

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION NO.186 OF 2016
IN
WRIT PETITION NO.5086 OF 2011
WITH
CIVIL APPLICATION NO.4814 OF 2015
IN
REVIEW APPLICATION NO.186 OF 2016

The Pachora Peoples' Cooperative Bank Ltd.,
Pachora, District Jalgaon.
Through it's Recovery Officer,
Shri Chandrakant Madhukar Ghodke,
Age : 48 years, Occupation : Service,
Recovery Officer, Pachora Peoples'
Cooperative Bank Limited,
Pachora, District Jalgaon.

..APPLICANT

-Versus-

The Employees Provident Fund Organization.
(Ministry of Labour, Government of India).
Sub-Regional Office, through Assistant
Provident Fund Commissioner,
Plot No.P-11, Bhavishya Nidhi Bhawan,
MIDC, Satpur, Nashik.

..RESPONDENT

.....

Shri A.A.Shelke h/f Shri P.D.Suryawanshi, Advocates for the Review Applicant.

Shri K.B.Chaudhari, Advocate for the Respondent.

.....

CORAM : S.S.SHINDE & RAVINDRA V. GHUGE, JJ.

**Reserved on : 25TH NOVEMBER, 2016
Pronounced on : 11TH JANUARY, 2017.**

Judgment (Per Ravindra V. Ghuge, J.):

1 By this Review Application, the Applicant Bank has prayed for reviewing the order dated 07.02.2014 passed by this Court in Writ Petition No.5086/2011. By the said order, the Writ Petition filed by the Review Applicant was dismissed and the order dated 28.09.2010 passed by the Assistant Provident Fund Commissioner (Compliance), Sub-Regional Office, Nashik (hereinafter referred to as "the APFC") and the order dated 20.05.2011 passed by the Employees Provident Fund Appellate Tribunal, New Delhi, holding that the Bank was liable to contribute provident fund contributions of the pigmy agents, were sustained.

2 We have heard the learned Advocates for the respective sides at length. The grounds put forth by the Applicant are as under:-

- "(I) *It may please be considered that the orders under challenge passed by the authorities below are quite contrary to the evidence on record.*
- (II) *It may please be considered that the Pigmy Deposit Collectors are not employed on wages as per the provisions of Section 2(F) of the said Act.*
- (III) *It may please be considered that the commission is expressly excluded from the definition of "wages" and as such the pigmy agents cannot be called the*

employees working for the wages. The commission paid to the pigmy deposit collectors is not fixed; it may vary with the collection of amount. The engagement of pigmy deposit collectors is purely on contractual basis for a specific period and it does not require any qualification.

- (IV) *It may please be considered that the work of pigmy deposit collectors is not like the other regular employees of the bank. There is no any master - servant relationship between the applicant Bank and the pigmy deposit collectors.*
- (V) *It may please be considered that the authorities below have wrongly relied upon the reported case law which is not at all applicable to the present case. The pigmy deposit collectors are collecting the amount from the customers of the Bank and getting commission for it as per their collection. As such, the commission paid to them is not fixed and therefore, it cannot be called as wages/ salary/ emoluments etc..*
- (VI) *It may please be considered that the Bank has intimated the pigmy agents to deposit their contribution as per letter/ order issued by the respondent authority. But, till this date they have not deposited their contribution. The respondent authority is likely to cease the account of the applicant bank. The respondent authority has issued notice dated 21.03.2014 and directed the Bank to deposit further amount of Rs.502652/- towards the provident fund, otherwise, the authority will proceed under the Act."*

3 Notwithstanding the grounds as above, we find that the whole thrust of the Applicant in this Review Application is that this Court has erroneously relied upon the judgment delivered by the Honourable Apex Court in the matter of the *Indian Banks Association vs. Workmen of Syndicate Bank and others*, **AIR 2001 SC 946**. It was also canvassed that

the said reported judgment was delivered by the Honourable Apex Court while considering whether, the pigmy agents could be covered by the definition of “workman” under Section 2(s) of the Industrial Disputes Act, 1947, as amended in 1984 and could not have been relied upon for deciding whether, the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short “the EPF Act”) would be applicable to them.

4 During the course of the hearing in this matter, we deemed it proper to direct the Applicant as well as the APFC to produce the appointment letters/ letters of contract between the Applicant Bank and the pigmy agents. The purpose for which we directed the Applicant to produce the above documents, was to scrutinize the contentions of the Applicant that the Applicant Bank does not share “employer-employee” relationship with the pigmy agents, that there is no privity of contract of employment and that they are being paid commission which would not fall within the definition of “wages”. Pursuant to our order, the Applicant has placed on record the said documents.

