

(1992) 07 P&amp;H CK 0014

**High Court Of Punjab And Haryana At Chandigarh****Case No:** Civil Writ Petition No. 14219 of 1991

Smt. Avta Saha

APPELLANT

Vs

Canara Bank and Another

RESPONDENT

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**Date of Decision:** July 28, 1992**Acts Referred:**

- Banking Regulation Act, 1949 - Section 10, 10(1)
- Constitution of India, 1950 - Article 14, 16, 226
- Contract Act, 1872 - Section 201
- Industrial Disputes Act, 1947 - Section 25F

**Citation:** (1994) 1 ILR (P&H) 303**Hon'ble Judges:** Jawahar Lal Gupta, J**Bench:** Single Bench**Advocate:** Dinesh Kumar, for the Appellant; Ashok Jagga, for the Respondent

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**Judgement**

Jawahar Lal Gupta, J.

The Petitioner is a widow. She claims a right to be appointed on compassionate grounds as an Agent under the New Nitya Nidhi Scheme being run by the Canara Bank, Bangalore (hereinafter referred to as "the Bank"). The claim having been rejected by the Bank by passing orders dated May 17, 1991, May 21, 1991 and August 8 1991 (Annexures P.4 P.5 and P.7) she prays for the issue of a writ of certiorari, mandamus or any other writ, order or direction quashing these orders. A few facts may be noticed.

2. The Petitioner's husband (Mr. Ajay Kumar Saha) was working with the Bank as an Agent under the New Nitya Nidhi Scheme. A copy of the agreement dated November 30, 1983 between Mr. Saha and the Bank has been produced as Annexure P.1 Reference to the various terms of the agreement shall be made at the appropriate state. Unfortunately, Mr. Paha expired on April 1, 1991. on his death, the Petitioner submitted an application to the Bank for employment on

compassionate grounds. A copy of this application has been produced as Annexure P.2. It is averred that she submitted another application on May 17, 1991, a copy of which has been produced as Annexure P.3. The Petitioner's claim was rejected,--vide letters dated May 17, 1991 and May 21, 1991. It was pointed out by the Bank that "the scheme for employment on compassionate grounds has been evolved in our Bank to provide employment to dependents of our employees who die while in harness. N.N.N.D. Agents are not our employees." The Petitioner then, served a notice dated June 22, 1991 through her counsel, a copy of which has been produced on the record as Annexure P.6. The Bank sent a reply,--vide letter dated August 8, 1991. The Petitioner's claim was stated to be untenable. In the notice sent by the counsel for the Petitioner, even a claim for gratuity and certain other amount was also made. The claim for gratuity was also declined on the ground that the Petitioner's husband was not an employee of the Bank. With regard to the amount claimed by the Petitioner on account of arrears due to her husband, it was mentioned that the payment shall be made after completion of procedural formalities. Aggrieved by the action of the Bank in rejecting the Petitioner's claim for employment on compassionate grounds as also for the payment of gratuity, the Petitioner has approached this Court through the present writ petition. The action of the Bank has been challenged on the various grounds. It has been claimed that the Bank is an industry and that Petitioner's husband was a workman. It has also been claimed that even according to the agreement executed between the Petitioner's husband and the Bank, there was contract of service. Reliance has been placed on the decision of a Division Bench of the Madras High Court in the Management of Indian Bank Madras v. P.O. Industrial Tribunal Central Madras 1991 Lab .I.C. 552, in support of her claim.

3. A written statement has been filed by way of an affidavit of the Senior Manager of the Bank. It has been averred by way of a preliminary objection that there is no violation of fundamental right which may entitle the Petitioner to file the present petition. It has been further averred that the claim of the Petitioner is, in fact, barred by the provisions of Section 10 of the Banking Regulation Act, 1949 (hereinafter referred to as "the Act") which "envisages that no Banking Company can employ or continue the employment of any person whose remunerations take the form of Commission or a share in the profit of the Company." Specific reference has been made to the provision of Section 10(1)(b)(ii) of the Act. It has also been averred that the Petitioner's husband was never as employee or workman of the Bank and thus the claim is wholly untenable. Further, the Respondents aver that the "employment is not heritable." In any event, the Respondents aver that the dispute between the parties is an industrial dispute and that the appropriate remedy is before the Tribunals constituted under the Industrial Disputes Act. Even on merits, the claim of the Petitioner has been contested. It has been inter alia averred that u/s 201 of the Indian Contract Act, an agency is terminated on the death of the Agent. Similarly, with regard to the claim, for gratuity of the Petitioner, it has been stated that her

