IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.140 OF 2010

M/s. Swift Couriers,
Represented by its partner,
Shri Tejinder Singh,
Chamunda Apts., Ground Floor,
Near State Bank of India,
Vasco-da-Gama, Goa. ....Petitioner

V/s

The Assistant Provident Fund
Commissioner, having office
at Bhavishya Nidhi Bhavan,
24, Patto Plaza,
Panaji-Goa 403 001. ... Respondent

Shri Vijay Palekar, Advocate for the Petitioner.
Shri P.P. Singh, Advocate for the Respondent.

CORAM : C.V. BHADANG, J.

Reserved on : 13th JUNE, 2016
Pronounced on : 1st AUGUST, 2016

JUDGMENT :

The challenge in this petition, is to the order dated 12/02/2009 of the Employees Provident Fund Appellate Tribunal, New Delhi (Appellate Tribunal, for short) by which the appeal filed by the petitioner has been dismissed and the order dated 20/05/2004 passed by the Assistant Provident Fund Commissioner, Goa (Commissioner) under Section 7A of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952, (Act, for short) has been confirmed.

2. The brief facts necessary for the disposal of the petition may be stated thus:

That the petitioner is a partnership firm engaged in the business of courier services. The Provident Fund Enforcement Officer (Enforcement Officer), had visited the establishment of the petitioner on 25/07/2002 to examine the issue of the coverage of the said establishment, under the Act. He verified certain records, including a petty cash book and found that the strength of the employees in the establishment is twenty, from 1/12/2001 and establishment is coverable. The petitioner claimed that the strength of the employees never exceeded nineteen. The petitioner was asked to produce the relevant records before the

Commissioner who after considering the material, by his order dated 2/06/2004 directed that the petitioner-establishment should comply with the provisions of the Act and the Scheme framed thereunder with effect from 1/03/2002 and, accordingly, upheld the coverage notice dated 5/03/2003.

3. The petitioner challenged the aforesaid order before the appellate Tribunal, which by the impugned judgment, has confirmed the order of the Commissioner, which brings the petitioner to this Court.

4. I have heard Shri Palekar, the learned Counsel for the petitioner and Shri Singh, the learned Counsel appearing for the respondent. With the assistance of the learned Counsel for the parties, I have perused record and the impugned orders passed.

5. It is submitted on behalf of the

petitioner that the two pilots and two commission agents, were self employed persons and could not have been reckoned as regular employees of the petitioner-establishment. It is submitted that the engagement of these persons was purely on temporary basis and for a casual nature of work and they cannot be termed as 'employees' within the meaning of Section 2(f) of the Act. It is submitted that the authorities below failed to consider the declarations given by the pilots namely Shri Abbas Khan and Shri Dattaprasad Bandodkar and the agreements executed with James Godai and Mr. U.K. Singh. It is submitted that the authorities below failed to appreciate the nature of the work, assigned to the two pilots and the two commission agents and they cannot be said to be 'employees' within the meaning of the Act. The learned Counsel submitted that the petitioner ought to have been afforded an opportunity to cross-examine the Enforcement Officer, on his report. Reliance is placed on the decision of this Court in the case of ***Varhadi That V/s. Assistant Provident Fund Commissioner, 2008 II LLJ 34 (Bom).*** In the absence of the same the order of the Commissioner would be vitiated. Reliance is placed on the decision of the Supreme Court in the case of ***The Managing Director, Hassan Co-operative Milk Producer's Society Union Ltd. V/s. The Assistant Regional Director Employees State Insurance Corporation, (2010) 11 SCC 537, M/s. Satish Plastics V/s. Regional Provident Fund Commissioner, 1981 GLR 686*** and the decision of the Calcutta High Court in the case of ***M/s. Vodafone Essar East Ltd. V/s. Regional Provident Fund Commissioner & Ors., 2012 (134) FLR 317.***

6. On the contrary, Shri Singh, the learned Counsel for the respondent, has supported the impugned order. It is submitted that there is enough material on record to come to the conclusion, that the four persons, styled as pilots/commission agents would fall within the

ambit of the definition of the 'employee' under Section 2(f) of the Act. It is submitted that the authorities below have rightly considered the material and the orders do not suffer from any infirmity. The learned Counsel places reliance on the decision of the Supreme Court in the case of ***Silver Jubilee Tailoring House & Ors. V/s. Chief Inspector of Shops & Establishments & Anr., (1974) 3 SCC 498***. The learned Counsel submits that the nature of the work done by the so called pilots and the commission agents, is integrally connected with the business of the petitioner, as a courier agency, for which remuneration was paid to these persons and, therefore, they cannot be excluded as being persons who can be said to be self employed.

7. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. At the outset, it may be mentioned that

admittedly, there were sixteen regular employees (incorrectly mentioned as fourteen in the order of the Appellate Tribunal) at the relevant time working with the petitioner. According to the respondent, Mr. Abbas Khan and Mr. Dattaprasad Bandodkar, who were engaged as pilots and Shri James Godai and Shri U.K. Singh, who were said to be working as commission agents would come within the ambit of the definition of the 'employees' under Section 2(f) of the Act. There was yet another person Mr. Sarvesh Surlekar who was said to be employed as a computer mechanic. However, in respect of Sarvesh, the Tribunal has found that there were no details provided and the Appellate Tribunal has directed a fresh inquiry in respect of the status of Mr. Sarvesh Surlekar. Thus, the dispute in the present petition is confined to the four persons namely Mr. Abbas Khan and Dattaprasad Bandodkar employed as pilots and Ms. James Godai and U.K. Singh engaged as commission agents. If these four persons are reckoned as employees, the strength of the employees works out to twenty, in which case, the petitioner would be covered, under the Act.

8. On behalf of the petitioner, reliance is placed on the declaration signed by the two pilots and the agreement with the two commission agents, to state that they are not employees. Before considering the same, it is necessary to deal with the contention on behalf of the petitioner that an opportunity to examine the Enforcement Officer ought to have been granted. In this regard, I find that the petitioner had not sought for the cross-examination of the Enforcement Officer in the proceedings before the Assistant Commissioner nor any such ground was raised either before the Appellate Tribunal or in this petition. In other words this ground is for the first time raised during the course of the argument at bar. In my considered view, the contention cannot be entertained as the same was not raised before the authorities below nor

in the petition. That apart, the decision in the case of ***Varhadi That*** (supra) would be distinguishable. In that case, the authorities under the Act had sought to link two units of the petitioner-establishment, as being one and the same, which was seriously disputed by the petitioner. The Enforcement Officer, had reported, that both these units, are part of the same establishment. It was in these circumstances found that the stand of the Enforcement Officer and his report was liable to be tested in cross-examination.

In the present case, the petitioner, was asked to produce the relevant documents which he has produced and no such claim for cross-examination of the Enforcement Officer was ever raised. In that view of the matter, the contention cannot be accepted.

9. This takes us to the two declarations and the two agreements. The declaration signed by Dattaprasad and Sarvesh Surlekar are

identical and read as under:

> **"DECLARATION**
>
> I, the undersigned Shri Dattaprasad Bandodkar, major of age, hereby declare that I am by profession a pilot of two wheeler and not a Employee of M/s. Swift Couriers and that I come to M/s. Swift Couriers, Vasco to collect my rental charges of the vehicle as and when my Vehicle is rented to the parties and further I am not connected with any job of the swift couriers directly or indirectly in any manner.
>
> I have made this declaration willfully at the request of my customer M/s. Swift Courier, Vasco-da-Gama, Goa."

10. Although the appellate Tribunal has observed that the work assigned to these pilots is "neither discussed in the grounds of the appeal nor is deposed anywhere", the nature of the work assigned to these pilots is mentioned in ground (iii) of the appeal memo before the appellate Tribunal. According to the petitioner, the services of the pilots were engaged by way of carrying persons to and from, various destinations and such services extended to carrying goods and materials. It can thus be

seen that the pilots were engaged in connection with the work of the courier agency and can be said to be integrally connected with the said work, notwithstanding their designation as 'pilots'. It is difficult to accept that the regular employees of the petitioner, would only be carried by the said pilots. The petitioner cannot justifiably ask the authorities to place implicit reliance on the declaration, as in an appropriate case the authorities can always examine the real nature of the employment/engagement, to find out whether these persons can be said to be 'employees' within the meaning of the Act, their designation/ nomenclature notwithstanding. Thus, the authorities can always find out whether such nomenclature is adopted in order to avoid statutory obligations. The appellate Tribunal has found that a person who merely rents his vehicle on rent can "by no stretch of imagination ask for travelling expenses". This has prompted the appellate Tribunal to hold that the pilots were working for the petitioner and would be 'employees' within the meaning of the Act.

