

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.786 OF 2017

The Goa Urban Co-operative Bank Ltd.
A bank registered under the Maharashtra Co-operative Societies Act, 1960, having its Head Office at Dr. Atmaram Borkar Road, Panaji, Goa Represented by its Authorised Representative Shri Vilas M. Narkar, S/o. Mahadev Narkar aged 62 years, Managing Director ...Petitioner

Versus

- 1 Mr. Rui Ferreira
major of age,
Residing at,
H.No.E-1, Near Panaji Church,
Panaji Goa 403 001 ...Respondent
No.1.
- 2 Labour Commissioner
Labour and Employment
Government of Goa
Shram Shakti Bhavan,
2nd Floor, Patto Plaza, Panaji – Goa. Respondent
No.2.
- 3 Head of Taluka Revenue Officer,
Tiswadi Taluka,
Tiswadi Goa. Respondent
No.3.
- 4 The Principal Commissioner of Income
Tax office of Income Tax department,
Aayakar Bhavan, Patto, Panaji Goa – 403 001 Respondent
No.4.
(Amendment carried out as per order dated 31/10/2017)

Shri G.K. Sardessai with Shri A. Carvalho, Advocates for the petitioner.

Shri Vivek Rodrigues, Advocate for the respondent No.1.

Shri Sagar Dhargalkar, Additional Government Advocate for the respondent Nos.2 and 3.

Ms. Amira Razaq, Government Advocate for the respondent No.4.

CORAM: NUTAN D. SARDESSAI, J.

RESERVED ON : 21st June, 2018.

PRONOUNCED ON : 4th July, 2018.

JUDGMENT:-

1. This petition takes exception to the impugned order dated 24/03/2017 passed by the Labour Commissioner under Section 33(C)1 as also the Recovery Certificate dated 11/05/2017 passed by the Taluka Revenue Officer, Tiswadi under Article 227 of the Constitution.

2. Heard Shri G.K. Sardesai, learned Advocate on behalf of the petitioner who submitted that an Award was passed by the Industrial Tribunal dated 30/08/2003 in favour of the respondent No.1 granting reinstatement with full backwages. This Award of the Industrial Tribunal was upheld by this Court vide its judgment dated 21/07/2014 by modifying it to the extent of granting backwages to the extent of 75%. The petitioners had challenged the same before the Supreme Court and where on hearing the learned Counsels an order was passed dated 08/02/2016 pursuant to which the petitioners were directed to pay an amount of ₹42,50,000/- to the respondent No.1 within

three weeks. The petitioners had issued a pay order in favour of the respondent No.1 in the amount of ₹31,09,708/- after deducting the tax at source of ₹11,40,292/-. A remedy was available to the Respondent No.1 under Section 89 of the Income Tax Act, 1961 and the application at his instance under Section 33 (C) 1 of the Industrial Disputes Act, 1947, 'the Act' for short, for recovery of the account deducted as tax at source was without any basis. They had filed their reply to the said application clearly spelling out that they had deducted the tax at source as per the provisions of the Act and none deduction thereon would amount to a violation thereon. There was a due compliance of the order of the Hon'ble Supreme Court dated 08/02/2016. The order passed by the Labour Commissioner on the application of the respondent No.1 under Section 33 (C) 1 of the Act was without any basis and had to be quashed and set aside and the said application was not maintainable at the instance of the respondent No.1. The order of the Labour Commissioner had therefore to be quashed and set aside.

3. Shri V. Rodrigues, learned Advocate for the respondent No.1 referred to the order of the Hon'ble Apex Court dated 08/02/2016 and the findings recorded by this Court while

disposing off the application in a separate petition which were interpreting the order of the Apex Court and binding on this Court. He placed reliance in **All India Reporter Ltd. V/s. Ramchandra D. Datar** [AIR 1961 SC 943 (V 48 C 151)] and submitted that the deduction of tax at source @30% was not justified. He placed reliance in **Saroj Kumar Maheswari v/s. Hindusthan Motors Ltd. and Anr.** [1985 154 ITR 363 Calcutta], **Commissioner of Income-Tax v/s. Captain H.C. Dhanda** [AIR 1970 MP 205] and submitted that Section 192 of the Income Tax Act could not be brought into play even on its plain reading to his case. There was no basis to deduct the tax at source considering the order of the Apex Court and therefore the petition had to be dismissed.

