JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3842 of 2018
Developments In Literacy
Versus
The Assistant Commissioner (City)/Authority under Payment of Wages Act, ICT Islamabad and another

Date of Hearing:	13.02.2020
Petitioner by:	Syed Hassan Ali Raza and Mr. Hamza Wajid, Advocates.
Respondents by:	Syed Zia ul Hassan Bokhari, Advocate for respondent No.2.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Developments In Literacy through Ms. Sadia Hashir, Chief Operating Officer, impugns the order dated 13.09.2018 passed by the Assistant Commissioner (City)/Authority under Payment of Wages Act, 1936 (**"P.W.A."**), whereby respondent No.2 (Sohail Farooq) was held entitled to his claim for gratuity amounting to Rs.7,42,960/-.

2. The facts essential for the disposal of the instant petition are that the petitioner is a society registered under the provisions of the Societies Registration Act, 1860 **("the 1860 Act").** A certificate of registration was issued by the Registrar, Joint Stock Companies, Islamabad to the petitioner on 10.03.2003. As per the petitioner's Memorandum of Association **("MoA"),** its purposes and objects are to encourage and facilitate the improvement and use of educational resources in literacy development in Pakistan, and to engage in charitable purposes and social welfare activities strictly on a non-profit basis. Paragraph vi of the petitioner's MoA provides that it shall confine its activities only to these purposes and objects and the income and property derived from whatever source shall be applied solely towards promoting its objects and no portion of its income shall be paid by way of dividend, profit or bonus to any member, office bearer or otherwise.

3. It may be mentioned that the Federal Board of Revenue, in exercise of the powers conferred under Rule 212(1)(b) of the Income

Tax Rules, 2002, approved the petitioner as a non-profit organization under Section 2(36) of the Income Tax Ordinance, 2001.

4. On 04.11.2010, respondent No.2 was appointed as a Site Engineer at the petitioner's Islamabad office. Respondent No.2 was to be on probation for a period of three months. During the probation period, respondent No.2's employment contract could be terminated with a notice of one week. On 04.02.2011, respondent No.2's employment was confirmed on completion of his probation period. Subsequently, respondent No.2 was promoted to the position of Manager (Construction).

5. Vide letter dated 17.04.2017, the petitioner informed respondent No.2 that his services were no longer required. In the said letter, the petitioner appreciated respondent No.2's valuable contribution towards his employer. On 06.06.2017, respondent No.2 filed an application under Section 15(2) of the P.W.A. before the *"Authority under the Payment of Wages Act for Islamabad Area"*. In the said application, respondent No.2 prayed for a direction to the petitioner to pay gratuity for 6 ½ years as well as payment against fourteen days per annum in lieu of annual leave to him. The petitioner contested the said application by filing a written reply. In the said written reply, the petitioner raised preliminary objections to the maintainability of the said application on the grounds that the petitioner did not fall within the definition of a *"worker"*, and that the petitioner was not an industrial establishment. After the recording of evidence, the Authority, vide order dated 13.09.2018, turned down respondent No.2's claim for payment against fourteen days per annum in lieu of annual leave. However, respondent No.2's claim for the payment of gratuity was allowed by holding that he was entitled to his claim for gratuity amounting to Rs.7,42,960/-. The said order dated 13.09.2018 has been assailed by the petitioner in the instant writ petition.

6. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that Section 1(4) of the P.W.A. provides that the provisions of the P.W.A. apply to the payment of wages to persons employed in any factory, industrial establishment or commercial establishment and to persons

employed (otherwise than in a factory) upon any railway by a railway administration or, either directly or through a sub-contractor, by a person fulfilling a contract with a railway administration; that the petitioner does not come within the meaning of an industrial or commercial establishment as defined in Section 2(i) of the P.W.A.; that respondent No.2 was not a *"permanent workman"* as defined in Standing Order 1(b) in the Schedule to the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 **("the 1968 Ordinance");** that on 16.04.2013, respondent No.2 had expressly acknowledged that his employment with the petitioner was governed by the policies described in the petitioner's Human Resource Policy Manual; and that since the authority did not have the jurisdiction to adjudicate upon respondent No.2's claim, the impugned order dated 13.09.2018 is liable to be set-aside. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

7. On the other hand, learned counsel for respondent No.2 raised an objection to the maintainability of the instant petition on the ground that the law had provided an alternative remedy of an appeal to the Labour Court against the decision of the Authority under the P.W.A., and that since the petitioner had not filed an appeal against the impugned order dated 13.09.2018, the instant petition is liable to be dismissed on that score alone.

