

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 10th November, 2020

Date of decision: 4th December, 2020

+

W.P.(C) 3269/2018 & CM APPLs. 10178/2019, 17218/2020
UNION BANK OF INDIA Petitioner

Through: Mr. Rajat Arora, Advocate.

versus

MUJAHD QASIM Respondent

Through: Ms. Ayushi Jain, Advocate.

WITH

+

W.P.(C) 3286/2018 & CM APPLs. 10313/2019, 16861/2020
UNION BANK OF INDIA Petitioner

Through: Mr. Rajat Arora, Advocate.

versus

MOHAN SINGH Respondent

Through: Ms. Ayushi Jain, Advocate.

WITH

+

W.P.(C) 3293/2018 & CM APPLs. 10312/2019, 16862/2020
UNION BANK OF INDIA Petitioner

Through: Mr. Rajat Arora, Advocate.

versus

DINESH KAPOOR Respondent

Through: Ms. Ayushi Jain, Advocate.

WITH

+

W.P.(C) 3295/2018 & CM APPLs. 10179/2019, 16864/2020
UNION BANK OF INDIA Petitioner

Through: Mr. Rajat Arora, Advocate.

versus

MANOJ CHHETRI Respondent

Through: Ms. Ayushi Jain, Advocate.

WITH

+

W.P.(C) 3296/2018 & CM APPL. 12923/2018
UNION BANK OF INDIA Petitioner

Through: Mr. Rajat Arora, Advocate.

versus

**SECRETARY DELHI GENERAL WORKERS
UNION** Respondent

Through: Ms. Ayushi Jain, Advocate.

AND

+ **W.P.(C) 3304/2018 & CM APPLs. 48637/2018, 10311/2019,
17219/2020**

UNION BANK OF INDIA

..... Petitioner

Through: Mr. Rajat Arora, Advocate.

versus

RAKESH KUMAR VAID

..... Respondent

Through: Ms. Ayushi Jain, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The judgment is pronounced through video-conferencing.
2. All these petitions raise a common question – whether drivers, who were serving various Executives in the erstwhile Corporation Bank, which is now merged with the Union Bank of India (*hereinafter, 'Petitioner/Bank'*), are employees of the Bank. And if so, whether they are entitled to regularization. The Petitioner has filed these petitions challenging two sets of orders.
3. In W.P(C) 3296/2018, the challenge is to the industrial award dated 29th November, 2017 passed by Central Government Industrial Tribunal (“CGIT”) in ID No. 1/2014, wherein it was held that all the drivers/claimants are ‘Workmen’ and that there is an employer-employee relationship between the Bank and them. Accordingly, the Tribunal held that the demand of the drivers for regularization of their service was both legal and valid and had directed regularization of all these drivers.
4. A second set of awards were passed on the same date i.e. 29th

November, 2017 in complaints filed by the drivers, wherein the Tribunal held that the termination of drivers from employment, is contrary to law and therefore, they were directed to be reinstated in service. The challenge in the other writ petitions is to the various awards passed directing regularization of the Respondent-drivers.

Submissions

5. Mr. Rajat Arora, ld. counsel appearing for the Bank firstly takes this Court to the terms of reference as set out in the impugned award in ID No. 1/2014. He submits that the terms of reference are as under:

“Whether the demand of the Delhi General Workers' Union, D-195, Karampura, Shivaji Marg, New Delhi-15, against the Chairman-cum-Managing Director, Corporation Bank, H.O. Mangla Devi Temple Road, F.B. No.38, Mangalore-575001 (Karnataka)/ General Manager, Corporation Bank, Z.O. 16/10, Main Arya Samaj Road, Karol Bagh, New Delhi-15 for regularization of personal car drivers in the list enclosed at Annexure 1 is just valid and legal? if so, to what benefits the workmen are entitled to and what directions are necessary in the matter?”

6. Ld. counsel submits that in paragraph 12 of the Award, the Tribunal has rightly crystalized the issue as ‘*whether there is relationship of employer and employee between the management and claimants*’. However, according to him, having done so, the Tribunal thereafter steers in a wrong path by determining whether the drivers are ‘Workmen’ and thereafter based on this finding, comes to a conclusion that that there is an employer-employee relationship between them and the Bank. Mr. Arora points out that out of a total of 19 drivers, who were part of the reference in ID No. 1/2014, the

question before the Tribunal was only in respect of 10 of the drivers and crucially only 4 drivers, who had filed the complaints challenging their termination. This is because out of the 19 drivers, 3 were already regularized and thus the Tribunal, clearly, notes that the issues were to be decided in respect of only 10 drivers (para 24).