4. Ms. Amira Razaq, learned Standing Counsel for the Department submitted at the outset that the addition of the Department as a party in a petition under Article 227 of the Constitution of India was uncalled for. She next adverted to the order of the Apex Court which required the petitioners to make a deposit in lumpsum in full and final settlement of all the dues of the respondent No.1 and that it was for the respondent No.1 to complete the required procedural formalities from the

Income Tax point of view. She raised a query whether it was available to this Court to bifurcate the lumpsum amount ordered in favour of the respondent no.1 by the Hon'ble Apex Court under the head salary and other heads. She adverted to the order passed by this Court dated 04/08/2017 in an earlier petition and submitted that it was not open to the petitioners to re-agitate the issue once again.

5. Ms. A. Razaq, learned Standing Counsel also raised a query whether the Department could be compelled to subject the party respondent No.1 to assessment when a lumpsum amount was ordered to be paid to him. In reply it was her contention that no direction could be issued to the Department for release of the tax in favour of the respondent No.1 when his assessment was at large. Rather it was incumbent on the petitioner to pay the said amount to the respondent No.1 and seek its refund from the Department. In that context, she placed reliance in **S.S. Miranda Ltd. V/s. Shyan Bahadur Singh** [(1985) 21 Taxman 432 (Cal.)]. Shri Girish Sardessai, learned Advocate in reply made an attempt to distinguish the judgment in **All India Reporter Ltd.** (supra) and submitted that no finding could be given that the tax could not be

deducted at source since the proceedings were at large before the Income Tax Authorities. He raised a query whether it could at all be said that the petitioners had acted malafide while deducting the tax at source when they were otherwise duty bound to comply with the Income Tax Act. He also distinguished the judgment in **Saroj Kumar Maheswari** (supra) and contended that in case this Court arrived at a finding that the respondent No.1 was entitled to the amount deducted as tax at source then a direction had to be issued to the Department – Respondent No.4 to refund the amount to him.

6. i have considered their submissions, the judgments relied upon, the relevant provisions of the Income Tax and in view thereof decide the petition accordingly.

7. Indisputably, an award was passed by the Industrial Tribunal in favour of the respondent No.1 dated 30/08/2003 ordering his reinstatement with full backwages which was challenged in Writ Petition before this Court and upheld with the modification to the ordered backwages to the extent of 75%. The petitioner had challenged the same before the Apex Court and which by its order dated 08/02/2016 had clearly recorded

that “in full and final settlement of all the dues to the respondents, the Bank shall pay an amount of ₹42,50,000/- to the workmen within three weeks from today”. The Apex Court had further held that “for the Income Tax purpose, the workmen shall complete the procedural formalities within one week from today.” In this backdrop, a further order was made that in case the Bank had made any deposit in the High Court, it will be open the bank to withdraw the amount in view of the payment of the **lumpsum** amount of ₹42,50,000/- to the workmen. This order of the Apex Court is clear and unambiguous and which required the petitioner Bank to pay **all the dues** to the respondent No.1 in full and final settlement. It did not at all give a break up as to what part of this lumpsum constituted the amount of salary and the balance amount constituted what part of the other benefits / perquisites in his favour.

8. The Apex Court's order was absolutely unambiguous and had left the issue of settling the tax liability on the respondent No.1 and in that view of the matter, the plea taken on behalf of the petitioners that they were adhering to the law and in that regard had deducted the tax at source rings a hollow bell and does not at all show their bonafide while making such deduction

contrary to the orders of the Apex Court. Therefore, i am constrained to observe that the petitioners did act malafide in deducting the tax at source when the order was clear and unambiguous requiring them to pay the **lumpsum** amount to the respondent No.1 without specifying what constituted the salary component and what was comprised in the balance. It was not at all for the petitioners to make a breakup of the salary component as it did, make the deductions under Section 80C of the Income Tax Act and then deduct the tax payable on the amount ordered in favour of the respondent No.1 and charge a cess on it. This conduct of the petitioners displayed their malafide and it cannot at all be heard on their behalf that they acted in good faith and in consonance with the order of the Apex Court.

9. In that context, there is no basis in the contention of G.K. Sardessai, learned Advocate for the petitioners as to why the respondent No.1 should be driven to seek for the refund of tax by recourse to Section 89 of the Income Tax Act when the order of the Apex Court clearly indicated that the petitioners were to pay the lumpsum amount of ₹42,50,000/- to the respondent No.1 in full and final settlement of all the dues to

him. Besides, Section 192 of the Income Tax Act clearly provides that a person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year. This provision too would not be applicable inasmuch as what was ordered to be paid by the petitioners to the respondent No.1 was all the dues amounting to ₹42,50,000/- in full and final settlement to the respondent No.1 and not a defined amount under the head "Salaries", for the petitioners to undertake the exercise of deducting his tax at source as per the applicable rates.

