

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3821/2019

Managing Director, Bank of Khyber and others

Versus

Miss Iffat Nawaz and others

Date of Hearing: 01.10.2020

Petitioners by: Syed Ishtiaq Haider, Advocate

Respondents by: Mirza Muhammad Afzal, Advocate for respondent No.1

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioners impugn the judgment dated 31.07.2019 passed by the learned Full Bench, National Industrial Relations Commission ("**N.I.R.C.**"), whereby the appeal filed by respondent No.1, Miss Iffat Nawaz, against the order dated 29.01.2019 passed by the learned Member, N.I.R.C. was allowed and the matter was remanded to the learned Member, N.I.R.C. for disposal of respondent No.1's grievance petition on merits.

2. The record shows that on 05.07.2010, respondent No.1 was appointed as Officer Grade-III on regular basis in the Bank of Khyber ("**BoK**"). She was initially posted at the BoK's D.I. Khan Branch as General Banking Officer. After the Internal Audit Division ("**I.A.D.**") of BoK reported fraudulent transactions between 23.01.2014 and 04.08.2014, respondent No.1 was suspended on 11.11.2014 and a charge sheet along with statement of allegations was issued to her. On 22.07.2015, a final show cause notice was issued to respondent No.1 calling upon her to show cause as to why disciplinary proceedings should not be taken against her. Vide letter dated 12.08.2015, respondent No.1 was removed from service. In the said letter, it was mentioned that the Inquiry Officer had found respondent No.1 guilty of the charges levelled against her. Against the imposition of the said penalty, respondent No.1 issued a grievance notice to the BoK. Vide letter dated 21.09.2015, the BoK informed respondent No.1 that the penalty imposed on her had been upheld.

3. On 19.10.2015, respondent No.1 filed a grievance petition challenging her removal from service before the N.I.R.C., Peshawar. Vide order dated 29.01.2019, the learned Member, N.I.R.C. dismissed respondent No.1's grievance

petition primarily on the ground that since she was not a “worker” as defined in Section 2(xxxiii) of the Industrial Relations Act, 2012 (“**the I.R.A.**”), N.I.R.C. did not have the jurisdiction to adjudicate upon her grievance petition.

4. Against the said order dated 29.01.2019, respondent No.1 preferred an appeal before the learned Full Bench, N.I.R.C. Vide judgment dated 31.07.2019, respondent No.1’s appeal was allowed and the matter was remanded to the learned Member, N.I.R.C. for the disposal of respondent No.1’s grievance petition on merits. The said judgment dated 31.07.2019 has been assailed by the petitioners in the instant writ petition.

5. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant writ petition, submitted that the order dated 29.01.2019 passed by the learned Member, N.I.R.C. was strictly in accordance with the law since respondent No.1 did not come within the meaning of a “worker” as defined in Section 2(xxxiii) of the I.R.A.; that respondent No.1, as Officer Grade-III, was performing her duties as a Clearing Officer; that since respondent No.1 was not a worker, the N.I.R.C. did not have the jurisdiction to adjudicate upon her grievance petition; that respondent No.1 did not even plead in her grievance petition that she was a worker; that the onus was on respondent No.1 to prove that she was a worker; that there was nothing on the record to show that respondent No.1 was a worker; that in her affidavit, respondent No.1 had simply pleaded that she had been “*assigned the duties/works of clearance at BoK*”; that twelve fraudulent transactions reported by the I.A.D. of the BoK were made through respondent No.1’s I.D.; and that the sum involved in such fraudulent transactions was Rs.4,656,160/-. Learned counsel for the petitioners prayed for the impugned judgment dated 31.07.2019 passed by the learned Full Bench, N.I.R.C. to be set-aside and for the order dated 29.01.2019 passed by the learned Member, N.I.R.C. to be restored.

6. On the other hand, learned counsel for respondent No.1 drew the attention of the Court to respondent No.1’s cross- examination and submitted that there was ample evidence on the record to show that respondent No.1 was a worker; that in the reply to respondent No.1’s grievance notice, the BoK did not take a position that respondent No.1 was not a worker; that since respondent No.1 had given the descriptions of her duties in paragraph 4 of the grievance petition and also in her affidavit-in-evidence, the learned Full Bench, N.I.R.C. was

correct in holding that respondent No.1 was a worker; that the detailed descriptions of respondent No.1's responsibilities are set out in her cross-examination; that respondent No.1's responsibilities for clearing cheques brought her within the meaning of the term "*worker*" as defined in Section 2(xxxiii) of the I.R.A.; that a regular inquiry had not been conducted against respondent No.1 before a major penalty of removal from service was imposed on her; that it was obligatory on the BoK to have conducted a regular inquiry against respondent No.1 in accordance with the law; and that the Courts are slow in interfering with remand orders. Learned counsel for respondent No.1 prayed for the writ petition to be dismissed.

7. 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 4 above and need not be recapitulated.

8. The primary ground on which the learned Member, N.I.R.C. dismissed respondent No.1's grievance petition was that the nature of her duties as Officer Grade-III was not such as would bring her within the meaning of the term "*worker*" as defined in Section 2(xxxiii) of the I.R.A. On this basis, the learned Member, N.I.R.C. held that the N.I.R.C. had no jurisdiction to adjudicate upon respondent No.1's grievance petition. The learned Member, N.I.R.C. did not go into the merits of respondent No.1's claim in her grievance petition.