11. Now coming to the two persons engaged as commission agents i.e. Mr. James Godai and U.K. Singh. Here again the agreements are identical and read thus:

> "It has been agreed between the parties James Godai - Residence of House No.121, Near Ice Factory, Baina-Vasco da Gama and Swift Couriers under the following terms and conditions:
> 1. That all couriers related works would be carried out and that Swift Couriers will provide such services to the other party as and when required to conduct courier and related works.
> 2. That Swift Couriers is at liberty to carry on business activity with any other agency or firm or individual as and when required and the same is not binding with Swift Couriers or with the other party.
> 3. That the terms of commission will be charged at 12% of the business amount/billing amount from he customer/end client.
> 4. That the commission amount will be payable within 07 days on completion of the work.
> 5. That all works assigned and documents given will be delivered and

> completed within 24 hours of being handed over.
> 6. That Swift couriers will be liable to pay all incidentals and other transport charges incurred during the course of delivery.
> 7. That Agreement could be terminated by serving a notice of 30 days by either party and that Swift courier could engage the services of any other agency or individual as and when they so required and the same is not binding with the other party."

From bare perusal of the agreement one thing is clear that these two persons were doing work which can be said to be integrally connected with the business of the courier agency and it cannot be said to be incidental, or casual in nature. Clause 3 & 6 would show that apart from the commission, which was to be charged at 12% of the business amount/billing amount from the customer/end client, the petitioner was also liable to pay transfer and other charges incurred during the course of the delivery. The appellate Tribunal has considered this aspect to hold that there was a certain amount of control as the articles were to be delivered to different destinations as per the directions of the petitioner and there was obligation to complete this work within 24 hours.

12. Let us now briefly consider the concept of 'employee' under the Act and the relevant case laws. Section 2(f) of the Act defines an 'employee' as under:

> (f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of [an establishment], and who gets his wages directly or indirectly from the employer, [and includes any person
>
> (i) employed by or through a contractor in or in connection with the work of the establishment;
>
> (ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment];

13. In the case of ***M/s. Satish Plastics*** (supra) the Division Bench of the Gujarat High

Court has held that in order to answer the question whether a person falls within the description of an 'employee' within the meaning of the Act, the following questions are to be asked and answered:

> (1) Was he doing the work for monetary payment ?
>
> (2) Was the work done by him the work of the establishment or had a nexus with such work ?
>
> (3) Was the payment made wages, in the sense of being remuneration for the physical or mental effort, in connection with such work ?
>
> (4) Was the work such that it had to be done as directed by the establishment or under its supervision and control to the extent that supervision and control are possible having regard to the specialized nature of the work or the skill needed for its performance ?
>
> (5) Was the work of such a nature and character that ordinarily a master-servant relationship could exist and but for the agreement styling it as a contract common practice and common-sense would suggest a master-servant bond ?

(6) Was the relation indicative of master-servant status in substance having regard to the economic realities irrespective of the nomenclature devised by the parties ?

(7) Was he required to do the work personally without the liberty to get it done through someone else ?

It has been held that if the answers to the aforesaid questions are in the affirmative, master and servant relationship can be spelt out with 'safety and certainty'. The relationship cannot derogate from that of a master and servant if the person is allowed to work:

(i) at his own place and/or
(ii) at the hours of his own choice, and or
(iii) for someone else

It has been held that in private employment there is no legal bar, to work for someone else.

14. If we consider the nature of the work of the two pilots and the two commission agents in the context of the questions as posed, it

appears that they were working for monetary payment and were doing work of the establishment and/or had clear nexus with such work, with a certain amount of supervision and control. Thus, in my considered view, the authorities below were justified in holding that these four persons would be 'employees', under Section 2(f) of the Act.

15. In the case of ***The Managing Director, Hassan Co-operative Milk Producer's Society Union Ltd.*** (supra), the appellant was a federal society engaged in the business of purchasing and pasteurization of milk. The milk procured by the federation society used to be transported in lorries/vans and for that purpose the contract was awarded on the basis of rate per kilometer to the lowest bidder. The contractors used to collect milk, from various societies and transfer it to the appellant's dairy and used to re-transport and return the empty cans. The question was whether the workers employed by the

contractors could be 'employees' under the Employees' State Insurance Act, 1948. It was held that the workers were neither directly or indirectly employees of the appellant-society and the appellant had no control over such workers nor there was any element of supervision on their work. It was also found that wages and salary of such persons was also not paid by the appellant.

16. In the case of ***M/s. Vodafone Essar East Ltd.*** (supra) there was a Direct Sales Agent Agreement and it was held that the Agency cannot be equated to an 'employee' under the Act. In my considered view, the cases relied upon are clearly distinguishable.

17. In such circumstances, I do not find that any case for interference is made out in the exercise of the supervisory jurisdiction under Article 227 of the Constitution of India. The petition is without any merit and it is

accordingly dismissed with no order as to costs.

C.V. BHADANG, J.

NH