7. Ld. counsel submits that the manner in which the Tribunal considers whether the drivers were ‘Workmen’ or not, is in effect framing of a wrong question, which led to a wrong answer. He further submits that though the employee may be a ‘Workman’ under the Act, it cannot be presumed that an employer-employee relationship exists between said ‘workman’ and the Management in question. The conclusion that they are ‘Workmen’ and hence there is an employer-employee relationship between the parties is an incorrect conclusion. Ld. counsel submits that the cars, which were being driven by the drivers, were cars belonging to the Bank, which were given to Senior Executives of the Bank. However, salaries were never paid to the drivers directly by the Bank – the same were paid by the Executives, under whom the drivers were working, and the Bank was merely “reimbursing” the same to the said Executives. This is clear from the vouchers issued by the bank which clearly mention that it is ‘reimbursement of salary’

8. Mr. Arora submits that the Tribunal after noting the definition of ‘Workman’ under Section 2(s) of the Industrial Disputes Act 1947, framed the wrong question of law and, thus, the award is faulty. The awards challenged in W.Ps(C). 3269/2018, 3286/2018, 3295/2018, 3293/2018 and 3304/2018 though passed on the same date, primarily rely on the main award in ID No. 1/2014 that the termination of the drivers has been held to be illegal and back-wages have been directed to be paid by the Bank.

9. Ld. counsel submits that the fact that the drivers were not the regular employees of the Bank, is clear from various circumstances namely—

- i. No provident fund was deposited
- ii. No gratuity payment was made
- iii. Drivers do not have any pension
- iv. No appointment or termination letter was given
- v. No conditions of service were specified at the time of appointment
- vi. The Bank did not have any disciplinary control over the drivers.
- vii. Even at the stage of recruitment, no advertisement was given by the Bank and no test was conducted and it was purely up to the Executives to whom they wish to engage as drivers – the Executives were merely entitled to a car and reimbursement of salary of drivers.

10. Thus, the Tribunal has clearly erred, in holding that the drivers are employees of the Bank while giving direction for regularization as also in setting aside the termination of the Respondent-drivers.

11. Mr. Arora, has cited two sets of judgments dealing with – firstly, the test to determine the relationship between employer and employee and secondly, as to under what circumstances the regularization of employees can be done. He relies upon the judgment of *Workmen of Nilgiri Cooperative Market Society Ltd. v. State of Tamil Nadu & Ors. [AIR 2004 SC 1639]* to argue that there is no hard and fast rule to determine as to whether there is an employer-employee relationship between the parties and the same would be adjudicated in each case. Mr. Arora submits that the various factors that have been set out in paragraph 38 of the judgment are merely illustrative. Further, reliance is also placed by Id. Counsel on *Ram Singh and Ors. v. Union*

*Territory, Chandigarh & Ors. [(2004) 1 SCC 126], Balwant Rai Saluja v Air India Ltd. [AIR 2015 SC 375], and the recent judgment in Sushilaben Indravadan Gandhi & Anr. v. The New India Assurance Company Ltd. & Ors. [Civil Appeal No. 2235 of 2020, Decided on 15th April, 2020]. The submission of Mr. Arora on the basis of these three judgments is that ‘control’ is not the sole test to determine the existence of an employer-employee relationship. He submits that the Court ought to adopt a pragmatic approach and various factors would have to be considered – for example as stated in *Balwant Rai Saluja (supra)*, whether the employee was in effect under the direct control of the employer, after lifting of the corporate veil. Ld. counsel submits that the question as to whether there is a contract for service or contract of service would have to be determined, depending upon the nature of service. He submits that if the service, that is provided by the employees, is integral to the business of the employer, then it would be considered a contract of service and if the service is not integral to business, and is only an accessory, then it would be a contract for service. According to the Supreme Court’s judgment in *Sushilaben Indravadan Gandhi (supra)*, the economic reality of the relationship has to be considered, while determining the nature of employment.*

12. While connecting these judgements to the facts, Mr. Arora submits that the Petitioner being a Bank, the primary function of the Petitioner is to deal with the acceptance of deposits and issuance of loan and other lending activities. The function performed by the drivers, who were employed for the purpose of various executives of the Bank, is not essential or integral to the functions of the Bank. Accordingly, he submits that this was only a *contract for service* and the drivers cannot be considered employees of the Bank. He

submits that due to wrong questions having been framed by the Labour Court, a wrong conclusion has been arrived at.

13. Insofar as regularization is concerned, Mr. Arora submits that the essential settled position is that regularization is an executive function, which is to be performed by the Management. It is not the Court's duty to direct regularization unless there is an unfair labour practice, which the Court sees in a particular case. There are various circumstances to be considered such as whether there are posts, whether such posts are needed to be created, as well as the financial burden on the establishment. Without considering these factors, regularization cannot be directed. Ld. counsel further submits that unfair labour practices is an exceptional circumstance, where if a Court finds that the Management is deliberately keeping the regular posts vacant and is continuing to engage contractual workers, the same would be considered as a relevant factor. Only under these circumstances, can regularization be directed, in accordance with law.

14. Mr. Arora finally relies upon the judgment in ***Indian Drugs & Pharmaceuticals Ltd. v. Workmen, Indian Drugs & Pharmaceuticals Ltd. [(2007) 1 SCC 408]*** to argue that ad-hoc/daily wage employees cannot be regularized as the creation and abolition of posts is settled as being an executive function. If no vacant posts exist, the posts cannot be directed to be created by the Court.