8. Learned counsel further submitted that the impugned order dated 13.09.2018 does not suffer from any legal or jurisdictional infirmity so as to warrant interference in the Constitutional jurisdiction of this Court; that there was sufficient evidence on the record to show that respondent No.2 was a worker; that the petitioner has employed more than 1,600 employees; that under the Labour Policy-2010, it is obligatory on industrial or commercial establishments to pay wages to their employees; that the petitioner falls within the meaning of a commercial establishment; that under the Employees' Cost of Living (Relief) Act, 1973 **("the 1973 Act")**, a commercial establishment includes a society registered under the provisions of the 1860 Act; and that gratuity equivalent to thirty days wages, calculated on the basis of the wages admissible to the

worker in the last month of his service or the highest pay drawn by him during the last twelve months for every completed year of service was payable to respondent No.2 under Standing Order 12(6) of the 1968 Ordinance; that by virtue of Section 2(x) of the Industrial Relations Act, 2012 ("I.R.A"), labour laws were fully applicable to the petitioner's establishment. Learned counsel for respondent No.2 prayed for the writ petition to be dismissed.

9. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 5 above, and need not be recapitulated.

10. I propose to first deal with the objection as to the maintainability of the instant petition raised by the learned counsel for respondent No.2. Indeed, Section 17 of the P.W.A. provides the remedy of an appeal against a direction made under Section 15(3) or (4) of the P.W.A. to the Labour Court constituted under the Industrial Relations Act, 1969. The Industrial Relations Act, 1969 has been repealed and presently the Industrial Relations Act, 2012 is in vogue. There is no provision in the latter statute for the establishment of a Labour Court for the Islamabad Capital Territory. *"Labour Court"* has been defined in Section 2(xx) of the Industrial Relations Act, 2012 as *"a Labour Court established in a province"*. Even if it is assumed that the Islamabad Capital Territory would be included within the meaning of a province, it is nonetheless an admitted position that till date, no Labour Court has been constituted for the Islamabad Capital Territory. Since there is no forum before which the petitioner could have preferred an appeal against the impugned order dated 13.09.2018, I hold that the instant petition is maintainable.

11. This Court, vide order dated 31.05.2016 passed in writ petition No.3671/2015, titled "Airblue Ltd. Vs. Authority under Payment of Wages Act, etc." had spurned an objection to the maintainability of a writ petition challenging an order passed by the Authority under the P.W.A., in the following terms:-

> ***"There is not cavil with the proposition that extra ordinary constitutional jurisdiction can be invoked when no efficacious alternate remedy is available. The main thrust of arguments advanced by learned counsel for the respondents was based upon the provisions of Labour Court envisaged u/s 17 of the Payment of Wages Act, 1936, which according to them was alternate remedy available to the petitioners. I am unable to see to eye to with the learned counsel for the respondents for the simple reason that there is no Labour Court at Islamabad. As far as NIRC is concerned, there is nothing in the Industrial Relations Act, 2012, that it will be considered to be appellate authority against the orders passed by the Authority under the Payment of Wages Act, 1936. As the petitioners have not filed appeals, therefore, the question of deposit of payable amount does not arise. Thus, I have no hesitation to hold that no alternate remedy was available to the petitioners. The objection raised by the respondents has no force. Hence, the preliminary objection is turned down and the writ petitions mentioned above are held to be maintainable, which shall be decided on merits."***

12. The vital question that needs to be determined is whether the Authority, under the P.W.A., had the jurisdiction to adjudicate upon respondent No.2's claim against the petitioner. Respondent No.2's assertion was that since the petitioner was a *"commercial establishment"* and he was a *"worker",* the latter could have filed a claim for the payment of gratuity against the former before the Authority under the P.W.A.