5 While dealing with this Review Application, we are conscious about the restrictions applicable in the light of the judgment of the

Honourable Supreme Court in the matter of *Lily Thomas vs. Union of India*, **AIR 2000 SC 1650** whereby, the Honourable Supreme Court has held that a review petition cannot be entertained either as an appeal or as a re-hearing of the petition in which the order under review has been passed. Unless an error apparent on the face of the order is pointed out, the review petition would fail.

6 While considering this Review Application, we deem it proper to reproduce paragraphs 8, 9, 12, 15, 18 to 20, 27 and 28 of *the Indian Banks Association judgment* (supra) as under:-

"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 & Ors. V. Chief Inspector of Shops and Establishments & Anr. reported in (1973) 2 Lab LJ 495 : (AIR 1974 SC 37 : 1974 Lab IC 133). 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 employer 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 reported in (1957) SCR 152 : (AIR 1957 SC 264) 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 & Ors. V*

K.V.Baby & Anr. reported in (1999) 1 LLJ 1290 : (1999 AIR SCW 4855). 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."

7 It is obvious that a person receiving consideration in the form of commission, has been excluded from the definition of "workman" under Section 2(s) of the Industrial Disputes Act, 1947. However, if the nature of the contract or the terms and conditions set out in the contract between the Bank and the pigmy agents/ deposit collectors clearly indicate supervision, control and direction of the Bank, the deposit collectors would become workmen, as is held in the Indian Banks Association case (supra). For this purpose, the corporate veil will have to be lifted in order to assess as to whether, the Bank has camouflaged the wages being paid to the deposit collectors (pigmy agents in common parlance), as "commission".

8 The entire thrust of the Review Applicant is on the aspect of commission being paid to the pigmy agents and hence, they would not be workers of the Bank. In *Silver Jubilee Tailoring House and others vs. Chief Inspector of Shops and Establishments and another*, **(1973) 2 Lab LJ 495 : AIR 1974 SC 37**, the Honourable Supreme Court concluded that though control was an important factor, it was wrong to say that it would be a decisive factor in every case. The degree of control and supervision would be different in different types of businesses and what was essential was the element of the Authority over the workers in the performance of their work so as to subject the said employee to the directions of the employer.

9 It was further held by the Honourable Supreme Court in the *Silver Jubilee Tailoring Case (supra)* that the working with more than one employer did not militate against being the employee of the proprietor of the shop where he attended the work. The fact that the workers were not obliged to work for the whole day, was also not material. It was held that all that was required and was necessary was that the workman was principally employed by that employer.

10 We are unable to accept the submissions of the Applicant

Bank that the judgment of the Honourable Supreme Court in the Indian Banks Association case (supra) needs to be restricted only to the extent of whether, the deposit collectors of the Bank were "workmen or not", under the Industrial Disputes Act, 1947. The Honourable Apex Court had considered the entire nature of activities of the deposit collectors in the said judgment and by considering Section 10 of the Banking Regulations Act, concluded in paragraph 27 that the deposit collectors, though undoubtedly are not regular employees of the Bank, but nevertheless, are workers within the definition of "workman" under the Industrial Disputes Act, 1947 and there was clearly a relation of master and servant between the deposit collectors and the concerned Bank.

11 While dealing with this case, when we decided the Writ Petition, we have observed in paragraphs 7 to 11 of our judgment as under:-

"7. 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.

8. *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.*
9. *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.*
10. *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".*
11. *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."*

12 It is noteworthy that the Jalgaon Zilla Urban Cooperative Banks Association Limited had preferred Writ Petition No.8568/2009 before this Court for challenging the notice of hearing dated 09.09.2009 issued by the Provident Fund Authority under Section 7-A of the EPF Act by which the issue as regards unpaid Provident Fund contributions in relation to pigmy deposit collectors was being enquired into. The said Writ Petition was dismissed as withdrawn by order dated 16.12.2009 passed by the learned Division Bench of this Court after recording the request of the Banks Association to withdraw the petition.