15. In conclusion, Mr. Arora has cited the following three judgments: ***Postmaster General, Kolkata and ors. vs. Tutu Das (Dutta) [(2007) 5 SCC 317]***, ***UP Power Corporation Ltd. vs. Bijli Mazdoor Sangh [(2007) 5 SCC 755]*** and ***A. Uma Rani vs. Registrar, Cooperative Societies and Ors. [AIR 2004 SC 4504]*** to submit that in this fact scenario, the employer-employee

relationship has not been established and thus the award deserves to be set aside.

16. On the other hand, Ms. Aayushi Jain, Id. Counsel appearing on behalf of the various employees, submits that the existence of an employee-employer relationship is not to be determined on the basis of the designation given to the employee, but rather on the nature of the duties performed by the employee. She submits that the employees, herein, were not merely performing the duties of a driver for a specific executive, but in fact were engaged in performing various other functions on behalf of the Bank including, for example, collecting cheques, collection of cash, collection of packets and handing over of parcels. The said employees were also given letters by the Bank confirming that they were employed by the Bank. According to her, even the salary slips clearly show that the employees were paid directly by the Bank. The language used in the cash payment receipts/vouchers is that the employees are being paid a 'salary'.

17. Ms. Jain further submits that none of the employees were paid through the executives, and in fact, the evidence of the management witness, at page 100 of the paper book, shows that the witness MW1 had admitted that there were no documents to show that the Executive of the Bank had paid the driver. The management witness has also confirmed that the post of peon-cum-driver still exists in the Bank.

18. Ms. Jain, thereafter, refers to the order dated 6th April 2018, in which it was specifically recorded that the Bank is willing to regularize the workmen, subject to meeting of the requisite criteria as per the policy guidelines. She heavily relies upon the fact that initially there were a total of 19 peon-cum-drivers, as set out in Annexure-1 of the claims statement. Out

of the said 19, three have been admittedly regularized. The employees who have not yet been absorbed are Mr. Mujahid Qasim, Mr. Mohan Singh, Mr. Dinesh Kapoor, Mr. Rakesh Kumar and Mr. Manoj Chettri. She submits that since there are only five workmen left, who have already worked for more than ten years, their services deserve to be regularized in terms of the first order passed by this Court.

19. Ms. Jain, ld. counsel, emphasizes upon the fact that as per the evidence of MW1, Ms. Anjali Kumar, the Manager of Bank, the services of these persons were engaged after proper approval, right till the headquarters. In fact, the approvals were granted as per the requirements prescribed by the Bank and decisions were also ratified duly by the Head Office of the Bank. She thereafter submits that though the revision petitions have been filed by five employees, she also represents the Trade Union, which, in turn, comprises of all the other employees who have not been regularized. Out of the 19 drivers, two employees have already passed away.

20. Ld. counsel also relies upon various documents issued by the bank confirming that they were bank's drivers. For eg., page 90 of the paper book, is a letter issued by the Bank to Mr. Mujahid Qasim, stating that he is the Bank's driver. She further submits that the fact that these employees are direct employees of the Bank is clear, as these workmen have worked under more than one executive. According to her, whenever an executive is transferred, the driver is not transferred. In her submission, this proves that the drivers were not the personal employees of the executives, but rather were employees of the Bank. She submits that applying the economic control and integration test to determine the employer-employee relationship, the services of these employees deserve to be regularized.

21. Ms. Jain further relies upon various case laws. In the first place, Ms. Jain relies upon ***Hussain Bhai v. Alath Factory Employees Union***, AIR 1978 SC 1410, to canvass the proposition that the employer-employee relationship can be established by various facts. The test of economic control as well as the integration test can be applied to the facts of this case. She submits that as held in ***Hussain (supra)***, if the employer has economic control over the employee, that would be a good indication of the fact, to determine that the employee is a direct employee of the employer, and not of the contractor. She submits that any camouflage or make-believe methodology, that may be adopted, ought not to be accepted by the Court.

22. She further submits that the drivers, in the present case, used to drive the vehicles owned of the Bank and were being paid by the Bank. She submits that if the Bank closes down, the drivers would remain unemployed as they were not the personal drivers of the executives of the bank. She further submits that the vouchers, placed on record, clearly show that the Bank was reimbursing all their expenses. According to her, this question of fact, having been established before the Labour Court, does not deserve to be revisited in writ jurisdiction. She further submits that, applying the test of integration and economic control, the Court ought to hold that these drivers are the employees of the Bank itself. She relies upon these three judgments to support this proposition:

- ***Hussain (Supra)***
- ***India Literacy Board and ors. v. Veena Chaturvedi and ors.***
(2005) 10 SCC 79
- ***Bank of Baroda v. Ghemarbhai Harjibhai Rabari***, AIR 2005 SC 2799

23. Insofar as similar drivers having been regularized and there being availability of permanent posts, she submits that drivers are entitled to regularization in light of the following judgments:

- *State of Haryana v. Piara Singh (1992) AIR 2130*
- *Workmen of Bhurkunda Colliery of M/S Central Coalfields Ltd. v. The Management of Bhurkunda Colliery of M/S Central Coalfields Ltd, (2006) 3 SCC 297*
- *ONGC v. Krishan Gopal (2020) SCC Online SC 150*

24. On the strength of these three judgments, she submits that, by virtue of the Act being a beneficial legislation, in favour of the workmen, if there is a dispute between the employer and workman, the Court ought to exercise its powers in favour of the workman. For a Workman, the security of tenure is essential, which can only happen by regularization. When sanctioned posts exist, the non-regularization of few employees while others are being regularized, would completely be arbitrary and contrary to the guidelines laid down in *ONGC (supra)*. She submits that despite the fact that in *ONGC*, another two-judge bench's decision of the Supreme Court has been referred to larger bench, the guidelines are very clear, meaning that whenever there is unfairness being shown towards the Workman, and if the employer engages in an unfair labour practice, the temporary or daily wage workers ought to be regularized, as otherwise the same would be discriminatory in nature. She further submits that whenever temporary workmen have worked for a long duration, they ought to be regularized in their employment, so that they have a security of tenure and service, rather than being on a tender hook.