13. *"Commercial establishment"* has been defined in Section 2(i) of the P.W.A. to mean a commercial establishment as defined in Section 2(b) of the 1968 Ordinance which is reproduced herein below:-

> ***"Commercial establishment" means an establishment in which the business of advertising, commission or forwarding is conducted, or which is a commercial agency, and includes a clerical department of a factory or of any industrial or commercial undertaking, the office establishment of a person who for the purpose of fulfilling a contract which the owner of any commercial establishment or industrial establishment employs workmen, a unit of a joint stock company, an insurance company, a banking company or a bank, a broker's office or stock-exchange, a club, a hotel, a restaurant or an eating house, a cinema or theatre, and such other establishment or class thereof, as Government may, by notification in the official Gazette, declare to be a commercial establishment for the purpose of this Ordinance;***

14. The petitioner neither conducts the business of advertising, commission or forwarding nor is it a commercial agency or a clerical department of a factory or of an industrial or commercial undertaking. The petitioner is also not the office establishment of a

person for the purpose of fulfilling a contract with the owner of any commercial establishment or industrial establishment employs workmen. It is not a unit of a joint stock company, an insurance company, a banking company, or a bank, a broker's office or stock-exchange, a club, a hotel, a restaurant or an eating house, a cinema or theatre. There is no notification of the government declaring the petitioner to be a commercial establishment for the purposes of the 1968 Ordinance. Therefore, it would be safe to hold that the petitioner is not a commercial establishment within the meaning of Section 2(i) of the P.W.A. read with Section 2(b) of the 1968 Ordinance. It was not respondent No.2's case that the petitioner was an industrial establishment.

15. Section 1(4) of the P.W.A. provides *inter alia* that the provisions of the P.W.A. apply to the payment of wages to persons employed in any factory, industrial or commercial establishment and to persons employed (otherwise than in a factory) upon any railway by a railway administration or, either directly or through a sub-contractor, by a person fulfilling a contract with a railway administration. The Authority under the P.W.A. would have jurisdiction only with respect to matters to which the provisions of the P.W.A. have been made applicable by Section 1(4) *ibid*. Learned counsel for respondent No.2, in his arguments as well as in his written comments, took the position that a society registered under the provisions of the 1860 Act is a commercial establishment under the provisions of the 1973 Act. It ought to be borne in mind that the definition of a commercial establishment given in the 1973 Act could be of no avail to respondent No.2 and the Authority under the P.W.A. could not adopt the said definition of commercial establishment since Section 2(i) of the P.W.A. explicitly provided that *"commercial establishment"* means a commercial establishment as defined in the 1968 Ordinance.

16. In the case of Messrs HALCROW ULG, Engineering Consultants Vs. The "Authority" under the Payment of Wages Act, Quetta (1999 PLC 362), it was held *inter alia* that the Authority under the P.W.A. could assume jurisdiction if the applicant would satisfy that he was a workman or that he was employed in the

establishment of Pakistan Railways. Applying the same analogy to the case at hand, the burden lay on respondent No.2 to satisfy that the petitioner was an industrial or commercial establishment so that the Authority under the P.W.A. could assume jurisdiction in the matter. Respondent No.2, in his cross-examination, has deposed that he did not have knowledge as to whether the petitioner was engaged in any industrial or commercial activity. He also deposed that a Non-Governmental Organization cannot be included within the meaning of an industry. The evidence on the record shows that respondent No.2 was unable to discharge the burden of proving that he was employed in an industrial or a commercial establishment.

17. In holding that respondent No.2 was not employed by a commercial or an industrial establishment so that the Authority under the P.W.A. would have jurisdiction to adjudicate upon his claim for the payment of gratuity etc., reliance is placed on the following case law:-

(i) In the case of Muhammad Saeed Bhatti Vs. Presiding Officer, Punjab Labour Court No.8 (2007 PLC 508), the Hon'ble Lahore High Court held *inter alia* as follows:-