13 We conspicuously find that the entire endeavour of the Review Applicant is to apply an opaque gloss over the factual relationship that it has with the pigmy agents so as to lead us to believe that merely because the pigmy agents are getting commission for their work, they would not be covered by the definition of “basic wages” under Section 2(b) of the EPF Act which reads as under:-

- "(b) *"basic wages" means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include --*
- (i) the cash value of any food concession;*
 - (ii) any dearness allowance (that is to say, all cash*

payments by whatever name called paid to an employee on account of a rise in the cost of living), house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;
(iii) *any presents made by the employer;"*

14 In order to scrutinize the veracity of the contentions of the Review Applicant, we have closely scrutinized “the copy of the appointment order” issued by the Bank to the pigmy agents which is in Marathi. We noticed the following aspects :-

- (a) The opening paragraph of the order indicates that the pigmy agent has been “APPOINTED” by the Bank after the Board of Directors passed the resolution on 24.02.1991.
- (b) For the past about 23 years, the said pigmy agents are continuously working.
- (c) In clause 1, it is stated that the appointment would not be on wages and they would be paid commission at the rates fixed and decided as per the Rules of the Bank.
- (d) In clause 2, it is stated that the pigmy agent would be duty bound to comply with the directions of the Bank Manager, Assistant Manager and other Superior Officers as may be issued from time to time and he will work strictly as per the said directions.

- (e) In clause 3, it is stated that the “APPOINTMENT” is on temporary basis and the agency of the pigmy agents can be disengaged at any time.
- (f) In clause 4, it is stated that this appointment is for the Pachora Branch of the Pachora Peoples Bank.
- (g) In clause 7, it is stated that there would be an addition or deletion of the nature of duties at any time at the behest of the Bank.
- (h) An undertaking on Rs.10/- Bond paper has been taken from these pigmy agents in which it is stated that he would obediently, faithfully and diligently fulfill the duties of the office, would strictly adhere to the rules of the Bank and if he commits any misdemeanor, he would be liable to be penalized by the Bank.

15 We are aware that the above said specimen appointment order of the pigmy deposit collector was not placed by the Applicant/ Bank before the Provident Fund Authorities earlier. We have considered the said document while dealing with this Review Petition so as to assess as to whether, the Provident Fund Authorities rightly covered such pigmy deposit collectors under the EPF Act.

16 From the specific contents of the appointment order issued by the Applicant Bank, we find that the pigmy agent has not been given any liberty to engage in the same business or any other business or enter into any contract with any other Bank or establishment as long as he is working for the Applicant Bank. It is based on such contents of the order, that, in this case, we are convinced that there is supervision, control and direction of the Applicant Bank on these pigmy agents. We hasten to clarify that these conclusions are restricted to the Applicant Bank and their pigmy agents considering the above and these conclusions may not apply to any other establishments if the terms and conditions applicable to the pigmy agents do not indicate supervision, control or direction.

17 The Review Applicant has heavily relied upon the judgment of the learned Division Bench of the Karnataka High Court in **Writ Appeal No.6081/2001 dated 12.01.2003** (*The Assistant Provident Fund Commissioner vs. The South Kanara Government Officer's Cooperative Bank Ltd.*). Much stress has been placed on the observations in paragraphs 9 and 10 of the said judgment, which read as under:-

"9. *It is not in dispute that what is being paid to employees referred to above are in the nature of a commission. Section 2(b)(ii) of the Act defines the "basic wages". It reads as follows:-*

-
10. *As it can be seen from the said provision, 'commission' is excluded from "basic wages". As noticed by us earlier, the Tribunal has recorded a finding that what was paid to the said two employees admittedly being a 'commission', the same is excluded from the definition of "basic wages" and as such the Act cannot be made applicable so far as the said two employees are concerned as the contribution to the provident fund is required to be made only on basic wages. It is not the case of the two employees referred to above and also the case of the commissioner that the first respondent bank had devised a method of paying commission with a view to circumvent the provisions of the Act. The Commissioner proceeded to treat the commission paid to the said two persons as basic wages on the premise that the said two persons should be treated as employees. In our view, the said approach made by the Commissioner is erroneous in law. The finding recorded by the Tribunal shows that Sri.Nagesh Kulal is a permanent employee of Hotel Pooja International and was admitted to the benefit of the provisions of the Act and was covered under the provident fund Act. So far as Sri.Ganesh Rao is concerned, it is also not in dispute that he is the pigmy collector of Karnataka Bank and was being paid commission."*

18 We find from the conclusions of the Karnataka High Court that it was guided by the fact that the two employees in the matter had not contended that the Bank had devised a method of paying commission with a view to circumvent the provisions of the Act. The said workers had not claimed that the payment of commission was aimed at suppressing and camouflaging the actual payment of wages. With due respect to the Karnataka High Court, we find that, in the said set of contentions, it

should have been seen as to whether, the payment of wages were camouflaged by the payment of commission and for the said purpose, the corporate veil should have been lifted. That was not done in the South Kanara Bank Case (supra) and the defence of the Bank was accepted without scrutiny only because the two employees had not raised the said issue.