10. In **All India Reporter Ltd.** (supra), the respondent was employed by the appellant company on an agreement that he would be paid remuneration per annum equal to 3 1/2% of the gross sales or ₹12,000/- whichever was greater and the agreement was to remain in operation for ten years w.e.f. 01/04/1943, in the first instance and renewable at the option of the respondent for such period as he desired. The appellant

terminated his employment on 22/04/1948 whereupon he filed a suit in the District Court, Nagpur, for a decree of ₹1,30,000/- being the amount of compensation for wrongful termination of employment, arrears of salary and interest. The Court after giving credit for the amount received by him passed a decree for ₹42,359/- inclusive of ₹36,000/- as compensation for termination of employment and ₹6,000/- as salary in lieu of six months' notice, interest and costs. He then claimed execution of the decree. In the meantime, the Income Tax Officer, Nagpur, served a notice on him under Section 46 of the Act upon the intimation to the District Judge, Nagpur, that the appellant company be permitted to deduct the tax at source and to pay ₹15,956.13 as income-tax, surcharge and super-tax due on the sum of ₹50,972.20 awarded to the respondent. The learned Judge directed the appellant company to pay to the Income Tax Department ₹15,956.13 on account of the income-tax and super-tax on the amount due to the respondent and directed him to pay the balance in court after filing a receipt for payment of tax from the Department. In appeal, the High Court of Judicature at Nagpur, reversed the order passed by the District Judge and directed execution as claimed by the respondent.

11. In **All India Reporter Ltd.** (supra), the company took a plea that it was bound to deduct the tax computed at the appropriate rate on the salary payable to the respondent under Section 18(2) of the Act as the amount due under the decree represented salary. The Legislature has imposed upon the employer the duty to deduct the tax at the appropriate rate on the salary payable to the employee and if he fails to do so, the tax not deducted may be recovered from him. **But the liability to deduct arises in law, if the amount is due and payable as salary.** In this case, there was no assessment of tax due by the Income Tax Officer on the amount payable to the respondent. Under Section 46(5), any person paying salary to an assessee may be required by the Income Tax Officer to deduct an arrears of tax due from the latter and the employer is bound to comply with such a requisition and to pay the amount deducted to the credit of the Government. But this order can only be passed if the income-tax has been assessed and has remained unpaid.

12. In **All India Reporter Ltd.** (supra), at the material time and indisputably, no tax was assessed by the respondent and therefore the Income Tax Officer had no authority to issue a

notice under Section 46 (5) nor could he claim to recover tax due by a proceeding in the nature of a garnishee proceeding by applying to the Civil Court to attach the judgment-debt payable by the company. It was further observed that the respondent had filed a suit for a decree for arrears of salary, compensation for wrongful termination of employment and interest and the Court having passed a decree on that claim, it became a judgment-debt. The question which arose for determination was whether as between the appellant company and the respondent the amount decreed was due as salary payment attracting the statutory liability imposed by Section 18. The claim decreed by the Civil Court was for compensation, for wrongful termination of employment, arrears of salary, salary due for the period of notice and interest and costs, less withdrawals on salary account while the amount for which the execution was sought to be levied was the amount decreed against which was set off the claim under the cross- decree. A substantial part of the claim decreed represented compensation for wrongful termination of employment and it would be difficult to predicate of the claim sought to be enforced what part thereof, if any, represented salary due. Granting that compensation payable to an employee by an employer for

wrongful termination of employment be regarded as in the nature of salary, when the claim merged in the decree of the Court, the claim assumes the character of a judgment-debt and to judgment- debts, Section 18 has not been made applicable.

13. Saroj Kumar Maheswari (supra), the appellant-petitioner, was employed as an Assistant Development Engineer in the respondent company whose services were terminated under its service rules. He challenged the said order of termination in an application under Section 33A of the Industrial Disputes Act, 1947, and the Tribunal by its award set aside the order of termination of the services and directed his reinstatement with half backwages. The respondent company filed a petition under Article 226 of the Constitution of India for setting aside the award which was dismissed and thereafter the appeal filed against the said order was also dismissed giving rise to the Special Leave Petition before the Supreme Court. In the meantime, the respondent Company and the petitioner entered into a compromise pursuant to which the order came to be passed dated 14/02/1980. As in the present case, in Saroj Kumar Maheswari too the Company was directed to pay to him a sum of ₹1,50,000/- in full and final settlement of all his

claims, in respect of wages, provident fund, gratuity and all other emoluments and dues either under the impugned judgment within a defined time and in addition they were directed to pay to him any amount which might be due and payable to him in law for the period prior to 8th June 1970, including provident fund lying to his credit.