25. Ms. Jain, ld. counsel submits on the basis of all these judgments, that the Bank continues in its *malafide* / illegal conduct by challenging the Labour

Court's awards. Also, the Workmen in these matters are completely destitute as they do not have any employment, especially during the pandemic. Their only livelihood was the job which they were performing at the Bank. She further submits that despite interim orders passed by this Court, two of the drivers were removed from service which has entailed the Workmen to file a contempt petition before this Court. This, according to her, shows the perpetuation of illegal and *malafide* conduct by the Bank.

26. Ms. Jain, Id. Counsel concludes by submitting that, for all these reasons, the writ petitions filed by the Bank are liable to be dismissed, and the employees ought to be taken back into service. She further submits that the awards passed by the Tribunal should be upheld by this Court.

27. In rejoinder arguments, Mr. Arora, Id. counsel for the Bank, submits that the designation of these persons is not important and the question that the CGIT has framed, itself is a wrong question of law, i.e. as to whether they were workmen or not? He submits that even if they were workmen, the question that ought to have been framed is whether there existed an employer-employee relationship. He submits that even if the employees in these cases are workmen, that does not necessarily mean that they were employees of the Bank.

28. His second submission is that the relief of regularization can only be given if there is an "unfair labour practice". The said term is defined in the 5th Schedule of the Industrial Dispute Act, 1947. There are no allegations or findings to the effect that the Bank has indulged in any unfair labour practice. Thus, the relief of regularization could not have been granted. On this point, Ms. Jain, on the other hand, points out at that serial no.10 from this schedule would apply in the present case.

29. Mr. Arora thirdly submits that the documents relied upon by the workmen, for e.g.- the letters given to the licensing authority for renewal of license, or other such documents, would not by itself be sufficient to establish an employer-employee relationship, inasmuch as these employees have not been employed by the normal procedure of recruitment of the Bank. He submits that the ***ONGC v. Petroleum Coal Labour Union (2015) 6 SCC 494*** decision, that has been relied upon by the Tribunal, has in fact been referred to a Larger Bench in the judgment of the Supreme Court ***ONGC v. Krishan Gopal (2020) SCC Online SC 150***. Thus, according to him, reliance upon judgment of ***ONGC v. Petroleum Coal Labour Union (2015) 6 SCC 494*** by the Tribunal, may not be correct as it may not be good law anymore.

30. Mr. Arora finally concludes his rejoinder submissions by submitting that the usual recruitment of the Bank is either done through advertisement or through employment exchange. The Bank may be willing to consider the employees for regularization, so long as the basic criteria of employment is fulfilled. These were ad-hoc employees who were employed as drivers for the personal usage of the Executives of the bank and are not “entitled” to regularization.

Analysis and Findings

31. The short question is whether there exists an employer-employee relationship between the Bank and all the Respondents who were employed as drivers.

32. The case of the Union was that the drivers were appointed against sanctioned posts, after obtaining approvals from the Head Office. They used to work, not merely with the executives but would perform various other tasks

including taking clearance from one branch to others, collection of Cheque Books from one to another, carrying cash from one branch to another, taking deliveries of gadgets such as computers and their accessories from one branch to another, taking deliveries of the goods that were consigned to the respective branches from different airlines, taking deliveries of TDS cheques from other customers like the ministries, carrying cash against NSC/ deposits from post office, and other sundry works.

33. The Union also claimed that the cleaning expenses, salaries, petrol reimbursement etc. were given by the Bank. The Workmen then sought regularization which was not acceded to by the Bank. Upon the demand of regularization being raised by the Union, the Bank's attitude towards the drivers completely changed.

34. The drivers had worked for more than 240 days in each calendar year and some drivers were being selectively regularized. The Union representing the drivers approached the CGIT, on the ground that the drivers are entitled to be regularized from the date of initial appointment.

35. The Bank's case before the CGIT was that the drivers were the personal car drivers of the Executives, and it further pleaded that recruitment is by a proper process through the employment exchange only after the candidate fulfils the eligibility criteria. Their submission was that ad-hoc drivers cannot be given regularization as there is no master servant or employer-employee relationship.

36. The Bank disputed the averments of the Union. It, however, admitted that the expenses for maintenance, petrol and oil requirements, and reimbursement of salaries was given by the Bank, as they were fulfilling the needs of the higher-level officials in the Bank and were rendering services to

them. The Union filed a large number of documents, including letters, vouchers, logbooks etc. supporting its claim. Evidence was led before the CGIT, both by the Workmen and as also the Management. The Workmen exhibited all the documents including the vouchers for payment, voucher for overtime, travel allowance voucher, letters regarding outdoor duty, appointment letters, etc.