19 Nevertheless, we are also of the firm view that if supervision, control and direction is evident and if the privity of the contract between the parties would indicate that the Bank has camouflaged the payment of wages under the guise of the payment of commission, it needs to be concluded that the said amount of commission will have to be treated as “basic wages”. For the said purpose, we would be setting forth in the later part of this judgment, the factors which the PF Authorities would be normally required to consider while dealing with such cases of pigmy agents/ deposit collectors.

20 The Review Applicant has placed reliance upon the following orders of the Karnataka High Court, which in fact are based upon the judgment delivered in the South Kanara Bank Case (supra):-

- (i) Writ Petition No.35152/2010 (L-PF), dated 24.06.2011, Sri

Gokarnanatha Cooperative Bank Limited vs. The Assistant PF Commissioner.

- (ii) Writ Appeal No.17717/2011 (L-PF), dated 04.10.2012, The Assistant PF Commissioner vs. Sri Gokarnanatha Cooperative Bank Limited.

21 We are not required to dilate on the view taken in the above said three orders of the Karnataka High Court since they are purely based on the view taken in the South Kanara Bank Case (supra).

22 The Review Applicant has then placed reliance upon the judgment delivered by the High Court of Chattisgarh in the matter of *Sunshine Caterers Private Limited vs. Employees Provident Fund Appellate Tribunal*, **2016 LAB. I.C. 2064**. Upon going through the said judgment, we find it appropriate to reproduce paragraphs 19, 20 and 21 as under:-

"19. Section 2 (f) of the EPF Act defines the term "employee" which reads 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 (52 of

1961), or under the standing orders of the establishment;”

20. *A careful perusal of the definition of “employee” as contained in Section 2 (f) of the EPF Act would show that a person would be deemed to be an employee (i) if he is employed for wages in any kind of work, manual or otherwise; (ii) in or in connection with the work of an establishment; (iii) getting his wages directly or indirectly from the employer; (iv) including any person employed by or through a contractor in or in connection with the work of the establishment; and (v) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment.*
21. *It would appear that definition of “employee” under the EPF Act is an independent one and comprehensive enough. Definition of “employee” or to say “workman” or “worker” cannot be borrowed from other enactments relating to labour laws such as the Minimum Wages Act, the Employees' Compensation Act, the Industrial Disputes Act etc.. Definition of “employee” under the present Act is completely different from the definition of “worker” or “workman” or “employee” under these Acts. Thus, the scope of the term used “employee” under the EPF Act is having altogether different connotation, purport and scope than that of other enactments.”*

23 It is, therefore, obvious as has been held in paragraph 20 reproduced above that the definition of “employee” under the EPF Act would render the person deemed to be an employee, if he is employed for wages in any kind of work, in or in connection with the work of the Establishment and is getting his wages directly or indirectly from the

employer.

24 We are specifically informed by the learned Advocate for the Applicant, on instructions, and we also find from the order of appointment of the pigmy agents that these pigmy agents are employed exclusively to do the work of collecting deposits and such other works/ activities as may be directed by the Manager, Assistant Manager or Superior Officers of the Bank. We also find that the work done by them is in connection with the perennial work of the Bank (Establishment) of collecting deposits.

25 In our endeavour to go to the root of the contentions of the Review Applicant, we find that it is imperative to see whether, the “commission” being paid to the pigmy agents in the above backdrop would be a camouflage in order to disguise the wages as being commission. This is a decisive factor in the light of the two aspects set out in paragraph 24 herein above and is necessary to conclude whether, the commission paid by the Applicant Bank directly to the pigmy agents, would amount to wages under the EPF Act. We find from the record and the contentions of the Applicant Bank that these pigmy agents do not take away their commission amounts from the deposits collected or from the

depositors themselves. They collect the entire amounts and deposit the same in the Applicant Bank which eventually calculates the commission as per its Rules to be paid to the pigmy agents.

26 This pattern of payment in the light of the exclusive engagement of the pigmy agents with the Review Applicant Bank alone, is squarely covered by the judgment of the Honourable Supreme Court in the case of Silver Jubilee Tailoring House (supra). As we are convinced, in this case, that the Applicant Bank has specifically engaged these pigmy agents to perform perennial nature of duties which is the core activity of the Bank and exclusively for this Bank, the amounts of wages being paid to them have been well disguised as commission amounts. Considering all the factors as recorded above, the said manner of payment of commission is in fact payment of wages and the amounts being paid to these pigmy agents would, therefore, amount to basic wages under Section 2(b) of the EPF Act.