14. In **Saroj Kumar Maheswari** (supra), as in the case at large, a sum of ₹78,279/- was deducted by the company as tax on the said sum of ₹1,50,000/- and paid to the Income-tax Department. Thus, a sum of ₹1,45,479.40 in the aggregate was paid to the petitioner and the remaining sum was deducted as alleged license fee for the occupation of the quarters including the electricity charges. The petitioner received only a sum of ₹67,200.40 against the sum of ₹1,50,000/-, and demanded the balance amount from the respondent company which they did not pay and accordingly he filed an application under Section 33(C)(1) of the Industrial Disputes Act, 1947, followed by a certificate issued by the Chief Metropolitan Magistrate, for recovery of the amount followed by a complaint of the Deputy Labour Commissioner against the company for non-payment of the dues claimed by him, a distress warrant for realisation

followed and thereupon, a petition under Article 226 of the Constitution was filed by the Company for quashing the proceedings pending before the learned Metropolitan Magistrate.

15. In **Saroj Kumar Maheswari** (supra), the learned Judge of the Calcutta High Court while disposing off the petition under Article 226 of the Constitution held that when the employer and the employee entered into an agreement whereby the employee gave up all his claims in dispute, agreed to the terms of settlement and the figure arrived at was ₹1,50,000/- towards the dues arising out of various claims, under the circumstances, whatever amount had been awarded by the Supreme Court was payable to him without deduction and the company was not entitled to deduct tax at source. Since it was revealed that the Company had already deposited the amount with the income-tax authority, the court directed the income-tax authority to refund the same to the company with interest for the purpose of making payment to the petitioner. The Court held that the company was under no obligation to deduct the amount of income-tax from the said sum of ₹1,50,000/- which had been directed by the Supreme Court to be paid to the judgment-creditor and non-deduction of income-tax from the said sum

would not attach any liability to the company. Reliance was placed in **All India Reporter Limited** (supra), where the Apex Court had held that in the execution of a decree passed in favour of an ex-employee, for compensation for wrongful termination of employment, arrears of salary, salary due for the period of notice, interest and costs, less the withdrawals on salary account, the substantial part of the decree representing compensation for wrongful termination of employment, it being difficult to predicate which part of the decree represented salary due, in the absence of a provision in the decree for payment of income-tax due by the decree-holder, the employer judgment-debtor cannot claim to deduct under Section 18, the income-tax payable by the decree-holder upon the amount. The learned Judge considered in that case too Section 192 of the Income Tax Act and observed that it was crystal clear that the entire sum of ₹1,50,000/- as ordered by the Apex Court could not be the salary income of the petitioner and the respondent company, therefore, should not have deducted any amount at source and deposited it with the Income-tax Department. The deduction is made under Section 192 when an amount is paid which is taxable under the head "Salaries". Besides, the consent order before the Apex Court, did not provide that the respondent

company before making the payment of ₹1,50,000 would be entitled to deduct any amount on any account whatsoever. This judgment squarely covers the case of the respondent No.1.

16. In **Captain H.C. Dhanda** (supra), a sum of ₹1,67,345/- represented the payment made to him by His Highness of the erstwhile State of Madhya Bharat, in full and final settlement of his claim for damages for wrongful termination of his services as a personal Adviser to his Highness. The whole question was whether the money which was received by the assessee after cessation of his office as compensation, in respect of which he was assessed for the year 1955-56, part of his income for the year in question as contended for by the Revenue or were they of a capital nature as held by the Tribunal. He claimed before the Income Tax Officer that this amount of ₹1,67,345/- was received by him as a compensation for the loss of employment and as such, exempt from tax liability. It was received under the terms of the compromise petition filed in the Bombay High Court and it was not a receipt under Huzur Order of 1st March 1950, that the payment in question had been understood between the parties as "compensation for loss of employment", and there was no element of remuneration for past services.