husband was only an Agent and no gratuity was admissible to him. Further, an extract from, the Hand-book on Staff matters relating to the matter on compassionate grounds has been produced to show that the scheme has been "evolved to help dependents of our employees who die or become permanently disabled while in harness, to overcome the immediate. financial difficulties faced by dependents of the deceased employees on account of the sudden stoppage of main source of income. However, the employment on compassionate grounds cannot be claimed as a matter of right." (Emphasis supplied).

4. The Petitioner has filed a replication reiterating the stands taken in the petition.

5. The matter had initially come up for hearing on March 12, 1992. Keeping in view the fact that the Petitioner is a widow, Mr. Ashok Jagga, learned Counsel for the Respondents, was asked to explore the possibility of the grant of an agency to the Petitioner. In the order, it was inter alia observed that "it is hoped that in the circumstances of the case and particularly the fact that the Petitioner is a young widow, the authority would consider the case sympathetically and do the needful before the next date of hearing." In response to this order, the Bank had made an offer to grant an Agency to the Petitioner subject to the condition that she would not claim to be a workman. Mr. Dinesh Kumar, learned Counsel for the Petitioner was not willing to accept this condition. In fact, he insisted that the Petitioner is not inclined to give up her rights as a workman. Consequently, it became necessary to hear and decide the matter.

6. Mr. Dinesh Kumar has contended that the Petitioner's husband was an employee of the Bank and, therefore, under the instructions issued by the Bank, she was entitled to be employed as an Agent. On the other hand, Mr. Ashok Jagga, contended that the claim of the Petitioner was wholly untenable. He reiterated the various submissions made in the written statement filed on behalf of the Respondents.

7. Was the Petitioner's husband an employee of the Bank? The relationship has commenced with an agreement which has been produced as Annexure P.1 by the Petitioner. By this agreement "the terms and conditions governing the jural relationship of Principal and Agent between the Bank and the Agent" were recorded. This agency was to commence from the date of the execution of the agreement and was to continue to remain in force until otherwise terminated by the Bank at its discretion. Besides mentioning various circumstances under which the agency may be terminated at any time, it was postulated that "the Bank may in its absolute discretion, terminate the agency without any prior notice at any time; without assigning any reason whatsoever and the Agent shall not be entitled to question such termination in any manner." It was also provided that the Bank shall pay to the Agent "commission at the, rate/rates determined by the Bank from time to time. The Agent shall not be entitled to claim any other amount by way of reimbursement, remuneration, honorarium, allowances, or otherwise or benefits of

any other type whatsoever." It was also postulated that the Agent "shall have his own hours of work for collection of amounts and the Bank shall not have any right to control the manner in which the N.N.N.D. Agent shall work except to the extent necessary to ensure that the deposit amounts collected from time to time are on proper acquaintance." Finally, it was also provided that "the Agent has to make his own arrangement for transport or other conveyance at his/her own cost and the Agent is in no way required to subject himself/herself to the general discipline of the Bank as if applicable to an employee of the Bank."

8. It is thus apparent that the Agent was not required to attend office at a fixed time every day. He did not have to mark his presence. He was not obliged to attend office up to a fixed hours. He was not subject to the control and direction of the Bank in respect of the manner in which the work was to be done. He was not entitled to any fixed wages. The Agency could be terminated at any time without any notice or assigning any reason. The Agent was not entitled to any notice nor was the Bank obliged to disclose some lawful justification. In fact, the disciplinary control which an employer exercises over an employee was completely absent. The agreement categorically provided that the Agent is "in no way required to subject himself/herself to the general discipline of the Bank...." In this situation, it appears clear as has been recorded in the agreement itself, that there was only a "jural relationship of Principal and Agent" between the Bank and the Petitioner's husband. He was not an employee. He was not a workman. It may be said that the Petitioner's husband was engaged as a Commission Agent but it cannot be said that he was "employed". He was thus not an employee.

9. In any event, the question whether a relationship of employer and employee existed between the parties is a mixed question of law and fact. It is not a question which can be appropriately decided in proceedings under Article 226 of the Constitution. Keeping in view the pleadings of the parties and the material placed on record, it appears impossible to hold that the Petitioner's husband was an employee of the Bank.