37. The witness on behalf of the Management confirmed that the bio-data photograph, driving license, address proof etc. of the drivers was sent to the Head Office of the Bank for ratification. The witness also confirmed that the parameters for engaging drivers was issued by the Head Office. He also admitted that logbooks are maintained, which show the activities conducted by drivers. He further admitted that posts for peon-cum-drivers have also been sanctioned. The witness, however, could not give the figures of personal drivers absorbed by the Bank into its service. He confirmed that three of the drivers were absorbed during the pendency of the dispute.

38. After perusing the pleadings and the evidence, the CGIT vide the impugned order dated 29th November 2017, directed for regularization of the services of the drivers. The findings of the CGIT in the impugned order are:

- The documents on record show that there is correspondence between the AGM and the Chief Manager of the Bank, regarding engagement of the drivers and verification of the drivers.
- Approval was sought for appointment of drivers from the Head Office.
- Enhancement of salary for drivers is mentioned in a number of letters.

- Various expenses towards petrol, maintenance etc. was being released by the Executives to the drivers.
- No post of personal driver exists in the Bank.
- The logbook of the vehicle, establishes the various activities which the drivers were engaged in.
- Claims for regularization of service have been considered by Board of Directors against the post of peon-cum-drivers.
- Drivers were also required to wear uniforms prescribed by the Bank for which payment was also made by the Bank.
- Out of the 19 drivers, only 10 drivers are left for being regularized. Many have already been regularized.
- When an Executive is either transferred or if they retire, the driver continues to serve the new incumbent.
- The drivers were getting salary from Bank's kitty.
- The drivers were also doing other jobs assigned to them by the Executives and hence cannot be termed as personal drivers of the executives.

39. Thereafter CGIT analyzed the applicable case law and held that the demand of the drivers for regularization is legal and valid. The operative portion of the award reads as under: –

“32. In view of this, the reference is answered in favor of the claimants and against the management by holding that demand of the claimants for regularization of their service is both legal and valid. Services of the claimants herein, whose names are mentioned in Annexure-I attached with the statement of claim, are liable to be regularized. The Award is passed accordingly. Let a copy of this

*Award be sent for publication as required under
Section 17 of the Act.”*

40. The submissions of both counsels are recorded in detail above. After the conclusion of submissions, this Court had directed the ld. counsels to place on record the details of actual number of drivers in respect of whom the writs are to be decided inasmuch as there were several subsequent events which had taken place including demise, non-traceable person etc. Accordingly, affidavits were filed both by the Union and by the Bank. On 10th November 2020, after perusing the affidavits filed, it was recorded as under:

“2. Both the parties have filed their respective lists Workmen. After discussing the list with ld. counsels, it is clear that the present petitions would now only relate to 11 drivers as contained in the list filed by the Union for the Workmen, instead of 19 drivers as mentioned in the petitions. Some of the drivers are not traceable, some have been permanently absorbed and one driver has passed away.

3. It is also informed to the Court that out of the 11 drivers, Mr. Gangadhar Kushwaha, Mr. Ashok Kumar, Mr. Rajesh Kumar S/o Shri Purushotam Das and Mr. Narain Ram are working on temporary basis with the Bank with four different executives.

xxx”

41. Thus, the present writ petitions would now be restricted to 11 drivers, namely, Mr. Bachan Singh, Mr. Navin Kumar, Mr. Mujahid Qasim, Mr. Rakesh Kumar Vaid, Mr. Manoj Chettri, Mr. Mohan Singh Rawat, Mr. Dinesh Kapoor, Mr. Gangadhar Kushwaha, Mr. Ashok Kumar, Mr. Rajesh Kumar and Mr. Narain Ram. During the pendency of industrial disputes, three drivers, namely, Mr. Baldev, Mr. Babu Lal and Mr. Surinder Kumar have been regularized by the Bank.

42. Both sides have cited a large number of cases in support of their respective arguments. The various tests to establish as to whether an employer-employee relationship exists or not, are well settled. The same need not be reiterated. The control test, the integration test etc. are also well established. In ***Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of Tamil Nadu and Ors., (2004) 3 SCC 514***, the Supreme Court held that the control test and organization are not the only factors set to be decisive. Various other factors would have to be considered as well. The Court held that:

“38. The control test and the organization test, therefore, are not the only factors which can be said to be decisive. With a view of eliciting the answer, the court is required to consider several factors which would have a bearing on the result : (a) who is the appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job, e.g. whether, it is professional or skilled work; (g) nature of establishment; (h) the right to reject.”
xxx”

43. In ***Ram Singh and Ors. v. Union Territory, Chandigarh and Ors., (2004) 1 SCC 126***, the Supreme Court has held that the actual nature of the relationship ought to be established before the Tribunal, as the same is a question of fact. The Supreme Court further held that the integration test was one of the relevant tests, and even though the formal employment is by an independent contractor, management is not relieved of its liability. The Court needs to discern as to whether the relationship is being camouflaged in any manner.

