Bank. Those who are qualified with 8th class and below Matriculations shall be considered for absorption as Sub-staff by conducting qualifying examinations.

2. As regards the deposit collectors and agents who are above 45 years of age on the date 3.10.1980 and also those who are unwilling to be absorbed in regular Banks service they shall be paid the full back wage of Rs. 750.00 per month linked with minimum deposit of Rs. 7,500.00 per month and they should be paid incentive remuneration at 2% for collection of over and above Rs. 7,500.00 per month and they should also pay uniform conveyance allowance of Rs. 50.00 per month for deposits of fees than Rs. 10,000.00 and Rs. 100.00 per month for deposits of more than Rs. 10,000.00 upto or above Rs. 30,000.00 per month. They should be paid gratuity of 15 days commission for each year of service rendered."

11. This was modified by the Andhra Pradesh High Court with the observation as recorded in the decision of the High Court which we may find in the following expression.

"On conspectus of the consideration, we hence reach the conclusion that the deposit collectors are workmen of the respective Banks though they are not, and also cannot claim to be regular employees. In view of the conclusion it necessarily follows that the scheme evolved by the Tribunal in paragraph 69 of the award for absorption of the deposit collectors below the age of 45 years as on 3.10.1980 has to go. But the award also directed the deposit collectors above the age of 45 years and those who are unwilling to be absorbed as regular employees to be paid full back wages of Rs. 750/- per month linked with minimum deposit of Rs. 7,500/- per month plus the incentive remuneration at 2% for collection of over and above Rs. 7,500/-. Besides, such non-absorbed deposit collectors were also made entitled to conveyance allowance for Rs. 50/- per month for deposits of less than Rs. 10,000/- and Rs. 100/- per month for deposits of more than Rs. 10,000/- upto or above Rs. 30,000/- per month. Besides, they were also entitled to gratuity of 15 days commission for each year of service rendered.

Now that we find that all deposit collectors are only workmen and none can be absorbed as regular employees all of them have to be treated as only one category. We would hence uphold and apply the decision of the Tribunal of payment of full back wages and incentive commission as well as conveyance allowance and gratuity to the deposit collectors as workmen. The award stands modified accordingly.

In the result the writ petition is partly allowed. No Costs."

12. When it came to the Apex Court, the Apex Court has also accepted the judgment of the Andhra Pradesh High Court while making the following

observation.

"We also see no force in the contention that Section 10 of the Banking Regulation Act prevents employment of persons on commission basis. The proviso to Section 10 makes it clear that commission can be paid to persons who are not in regular employment. Undoubtedly the deposit collectors are not regular employees of the Bank. But they nevertheless are the workers within the meaning of the term as defined in the Industrial Disputes Act. There is clearly a relationship of master and servant between the deposit collectors and the concerned Bank.

Mr. Nagswar Rao is right in his submission that the concession was not binding on his clients. However, what has been conceded has been correctly conceded. No question arose of directing absorption of the deposit collectors as regular workmen. No such demand has been made and, therefore, there could have been no such direction. Such directions were beyond the reference. Even otherwise, the question of absorption would be fully covered by an authority of this Court in the case of *Union of India and Ors. v. K.B. Baby and Anr.* reported in (1999) LLJ 1290. In this case it has been held that persons who are engaged on the basis of individual contracts to work on commission basis cannot be equated with regular employees doing similar work. It has been held that the mode of selection and qualification are not comparable with those of the employees, even though the employees may be doing similar works. In the present case, not only are the modes of selection and qualification not comparable, but even the work is not comparable. The work which the deposit collectors do is completely different from the work which the regular employees do. There was thus no question of absorption and there was also no question of the deposit collectors being paid the same pay scales, allowances and other service conditions or the regular employees of the Banks.

We also see no substance in the contention that these schemes are unremunerative. The Banks have introduced these schemes because they want to encourage the common man to make small and regular deposits. As a result of such schemes, the number of depositors have become much larger. We have no doubt that such schemes are continued because the Banks find them remunerative. The Banks have large collectors through such schemes.

For the reasons set out hereinabove, we see no substance in any of these appeals. All the appeals accordingly stand dismissed."

13. Thus it appears that having regard to the question of *res judicata* as discussed above, there was a complete merger of the award of the Tribunal with that of the Andhra Pradesh High Court and the decision of the High Court with that of the Apex Court. The reference to the citation in the case of *Indian Banks Association (supra)* with regard to the distinction sought to be made, as discussed above, is no more available and as such the principle and the ratio laid down in the said decision cannot be attracted in the facts and circumstances of

the present case. Similarly the decision in the case of Kunhayammed and Others (supra) in respect of doctrine of merger has no manner of application in the present case as has been sought to be made by Mr. De. The ratio laid down therein are accepted principle of law. But every law is to be applied in the facts and circumstances of each case. Having regard to the facts and circumstances of the case, as discussed above, the said principle, if it is applied, in that event this is a case of complete merger and there is no escape from such conclusion.

14. The decision in the case of Sajjedanashin Sayed (supra) is a proposition which is the accepted principle and there cannot be any two opinion about it. As discussed above, the said principle cannot be attracted in the present case since there the principle of res judicata applies in full force as I have discussed hereinbefore.

15. These three decisions do not support the contention of Mr. De. Furthermore Mr. Rao had pointed out from paragraph 17 of the writ petition to show that the decision of the Apex Court has already been given effect to.

16. In the result, I am not inclined to interfere with the matter. This writ petition is, therefore, dismissed.

17. However, this order will not prevent the petitioners from taking appropriate proceedings before the Apex Court seeking appropriate relief either by way of review or clarification or otherwise inasmuch as they are claiming that they were getting higher emoluments and that the effect of the decision of the Apex Court has resulted in the alteration or change in the service condition and reduction of emoluments as pointed out in paragraph 22 of this writ petition.

There will be no order as to costs.

Xerox copy of this order duly countersigned by the Assistant Registrar (Court) be given to the learned counsel for the parties on the usual undertaking.