27 We are assisted by the view of the Honourable Supreme Court in the matter of *Food Corporation of India vs. Provident Fund Commissioner*, 1990 (1) SCC 68, wherein the Honourable Supreme Court has clearly enumerated the scope of enquiry by the Enforcement Officer in

collecting sufficient material as evidence while conducting the proceedings for assessing unpaid provident fund dues/ contribution under Section 7 of the EPF Act. We deem it appropriate to reproduce paragraphs 7, 8 and 9 of the Food Corporation of India judgment (supra) as under:-

"7. The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.

8. It is of importance to remember that the Commissioner while conducting an inquiry under section 7-A has the same powers as are vested in a Court under the Code of Civil Procedure for trying a suit. The section reads as follows:-

"7-A Determination of Moneys due from Employer--

(1) The Central Provident Fund Commissioner, any Deputy Provident Commissioner or any Regional Provident Fund Commissioner may, by order determine the amount due from any employer under any provision of this Act (the scheme or the Family Pension Scheme or the Insurance Scheme as the case may be) and for this purpose may conduct such inquiry as he may deem necessary.

(2) The Officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, for trying a suit in respect of the following matters, namely:

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses.

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of Sections 193 and

228, and for the purpose of Section 196 of the Indian Penal Code."

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."

28 We also find from the view taken in the Sunshine Caterers Private Limited Case (supra) that the Honourable Supreme Court has followed the view laid down in the Food Corporation of India case (supra) while deciding the case of *Bharat Heavy Electricals Limited vs. ESI Corporation*, **(2008) 3 SCC 247**.

29 In the light of the above, we do not find any such factor brought to our notice by the Review Applicant which would call for a review of our judgment dated 07.02.2014. The Review Application, therefore, fails and is rejected. Consequentially, the pending Civil Application does not survive and stands disposed of.

30 We are informed that there are hundreds of cases of this nature pending before several EPF Authorities and the High Courts. The learned Advocates for the Review Applicant as well as the APFC have prayed that we should endeavour to lay down certain parameters so as to enable even the EPF Authorities to embark upon proper inquiries to collect sufficient material so as to conclude in a given case whether, the commission in fact amounts to wages.

31 Therefore, before parting with this matter, we deem it appropriate to lay down certain parameters for dealing with such cases in the interest of the Establishments and the workmen. We find that the EPF Authorities are under an obligation to carry out appropriate investigation, discovery of documents and collecting evidence while undertaking the Section 7-A proceedings which are aimed at recovering unpaid provident fund contributions. So also, the Establishments/ Industries at issue are equally obliged to render proper assistance and produce all the documents as they may find appropriate and even those documents which may be ordered to be produced by the EPF Authorities.

32 We are, therefore, of the view that the following factors must

be considered by the EPF Authorities in such cases :-

- (a) The EPF Authorities should collect necessary documents by inspection of records of the Establishment/ Industry.
- (b) A direction to the Management to produce the documents as may be found necessary, should be issued whenever the EPF Authorities realize that the Management is holding back certain documents.
- (c) The appointment orders/ contract letters or agreements in between the Banks and the pigmy agents/ deposit collectors should be made available for scrutiny and should be taken into consideration.
- (d) Based on the above documents, the EPF Authorities must adjudicate on the following aspects:-
 - (i) Whether, the contracts/ appointment orders have a semblance of employer-employee relationship?
 - (ii) Whether, there is supervision, control and direction of the Bank over such agents?
 - (iii) Whether, these agents are under an obligation to work only for a particular Bank or it's Branches?
 - (iv) Whether, these agents are permitted to work elsewhere or undertake any other business, job, profession or calling?

(v) Whether, such agents are primarily dependent upon the work of collecting deposits for a particular Establishment?

(e) Interrogate the pigmy depositors to elucidate information about their exact nature of duties.

(f) Based on the documents and an analysis upon considering the above mentioned factors, the APFC will have to arrive at a conclusion supported by reasons that such pigmy agents can be termed as “workmen” and share employer-employee relationship with the Bank and are being paid wages disguised as commission. The said commission amount would then be termed as basic wages under Section 2(b) of the EPF Act.

33 Writ Petition Nos.1469/2012, 1449/2012 and 1672/2012 be placed before the learned Single Judge for adjudication.

(Ravindra V. Ghuge, J)

(S.S.Shinde, J)