44. In ***Balwant Rai Saluja v. Air India Ltd., AIR 2015 SC 375*** canteen

workers were held to be employees of the corporation and further factors to determine the relationship, were laid down. The court held that:

*“61. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia, (i) who appoints the workers; (ii) who pays the salary/remuneration; (iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v) whether there is continuity of service; and (vi) extent of control and supervision, i.e. whether there exists complete control and supervision. As regards, extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case (supra), the International Airport Authority of India case (supra) and the NALCO case (supra).
xxx”*

45. In ***Hussainbhai, Calicut v. The Alath Factory Thezhilali Union, Kozhikode and Ors., (1978) 4 SCC 257***, the Supreme Court observed that the enquiry is meant to discern the naked truth, though the arrangement on paper maybe different.

46. In the recent decision in ***Sushilaben Indravadan Gandhi & Anr. v. The New India Assurance Company Limited (SLP (Civil) No. 1170 of 2019)***, the difference between an independent teacher and a regular teacher was discussed in the context of the control test, however, the Supreme Court held that the control test itself may not be sufficient to establish employer-employee relationship. The Supreme Court observed:

“xxx

24. A conspectus of all the aforesaid judgments would show that in a society which has moved away from being a simple agrarian society to a complex modern society in the computer age, the earlier simple test of

control, whether or not actually exercised, has now yielded more complex tests in order to decide complex matters which would have factors both for and against the contract being a contract of service as against a contract for service. The early 'control of the employer' test in the sense of controlling not just the work that is given but the manner in which it is to be done obviously breaks down when it comes to professionals who may be employed. A variety of cases come in between cases which are crystal clear - for example, a master in a school who is employed like other employees of the school and who gives music lessons as part of his employment, as against an independent professional piano player who gives music lessons to persons who visit her premises. Equally, a variety of cases arise between a ship's master, a chauffeur and a staff reporter, as against a ship's pilot, a taxi driver and a contributor to a newspaper, in order to determine whether the person employed could be said to be an employee or an independent professional. The control test, after moving away from actual control of when and how work is to be performed to the right to exercise control, is one in a series of factors which may lead to an answer on the facts of a case slotting such case either as a contract of service or a contract for service. The test as to whether the person employed is integrated into the employer's business or is a mere accessory thereof is another important test in order to determine on which side of the line the contract falls. The three-tier test laid down by some of the English judgments, namely, whether wage or other remuneration is paid by the employer; whether there is a sufficient degree of control by the employer and other factors would be a test elastic enough to apply to a large variety of cases. The test of who owns the assets with which the work is to be done and/or who ultimately makes a profit or a loss so that one may determine whether a

business is being run for the employer or on one's own account, is another important test when it comes to work to be performed by independent contractors as against piece-rated labourers. Also, the economic reality test laid down by the U.S decisions and the test of whether the employer has economic control over the workers' subsistence, skill and continued employment can also be applied when it comes to whether a particular worker works for himself or for his employer. The test laid down by the Privy Council in Lee Ting Sang v. Chung Chi-Keung [1990] 2 A.C. 374, namely, is the person who has engaged himself to perform services performing them as a person in business on his own account, is also an important test, this time from the point of view of the person employed, in order to arrive at the correct solution. No one test of universal application can ever yield the correct result. It is a conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight. Ultimately, the Court can only perform a balancing act weighing all relevant factors which point in one direction as against those which point in the opposite direction to arrive at the correct conclusion on the facts of each case.

25. Given the fact that this balancing process may often not yield a clear result in hybrid situations, the context in which a finding is to be made assumes great importance. Thus, if the context is one of a beneficial legislation being applied to weaker sections of society, the balance tilts in favour of declaring the contract to be one of service, as was done in Dharangadhara

(supra), Birdhichand (supra), D.C.Dewan (supra), Silver Jubilee (supra), Hussainbhai (supra), Shining Tailors (supra), P.M. Patel (supra), and Indian Banks (supra). On the other hand, where the context is that of legislation other than beneficial legislation or only in the realm of contract, and the context of that legislation or contract would point in the direction of the relationship being a contract for service then, other things being equal, the context may then tilt the balance in favour of the contract being construed to be one which is for service.
XXX”

47. In ***Mudra Communications v. Ganesh Kumar and Ors., [W.P.(C) 4913/1997, decided on 21st April 2010]***, the Court discussed the judgment in ***Punjab National Bank v. Ghulam Datsagir, (1978) ILLJ 312 SC*** where the plea was that the workman was the personal driver of the Executive of the Bank. In that case, the Delhi High Court had held that the workmen had failed to prove that the control and supervision over his employment was with the Bank and this was affirmed by the Supreme Court. In ***Bank of Baroda v. Ghemarbhai Harjibhai Rabari, AIR 2005 SC 2799***, the employee had produced three vouchers to show that he had been paid sums of money towards wages, and that the same was debited to the Bank. The Supreme Court held that the driver was the Bank’s employee. The court in ***Bank of Baroda (supra)*** held:

