

(2014) 02 BOM CK 0161

In the Bombay High Court

Case No : Writ Petition No. 5086 of 2011

The Pachora Peoples" Co-op. Bank Ltd.

APPELLANT

Vs

The Employees Provident Fund Organization (Ministry of
Labour, Government of India)

RESPONDENT

Date of Decision : 07-02-2014

Acts Referred:

Banking Regulation Act, 1949 — Section 10
Constitution of India, 1950 — Article 226 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(b)
2(f) 7A
Industrial Disputes Act, 1947 — Section 2(rr)

Citation : (2014) 3 ABR 249 : (2014) 3 ALLMR 658 : (2014) 143 FLR 121 :
(2014) 4 MhLj 436

Hon'ble Judges : S.C. Dharmadhikari, J;Ravindra V. Ghuge, J

Bench : Division Bench

Advocate : A.A. Shelke holding for Mr. P.D. Suryawanshi, for the Appellant;

Final Decision : Dismissed

Judgement

Ravindra V. Ghuge, J.—Heard the learned Advocates for the respective parties. Rule. Rule made returnable forthwith and heard finally by consent of the parties. By this petition filed under Articles 226 and 227 of the Constitution of India, 1950, the petitioner Pachora Peoples Co-op. Bank Ltd., impugns the order dated 28.9.2010 passed by the Assistant Provident Fund Commissioner (Compliance), S.R.O. Nashik (A.P.F.C.) and the order dated 20.5.2011 passed by the Employees Provident Fund Appellate Tribunal, New Delhi (Respondent herein) in A.T.A. No. 727 (9) of 2010.

2. The submissions of Shri A.A. Shelke h/f P.D. Suryawanshi, learned Advocate for the petitioner are summarized as follows:

a. The petitioner is a Co. Operative Bank registered under the provisions of The Co-operative Societies Act, 1960 and the rules framed there under.

b. The petitioner is covered by the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

c. The business of the petitioner Bank increased every passing day and became a renowned Bank in the Jalgaon District.

d. The Enforcement Officer working under the A.P.F.C. submitted his report dated 5.3.2010 and the A.P.F.C. initiated an inquiry u/s 7A with regard to non payment/deposition of Provident Fund subscription in connection with the Pigmy Deposit Collectors.

e. The petitioner challenged the 7A enquiry by filing W.P. No. 8568/2009 before the Bombay High Court, which came to be dismissed as withdrawn on 16.12.2009.

f. The petitioner had contended before the A.P.F.C. that the Pigmy Deposit Collectors were not covered by the definition of "employee" u/s. 2(f) of the E.P.F. Act and that they were not earning wages as basic wages from the petitioner u/s 2(b) of the said Act.

g. It was also contended that they are commission agents and not the employees of the petitioner.

h. The A.P.F.C., after concluding the enquiry in accordance with the procedure laid down in Law u/s 7A, delivered the impugned order dated 28.9.2010 concluding/assessing the outstanding provident fund dues in respect of the Pigmy Deposit Collectors at an amount of Rs. 8,37,745/-.

i. Being aggrieved by the impugned order dated 28.9.2010, the petitioner preferred an appeal A.T.A. 727(9) of 2010 before the respondent at New Delhi.

j. Under orders of the respondent dated 9.12.2010, the petitioner deposited 40% of the assessed amount.

k. All the points/grounds raised and agitated before the A.P.F.C. were canvassed before the respondent Tribunal.

l. By the impugned order dated 20.5.2011, respondent Tribunal upheld the findings of the A.P.F.C. and rejected the appeal of the petitioner.

m. The grounds for challenge and points urged before both the Authorities are set out by the petitioner in this petition.

n. The petitioner, therefore, prays that the petition be allowed.

3. Shri K.B. Chaudhary, learned Advocate for the respondent submitted that the only point raised by the petitioner is that the Pigmy Deposit Collectors are alleged to be agents and not workmen. This issue is no longer res-integra and the Hon''ble Supreme Court of India has settled the said issue in the case of Indian Banks Association Vs. Workmen of Syndicate Bank and Others etc. etc., . He, therefore, submitted that the A.P.F.C. and the respondent/Tribunal has rightly

followed the said ratio, which has binding effect and continues to hold the field.

4. We have, with the assistance of the learned Advocates, gone through the petition paper book and have also perused the judgment of the Hon''ble Apex Court in the Indian Bank Association's Case (supra).