17. In **Captain H.C. Dhanda** (supra), the income tax Officer held that the amount so received by him was a payment from his employer under his contract of service and that it would be taxable under the provisions of the Income Tax Act, 1922. He preferred an appeal before the Appellate Assistant Commissioner who agreed with the Income-tax Officer and dismissed the appeal. Their Lordships of the Madhya Pradesh High Court on a discussion had observed that the whole of the sum received by the assessee was in the nature of a capital receipt and it could be assumed that no ascertainable part of it represented arrears of salary. The assessee's claim on this count in the suit had become merged or extinguished as a result of the compromise arrived at between the parties. The entire sum was paid to him by way of damages, and it could not be regarded partly as derived from employment. The assessee became entitled to that payment by reason of disappearance of the contract of employment, by its repudiation due to the unilateral act of his employer and the payment of ₹1,67,345 was for abandonment of all his rights thereunder. In that view of the matter, it was held that the said payment being solely as compensation for the loss of employment, the question raised did not arise and no part of the amount could be considered to

be in lieu of salary for 23 days, the claim for which was withdrawn as a result of the compromise.

18. In **S.S Miranda Ltd.** (supra), the appellant was directed to pay a sum of ₹31,023.54 with interest thereon at the rate of 9% per annum, by a decree dated 05/03/1981, and thereafter interest at 6% per annum until realisation and to pay the costs of the suit to the plaintiff. The appellant chose to pay the amount after deduction of the Income Tax at source. The case of the respondent was that he was entitled to get the payment under decree and there was no scope for deduction of income tax on the amount placing reliance in **All India Reporter Ltd.** (supra) wherein it was held that when an employee obtains a decree for arrears of salary, compensation for wrongful termination of service and salary due for the period of notice and also interest and costs, there was no scope for applying the provision for deduction of income-tax at source. The amount was payable as "judgment-debt" and not as "salary" and the judgment-debtor could not claim to deduct income-tax payable as salary. In the circumstances, the appeal was disposed off directing the appellant to pay a sum of ₹16,986.24 to the respondent and the costs of the appeal. The appellant had

contended that they had already paid the amount of tax deducted at source to the credit of the respondent in Bombay. In that context, Their Lordship of the Calcutta High Court made it clear that the appellant would be at liability to take steps for the recovery of the amount from the Income Tax Authority in accordance with the law and the respondent was directed to co-operate for the recovery of the amount.

19. It is a matter of record that the Department was not a party and was subsequently joined as a party to the petition vide the order dated 31/10/2017. The Department being an independent body which could take the decision before it when admittedly the respondent No.1 had filed his returns and then submitted the revised returns, any orders passed therein would be open to vertical challenge i.e. in hierarchical order before the various authorities either at the instance of the respondent No.1 or the Department as the case may be depending on the outcome of such proceedings. Therefore, as rightly submitted by Ms. A. Razaq, the learned Standing Counsel for the Department, no direction could be issued to the respondent No.4 to refund the amount deducted at source by the petitioner herein.

20. The respondent No.1 who had been driven to pursue his remedies before the Commissioner of Labour under Section 33(C) 1 of the Act cannot be held to task when it was the action of the petitioners to make the deduction contrary to the order of the Hon'ble Apex Court. It cannot at all be heard on behalf of the the petitioners that the order passed by the Labour Commissioner is perverse when he had duly considered the submissions of the parties, perused the documents and more pertinently the order of the Apex Court dated 08/02/2016 and on its proper appreciation and construction had held that the respondent No.1 was entitled to the amount of ₹11,40,292/- and accordingly ordered the issuance of the Recovery Certificate to the Mamlatdar, Tiswadi to proceed under Section 33(C) 1 of against the petitioner. Last but not the least, even while disposing off the application in the earlier Petition No.40 of 2004 vide the order dated 04/08/2017, there was a clear finding by this Court that the issue had been brought to a quietus pursuant to the order of the Hon'ble Apex Court dated 8/02/2016 and that the petitioners were directed to pay an amount of ₹42,50,000/- to the respondent and quite on the contrary the petitioners had deducted ₹11,40,291/- towards the tax at source compelling him to move the Labour Commissioner

under Section 33 (C)1 of the Act.

21. In the result, therefore, it is held that the petitioners shall pay the amount of ₹11,40,292/- to the respondent No.1 and shall initiate the proceedings before the Department for recovery of the said amount deposited on deduction of the tax at source.

22. In the result, the petition stands disposed off.

NUTAN D. SARDESSAI J.

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