10. Mr. Dinesh Kumar has relied strongly on the decision of a Division Bench of the Madras High Court in *Management of Indian Bank v. Presiding Officer, Industrial Tribunal Madras* (supra). This is a case in which the Management of the Indian Bank had challenged the award of the Labour Court: It was found as a fact that the "Agent was paid remuneration. The Agent was required to attend the Bank daily and also to do some clerical work. The agreement provided for termination of agency on one month's notice which showed that it was a contract of service. There was sufficient control over the work of the Agent by the Bank." In the present case, it is absolutely clear that the agency was terminable at any time without any prior notice and without assigning any reason; There was thus no contract of service. A perusal of the agreement further shows that the Bank had to pay commission to the Agent at the rates determined by it from time to time. There were no fixed wages. It thus

appears that the factors which persuaded the Division Bench of the Madras High Court to hold that there was a relationship of employer and employee and that the Agent was a workman do not appear to exist in the present case. Even otherwise, I have reservation about the view expressed by the Court; Assuming, the agent is a workman and the Bank is constrained to trench him, what is the rate at which he will be paid the retrenchment compensation? There is no fixed rate of wages. In my view, it shall be very difficult, if not impossible, to comply with the provisions of Section 25-F of the Industrial Disputes Act. Nor is it possible to lose sight of the provisions of Section 10 of the Banking Regulation Act, 1949 (hereinafter referred to as "the Act") which, debars the Bank from employing any person "whose remuneration or part of whose remuneration takes the form of commission or of a share in the profit of the Company." It is thus held that the Petitioner's husband was not an employee of the Bank.

11. It is in the background of this finding that the Petitioner's claim as made out in this petition has to be examined. The provision regarding employment on compassionate grounds is contained in the Hand-book on Staff matters prepared by the Bank. A copy of the relevant extract appears to have been produced as Annexure R.1. The scheme has been "evolved to help dependents of our employees...." Since the Petitioner's husband was not an employee of the Bank, she is not qualified to claim employment on compassionate grounds. Even otherwise, the scheme also provides that the employment on compassionate grounds "cannot be claimed as a matter of right." It is thus only a concession. Even if it were to be assumed for the sake of argument that the Petitioner's husband was an employee, she could not have claimed appointment as a matter of right. The Writ Court cannot issue a mandamus commanding the employer to extend a concession to a person. Existence of a right is a necessary precondition. It is totally absent in the instant case. Furthermore, one cannot also lose sight of the fact that every citizen has a right to equality of opportunity under Article 16 of the Constitution. Instructions for grant of employment on compassionate grounds have to be strictly construed so as to avoid any criticism of their being violative of Article 16. In a country where poverty and unemployment stock the land, even bounty and concession have to be accorded in such a way that they do not attract the criticism of being violative of Article 16 of the Constitution. Compassion has to be invoked in the rarest of cases. The effort should be only to ensure that the family is able to survive and not that the posts in public service have to be treated as hereditary and on the death of the original employee his heir or dependent have to be automatically employed on the same or another equivalent post. Otherwise, I am afraid, a concession if interpreted a right, would degenerate into an act of discrimination and attract the wrath of Articles 14 and 16 of the Constitution. Consequently, the prayer made for the quashing of the orders rejecting the Petitioner's claim for appointment or for the issue of a writ of mandamus directing the Respondent-Bank to appoint her cannot be accepted.

12. Even though, learned Counsel had not addressed any argument regarding the payment of gratuity, it may be mentioned that in there agreement between Petitioner's husband and the Bank it was specifically mentioned that the Agent shall not be entitled to claim any other amount or b profit of any type whatsoever. Accordingly, even the claim for gratuity cannot be sustained.

13. In view of the finding that the relationship between an Agent and the Bank is not of master and servant or employer and employee, but is only that of a Principal and Agent, it is impossible to hold that an Agent is a workman. Consequently, this petition is wholly lacking in merit. It is dismissed.

14. As already noticed above, the Bank had offered to give an agency to the Petitioner if she gives an undertaking that she would not claim the status of a workman. The claim of the Petitioner has been rejected by me. In view of this situation, if she now applies to the Bank and gives an undertaking that she would not claim to be a workman, it is hoped that the Bank would consider her case sympathetically and mitigate the hardships that she may undoubtedly be facing.