5. We are bound by the view taken by the Hon''ble Supreme Court of India in the Indian Bank's Association case (supra). Paragraph 8, 9, 12, 15, 18 to 20, 27 and 28 can be aptly reproduced for ready reference here in below:

8. On behalf of the Appellants it has been submitted that the Deposit Collectors could not be treated as workmen since their engagement were purely a matter of contract between the parties. It was submitted that the Agreements were, in all cases, for a specific period. It was submitted that the Deposit Collectors did their work without any control or supervision of the Banks. It was submitted that the Deposit Collectors could also do other works and take on other employment. It was submitted that the Deposit Collectors had no fixed time or period to devote to their work as Deposit Collectors or for their attendance in the Bank. It was submitted that these Deposit Collectors could come to the Bank at any time and make the deposits. It was further submitted that there was no qualification or age limit for a person to be engaged as a Deposit Collector and that, in fact, many of the Deposit Collectors were well advanced in age. It was submitted that no disciplinary action could be taken against the Deposit Collectors. It was submitted that all the above mentioned facts showed that there was no relationship of master and servant and that, therefore, these Deposit Collectors were not workmen.

9. Reliance has also been placed on Section 10 of the Banking Regulation Act. The relevant portion of Section 10 reads as follows:

10. Prohibition of employment of managing agents and restrictions on certain forms of employment.-(1) No banking company-

(a) shall employ or be managed by managing agent; or

(b) shall employ or continue the employment of any person-

(i) who is, or at any time has been, adjudicated insolvent, or has suspended payment or has compounded with his creditors, or who is, or has been, convicted by a Criminal Court of an offence involving moral turpitude; or

(ii) whose remuneration or part of whose remuneration takes the form of commission or of a share in the profits of the company,

Provided that nothing contained in this sub-clause shall apply to the payment by a banking company of-

(a) any bonus, in pursuance of a settlement or award arrived at or made under any law relating to industrial disputes or in accordance with any scheme framed by such banking company or in accordance with the usual practice prevailing in

banking business;

(b) any commission to any broker (including guarantee broker), cashier-contractor, clearing and forwarding agent, auctioneer or any other person, employed by the banking company under a contract otherwise than as a regular member of the staff of the company; or.....

12. Mr. P.P. Rao further submitted that the Banking Regulation Act is an Act of 1949. He took the Court through the definition of the term "workman" in the Industrial Disputes Act as well as various other Acts like Beedi and Cigar Workers (Conditions of Employment) Act, Coal Mines Provident Fund and Misc. Provisions Act, Contract Labour (Regulation and Abolition) Act etc. He submitted that under each Act the definition was framed as per the purpose of the Act. He pointed out that depending on the purpose of the Act, either a wide or narrow definition had been given to the term "worker". He pointed out that the proviso to Section 10 of the Banking Regulation Act has been operative since 1949. He submitted that in the Industrial Disputes Act the definition of the term "worker" in Section 2(s) was amended in 1984. He submitted that even in 1984 the Legislature did not think it fit to include in this definition a person who was receiving commission. He submitted that this clearly indicates that persons receiving commission were not meant to be and were not workmen within the meaning of the term as laid down in the Industrial Disputes Act.

15. On the other hand Mr. Sharma, on behalf of the Respondents, submitted that the Deposit Collectors had to regularly visit the small depositors, i.e. small traders, house-wives, students etc. He submitted that they would have to go to these depositors at times which were convenient to those persons or at times when they would be in a position to give the deposit. He submitted that the Deposit Collectors may also have to make more than one visit to small depositors. He submitted that the Deposit Collectors would have to collect deposits from all these persons and then take the collections to the banks and make the deposits after making the relevant entries and filing up the relevant forms. He submitted that the work of Deposit Collectors was manual inasmuch as they had to make the collections by going from place to place and from depositor to depositor and that it was also clerical inasmuch as they had to fill up various forms, accounts, registers and pass books every day. He submitted that over and above this work many of the Deposit Collectors were also made to do other sundry works of a clerical nature in the banks. He submitted that amount received by the Deposit Collectors by way of commission was wage linked to productivity. He submitted that it was incorrect to state that the banks had no control over the Deposit Collectors. He submitted that the banks exercised control over the Deposit Collectors and laid down various stipulations which were to be followed by these Deposit Collectors. He submitted that merely because the nature of the control was different did not mean that there was no control.

18. Mr. Sharma relied upon the case of Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, . In this case the

question was whether certain tailors working with the Appellant Company were employees of the Appellant and were covered by the Andhra Pradesh Shops and Establishments Act and Payment of Wages Act. The questions which arose for consideration were whether the Appellants had control over these tailors and whether the fact that these tailors could work for more than one employee meant that there was no relationship of master and servant. This Court held that during the last two decades the emphasis in deciding the question of relationship of employer and employee had changed. It held that while control was an important factor it was wrong to say that in every case it would be a decisive factor. It held that the degree of control and supervision would be different in different types of business and that what was essential was an element of authority over the workers in the performance of the work, so that the employee was subject to the directions of the employer. It also held that working with more than one employer did not militate against being the employee of the proprietor of the shop where he attended the work. It held that a servant need not be in the exclusive control of one master. It held that the fact that the workers were not obliged to work whole day was also not very material. It held that all that was necessary was that the workman was principally employed by that employer.