“XXX

While there is no doubt in law that the burden of proof that a claimant was in the employment of a Management, primarily lies on the workman who claims to be a workman. The degree of such proof so required, would vary from case to case. In the instant case, the workman has established the fact which, of course, has not been denied by the bank,

that he did work as a driver of the car belonging to the bank during the relevant period which come to more than 240 days of work. He has produced 3 vouchers which showed that he had been paid certain sums of money towards his wages and the said amount has been debited to the account of the bank. As against this, as found by the fora below, no evidence whatsoever has been adduced by the bank to rebut even this piece of evidence produced by the workman. It remained contented by filing a written statement wherein it denied the claim of the workman and took up a plea that the employment of such drivers was under a scheme by which they are, in reality, the employee of the Executive concerned and not that of the bank; none was examined to prove the scheme. No evidence was led to establish that the vouchers produced by the workman were either not genuine or did not pertain to the wages paid to the workman. No explanation by way of evidence was produced to show for what purpose the workman's signatures were taken in the Register maintained by the bank. In this factual background, the question of workman further proving his case does not arise because there was no challenge at all to his evidence by way of rebuttal by the bank.

.....

For the reasons stated above, we are of the considered opinion that the respondent-workman in this case has established his claim as held by the tribunal, and we find no reason whatsoever to interfere with the impugned order.

xxx”

However, in ***Mudra Communications (supra)***, a 1d. Single Judge of this Court cited the ***Bank of Baroda*** decision but refused to hold that the driver was an employee of the Management, as no vouchers have been produced to

show payment of salaries.

48. In the light of the above decisions, the factors which are to be considered, to determine as to whether an employer- employee relationship exists would *inter alia*, include:

- (a) who is the appointing authority;
- (b) who is the pay master;
- (c) who can select and dismiss;
- (d) how long does the alternative service last;
- (e) the extent of control and supervision;
- (f) the nature of the job, e.g., whether it is professional or skilled work;
- (g) nature of the establishment;
- (h) the right to reject;
- (i) who can take disciplinary action;
- (j) whether there is continuity of service;
- (k) whether the person was fully integrated into the employer's concern (integration test);
- (l) who organizes the work, i.e., supplies tools and materials; and
- (m) who exercises control on when and how the work is to be performed.

49. An overall analysis of all the relevant judicial decisions, would show that the facts herein, are similar to the facts of ***Bank of Baroda v. Ghemarbai Harjibhai Rabari (supra)***. In the said case, the Supreme Court was dealing with a situation wherein, the employees had produced cogent evidence in the form of vouchers to show that they worked as car drivers for the Bank. The Supreme Court held that the employees had discharged their onus by producing these vouchers and hence the award of the CGIT, reinstating the

Workmen with full back wages, was upheld by the Supreme Court.

50. By applying the above tests, analyzing the case laws cited, and perusing the documents on record, as also the findings of the CGIT, there is no doubt that an employer-employee relationship exists between the Bank and the drivers. This is clear from an analysis of the documents placed on record which establishes the following facts:

- (a) All Respondents were working as drivers with various Executives of the Petitioner Bank.
- (b) At the time of appointment, the biodata of the drivers was submitted to the Bank, which was thereafter forwarded to the personnel administrative division of the Bank, located in the Head Office at Mangalore.
- (c) The salary for the drivers was being reimbursed by the bank to the Executives concerned, by means of vouchers.
- (d) The drivers have served in the Bank for several years.
- (e) The drivers did not merely work for the Executives, but also did various other sundry jobs such as collection/delivery of documents/packets/parcels/items/equipment from various locations for the Bank.
- (f) Expenses incurred by them were reimbursed by the Bank.
- (g) The Bank has issued letters confirming the salaries earned by the drivers.
- (h) The Bank has facilitated the driving license being obtained by the drivers, by issuing them certificates that they are working in the Bank. The text of one such certificate is set out below: –

“This is to certify that Sh. Naresh kumar, s/o Sh. Daya ram is an employee of our bank. He is working with us since last four years. As per our records he is residing at D-5/103, Tisra Pusta, Vijay Colony, new Usman Pur, Delhi-110053.

This certificate is issued in his specific request as he has to produce for making driving license.

We confirm the same.”

- (i) The vouchers issued by the Bank for the monthly payments to the drivers, mention the particulars as “*amount drawn for reimbursement of driver*” or the “*amount paid to the driver. Reimbursed*” @ **page 120, 121** of the paper books “*cash paid to Surinder on account of car driver salary month of May 2006 by AGM*” @ **page 124**; etc.
- (j) Copies of logbooks showing the details of travel of the car, petrol consumed, purpose etc.

The above facts have been gleaned from the large number of documents placed on record and cannot be disputed by the Bank.

51. The documents on record also show that the drivers have not been exclusively used for the executives of the Bank but have also been serving the Bank in various roles including picking up parcels, computers, running errands, claiming reimbursements, taking delivery of cars and other sundry jobs. Further, the Bank has given them letters and certificates, repeatedly confirming that they are the drivers of the Bank for issuance of licenses and for renewal of driving licenses. The initial appointment was also made after confirmation with the Head Quarters of the Bank. Complete reimbursement of salaries and well as expenses of the drivers has been given by the Bank. A

logbook also has been maintained to supervise their day-to-day movements and activities.