> ***"To invoke the provision of the Payment of Wages Act, 1936, it is necessary according to subsection (4) of section 1 of the Payment of Wages Act, 1936 that employer must be a Factory, industrial establishment or commercial establishment. If all these three essentials are not present the employer would not fall within the definition of employer and the employee/workman would not be able to file grievance petition against his employer. To determine the nature of work, which was being performed by Government Employees Cooperative Housing Society Limited, Bahawalpur, it may be mentioned that learned Presiding Officer in his ,judgment/order has clearly held that the aforementioned Cooperative Society, was not a Factory/industrial or commercial establishment. This finding of fact was actually rendered after considering all the evidence produced on the record, by the learned Presiding Officer, Punjab Labour Court No.8, Bahawalpur. Learned counsel for the petitioner has not been able to controvert this finding of fact that Government Employees Cooperative Housing Society Limited, Bahawalpur was not working as a factory. He has not established from the record that it was an industrial or commercial establishment. ... Government Employees Cooperative Housing Society Limited, Bahawalpur is not an establishment in which the business of advertising commission of forwarding is being conducted; it is not a commercial agency; it is not a clerical department of a factory, industrial or commercial undertaking. So, the definition of section 2(b) "commercial***

establishment" is not also applicable to the aforesaid Society. Same is the case with the definition applicability of section 2(f) of the West Pakistan (Standing Orders) Ordinance, 1968 under which the Society is not a "factory" as defined in clause (j) of the section 2 of the Factories Act, 1934 and nor it is railway as defined in clause (iv) of section 3 of the Railways Act nor an establishment of a contractor, who directly or indirectly employ workman tier an establishment of a person, who directly or indirectly perform the business of construction of industries."

(ii) In the case of Holy Family Hospital Society Vs. Third Sind Labour Court, Karachi (PLD 1975 Karachi 529), the petitioner was a charitable non-profit making society registered under the 1860 Act and according to its MoA, its object was to perform work of a charitable, social, corporeal, and spiritual nature and to establish and maintain all types of medical institutions for the preservation, promotion and restoration of health. It was held by the Hon'ble High Court of Sindh that the petitioner did not fall within the meaning of the commercial and industrial establishment defined in the 1968 Ordinance, therefore the Labour Court had no jurisdiction to adjudicate upon the claim filed by a workman seeking the reinstatement of his services.

(iii) In the case of Mst. Sakina Younas Vs. Administrator, Women's Christian Hospital, Multan (1991 PLC 798), the Hon'ble Lahore High Court, after going through the MoA of the Women's Christian Hospital, Multan which was a society registered under the 1860 Act, and was a charitable organization run on no profit basis, held that the said organization was not a commercial or industrial establishment to attract the provisions of the 1968 Ordinance or the Industrial Relations Ordinance, 1969.

(iv) In the case of Pakistan National Centre Vs. Presiding Officer, Punjab Labour Court No.2 (1976 PLC 693), it was held *inter alia* that the guarantees as contained in the 1968 Ordinance would apply to a party if he was a workman at an industrial or commercial establishment as defined in the said Ordinance. Furthermore, it was held that a society registered under the 1860 Act whose main function was to project programs and

ideas leading to the object of integration of Pakistan, and was rendering services to the community or the nation for no profit, was not an industrial or commercial establishment as defined in the 1968 Ordinance.

18. The petitioner, in its written reply to respondent No.2's claim, had explicitly taken an objection to the jurisdiction of the Authority under the P.W.A. In the impugned order dated 13.09.2018, the Authority under the P.W.A. has relied upon the definition of "commercial establishment" in the 1973 Act, and proceeded further to decide the claim on merits. The Authority under the P.W.A. could not have relied on the definition of "commercial establishment" in the 1973 Act since Section 2(i) of the P.W.A. had adopted the definition of "commercial establishment" in the 1968 Ordinance and not in the 1973 Act. Unlike the definition of 'commercial establishment' in Section 2(e) of the 1973 Act, the definition of 'commercial establishment' in the 1968 Ordinance does not include a society registered under the 1860 Act.

19. In view of the above, the instant petition is allowed; the impugned order dated 13.09.2018 is set-aside; and it is declared that the Authority under the P.W.A. did not have he jurisdiction to adjudicate upon respondent No.2's claim under Section 15(2) of the P.W.A. against the petitioner. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**