19. Mr. Sharma also relied upon the case of Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, In this case the Appellants were lessees holding a license for the manufacture of salt on certain lands. The salt was manufactured by labourers known as Agarias from rain water that got mixed with saline matter in the soil. The work was seasonal in nature and commenced in October after the rains and continued till June. Thereafter the Agarias left for their own villages and did their own cultivation work. During the season the lands were divided into plots and plots were allotted to the Agarias. Generally the same plot was allotted to the same Agaria every year. After manufacturing of salt the Agarias were paid at the rate of 5 as. 6 pies per maund. At the end of each season the accounts were settled and the Agarias were paid the balance due to them. During the season the Agarias worked with the members of their families and were free to engage extra labour on their own, if they so desired. No hours of work were prescribed, no master roll maintained, nor were working hours controlled by the Appellants. There were no rules as regards leave or holidays and the Agarias were free to go out of the factory after making arrangements for manufacturing of salt. The question for consideration before this Court was whether the Agarias were workmen within the meaning of the Industrial Disputes Act. This Court held that the prima facie test of master of servant between employer and employee was the existence of the right in the employer not merely to direct what work was to be done but also to control the manner in which it was to be done, the nature or extent of such control varying in different industries and being by its nature incapable of being precisely defined. This Court held that the correct approach, therefore, was to consider whether, having regard to the nature of the work, there was due control and supervision of the employer. This Court further held that the question whether the relationship between the parties was one as

between an employer and employee was a question of fact and where the Industrial Tribunal came to a finding, such finding of fact was not open to question in a proceeding under Article 226 of the Constitution, unless it could be shown to wholly unwarranted by the evidence.

20. Mr. Sharma submitted that in this case the Tribunal has on consideration of evidence and material before it arrived at a positive finding that there was control by the banks and that there was a relationship of master and servant. He submitted that such finding of fact was based upon the evidence on record and nothing had been shown that such finding was unwarranted or unsustainable on the basis of evidence on record. He submitted that the High Court was thus right in not interfering with such findings of fact.

27. We also see no force in the contention that Section 10 of the Banking Regulations 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 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.

28. Mr. Nageshwar 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 had 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 (UOI) and Others Vs. K.V. Baby and Another, . 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 qualifications 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 qualifications 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 of the regular employees of the banks.

6. We quite appreciate that the Pigmy Deposit Collectors, not only have to make regular visits to small depositors like traders, housewives, students, self-employed persons etc., but these visits are prompted owing to the requirement of collecting their deposits. This obviously is in tune with and traceable to the business of the petitioner bank. This is a manual nature of work and the collections have to be made by going from places to places and visiting persons

to persons. Various forms have to be filled in, accounts, registers and passbooks are required to be maintained and updated on day to day basis and the said amounts received have to be deposited with the petitioner bank. The commission to be paid to the said collectors is linked with the quantum of the collection. This is ultimately traceable to the business of the bank and is connected with the generation of funds for the bank.

7. The definition of "wages" u/s. 2(rr) of The Industrial Disputes Act, 1947, in our opinion and on the basis of the view taken by the Hon"ble Supreme Court, squarely covers such Pigmy Deposit Collectors. Needless to state, these collectors are answerable and accountable to the petitioner bank. In the event, the Bank is not satisfied with the performance of any such collector, it entitles the Bank to delete such collector from its list and allot no work to him.

8. As such, in our opinion, though the degree of supervision, control and direction may differ from what is commonly emanating from the public and private industrial sector, we intend to give a wider meaning to the principle of "Employer-Employee" in connection with such Pigmy Deposit collectors.

9. In such a situation, it is immaterial as regards the work hours/duty hours allotted to such collectors. In fact, their nature of duties and job profile is more arduous as has been held in the Indian Bank Association's Case (supra), it would be impossible to fix working hours for such collectors as their nature of work leaves them at liberty to regulate their own hours of work. By no stretch of imagination, can they therefore be held to be not covered by the principle of "Employer-Employee".

10. In the light of the above, we are of the considered view that the said issue of Pigmy Deposit Collectors is no longer res-integra. As such, we are not required to adopt a different view at the instance of the petitioner. Since the Law on this point is now well settled, the petition fails and deserves to be dismissed. In the result, this writ petition stands dismissed. Rule is, therefore, discharged with no order as to costs.