52. Therefore, irrespective of whichever test is applied, whether it be the control test, or the integration test or any of the other tests, the above facts clearly show that the functions performed by the drivers was integral to the everyday working of the bank. The documents establish the existence of employer-employee relationship and that the drivers were the employees of the Bank. They were not retained through an independent contractor and that is not even the case of the Bank. The Bank's case that the drivers were exclusively working for Executives is also negated, as it has been proved, on record, that the drivers would continue to remain in the same place irrespective of the transfer or retirement of the Executive and they would be placed under different Executives or the incumbent. The case of the Bank that they were employees of the Executives is thus belied.

53. Hence, in view of the above facts and discussion, this Court has no doubt that the drivers were the employees of the Bank.

54. Dealing with the question of regularization of the drivers in the Bank, the bank itself was willing to regularise the employees as recorded in the order dated 6th April 2018 which reads:

W.P.(C) 3269/2018 & CM No.12882/2018 (stay)

1. By impugned Award dated 29.11.2017 the Industrial Adjudicator while allowing the complaint under Section 33A of the Industrial Disputes Act, 1947 (in short "I.D. Act") filed by the respondent directed his reinstatement with the petitioner Bank observing that at the time of terminating his services no approval as required under Section 33 of the I.D. Act was obtained from the Court and termination was illegal.

2. *Learned counsel for the petitioner submits that the respondent was personal Driver of the Executive/Manager of the petitioner Bank and there was no relationship of employer and employee between the parties. However, he submits that there is a policy of regularisation of such personal Drivers with the petitioner Bank as per the policy/guidelines subject to meeting out the requisite criteria.*
3. *On taking steps, issue notice to the respondent by all permissible modes.*
4. *List on 19.11.2018. Meanwhile, no coercive steps shall be taken against the petitioner till the next date of hearing.*

Even during oral arguments, Ld. Counsel for the bank has submitted that the bank is willing to regularise, however, subject to certain conditions such as fulfilment of eligibility criteria etc.,

55. The Supreme Court has recently considered the parameters for regularization of employees in ***Oil and Natural Gas Corporation v. Krishan Gopal (supra)***. The Court held:

“xxx

23. *The following propositions would emerge upon analysing the above decisions:*

- (i) *Wide as they are, the powers of the Labour Court and the Industrial Court cannot extend to a direction to order regularisation, where such a direction would in the context of public employment offend the provisions contained in Article 14 of the Constitution;*
- (ii) *The statutory power of the Labour Court or Industrial Court to grant relief to workmen including the status of permanency continues to exist in circumstances where the employer has indulged in an unfair labour practice by not filling*

up permanent posts even though such posts are available and by continuing to employ workmen as temporary or daily wage employees despite their performing the same work as regular workmen on lower wages;

(iii) The power to create permanent or sanctioned posts lies outside the judicial domain and where no posts are available, a direction to grant regularisation would be impermissible merely on the basis of the number of years of service;

(iv) Where an employer has regularised similarly situated workmen either in a scheme or otherwise, it would be open to workmen who have been deprived of the same benefit at par with the workmen who have been regularised to make a complaint before the Labour or Industrial Court, since the deprivation of the benefit would amount to a violation of Article 14; and

(v) In order to constitute an unfair labour practice Under Section 2(ra) read with Item 10 of the Vth Schedule of the ID Act, the employer should be engaging workmen as badlis, temporaries or casuals, and continuing them for years, with the object of depriving them of the benefits payable to permanent workmen.

xxx"

56. Thus, regularization is not to be directed in a mechanical manner. The regularization of employees is the sole prerogative of the management. Unless and until the employee has indulged in an unfair labour practice, temporary or daily wage employees/ad-hoc employees cannot be regularized. The exception to that is contained in paragraph 23 (iv) of the said judgment, where the Supreme Court has held that if similarly situated workmen have been regularized, then other workmen cannot be deprived of the same benefit. In view of the fact that various drivers who were similarly situated have already

been regularized by the Bank, not extending the same benefit to the 11 drivers, to whom these petitions relate to, would be discriminatory in nature, and violative of Article 14 of the Constitution.

57. For whatever reasons, the drivers who were similarly placed have already been regularized and they as well as the others have rendered long service. Each of the drivers, in these petitions, has been employed with the Bank for at least 10 years. Considering the long duration of service and the fact that they are clearly employees of the Bank, their services deserve to be regularized in accordance with the judgment of the Supreme Court in *Oil and Natural Gas Corporation v. Krishan Gopal (supra)*.

58. Mr. Arora, Id. Counsel for the Bank, has raised a fine distinction in the wording of the reference and the manner in which the CGIT considered the documents in evidence, on record. The distinction between an “employee” and a “workman” though existing in law, the conflation between the two by the CGIT would not affect the final relief being granted in these cases, as the facts show that there exists an employer-employee relationship.

59. Accordingly, the impugned order by the CGIT does not warrant any interference. The reinstatement of the employees is upheld. It is directed that the bank shall regularize the services of the 11 drivers whose names are mentioned in the paragraph above (*paragraph 41*).

60. All writs and pending applications are dismissed in the above terms. Necessary steps shall be taken by the Bank within 6 weeks.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 4, 2020

Rahul/Ak