9. The learned Full Bench, N.I.R.C. did not agree with the view taken by the learned Member, N.I.R.C. and held that respondent No.1's "*job was clerical in nature and only her designation as clearing officer or Officer Grade-III does not [t]ake her out of ambit of workers.*" After holding so, the learned Full Bench, N.I.R.C. remanded the matter to the learned Member, N.I.R.C. for the disposal of respondent No.1's grievance petition on merits.

10. The sole question that needs to be determined is whether the nature of respondent No.1's duties was such as to bring her within the meaning of the term "*worker*" as defined in Section 2(xxxiii) of the I.R.A. Section 33(4) of the I.R.A. gives the right to a worker who is dissatisfied with his employer's decision on his grievance notice or where the employer does not respond to the worker's grievance notice to take the matter to the N.I.R.C. In order to invoke the jurisdiction of the N.I.R.C. under Section 33(4) of the I.R.A., it is essential for an

employee to satisfy that he is a worker or a workman as defined in Section 2(xxxiii) of the I.R.A., which is reproduced herein below:-

"2(xxxiii) "worker" and "workman" mean person not falling within the definition of employer who is employed (including employment as a supervisor or as an apprentice) in an establishment or industry for hire or reward either directly or through a contractor whether the terms of employment are express or implied, and, for the purpose of any proceedings under this Act in relating to an industrial dispute includes a person who has been dismissed, discharged, retrenched, laid-off or otherwise removed from employment in connection with or as a consequence of that dispute or whose dismissal, discharge, retrenchment, lay-off, or removal has led to that dispute but does not include any person who is employed mainly in managerial or administrative capacity."

11. Indeed, the BoK in its reply dated 21.09.2015 to respondent No.1's grievance notice did not assert that she was not a worker. Although in her grievance petition respondent No.1 had not pleaded that she was a worker but she had, in paragraph 4 of the said petition, pleaded *inter alia* that she had been assigned and had been performing the duties of clearing. Since she had mentioned the nature of her duties in her grievance petition, it was hyper-technical for the learned counsel for the petitioners to assert that the grievance petition was not maintainable only on account of respondent No.1 not pleading that she was a worker. For the purpose of clarity, paragraph 4 of the grievance petition is reproduced herein below:-

"4. That the petitioner since her appointment was assigned the duties/work of clearing and in the said duty, clearance Departmental of NIFT (National Industrial Facilitation Technology) of State Bank of Pakistan and FMD (Fund Management Department) of The Bank of Khyber, all the amount received and delivered tallied the said amount by the clearance/worker with report of NIFT & FMD and when all three department's amount is tallied then the clearance would become Zero, which work/duty since appointment has been performed by the petitioner and after this daily, clearing transactions sheet was used to be Generated and duly signed by the Operational Manager or Manager and the clearance/worker and the head assigned to the clearance is 5002."

12. In the case of National Bank of Pakistan Vs. Punjab Labour Court No.5, Faisalabad (1993 SCMR 672), it was held *inter alia* that a person who approaches a Court on the basis of an averment that he is a workman within the definition clause (xxviii) of section 2 of the I.R.O., the burden of proof lies on him and not the employer. In the case of National Bank of Pakistan Vs. Anwar Shah (2015 SCMR 434), it was explained that the person who approaches a Labour Court for the redressal of his grievance claiming to be a workman and such status of workman is denied by the employer, *"it becomes a bounden duty of the person who approaches the Labour forum to demonstrate through evidence that his*

nature of duties and functions were that of a workman and not that of a managerial or administrative capacity and that he was not an employee.”

Furthermore, it was held that unless categoric evidence to the said effect is led by him, he will not be considered to be a workman and his grievance petition will not be maintainable before the labour forum. Law to the said effect was also laid down in the case of Muslim Commercial Bank Ltd. Vs. Muhammad Shahid Mumtaz (2011 SCMR 1475) wherein it was held that the Courts had erred in placing the burden on Bank/employer to prove that the employee was not a workman.

13. It is well settled that it is not the designation of the person who files a grievance petition but the nature of his work and duties which determines as to whether such person was a workman or not. In the case of Dilshad Khan Lodhi Vs. Allied Bank of Pakistan (2008 SCMR 1530), it was held *inter alia* that mere designation of a person, the amount of emoluments drawn by him or even holding a power of attorney by itself are not the sole criteria for determining his status as a workman. Additionally, in the case of General Manager, Hotel Inter Continental Vs. Bashir A. Malik (PLD 1986 SC 103), it was held *inter alia* that the fundamental consideration for determining as to whether an employee is a workman within the meaning of various statutes in the field of labour legislation is the nature of the work done by the employee and not his designation. Furthermore, it was held that the pith and substance of the employment must be manual or clerical to fall within the definition of a worker or workman.

14. In the case at hand, respondent No.1, in her affidavit-in-evidence, deposed *inter alia* that since her appointment she had been assigned the duties of clearance at the BoK. The purpose of deposing as to the nature of her duties was obviously to show that she came within the meaning of the term worker. She had been subjected to vigorous cross-examination on this deposition of hers. She gave the detailed nature of her duties in her cross-examination in the following terms:-

“...I have mentioned in my grievance petition, my job description that I was performing the duty of clearance. The same fact I have mentioned in my affidavit. My duty was received cheques, put stamp on the cheque and then to sent the cheque to SBP through NIFT. I used to receive a cheque from the customer and entered the same in the register and then the same was sent to NIFT. After the clearance of NIFT, I used to credit the amount in the account of the customer. It is correct that clearance transaction sheets were daily generated and were sent to authorized officer. It is correct that the clearance transaction sheets which were

generated by me, my ID, was mentioned in those sheets being executory of the transaction. The transaction sheets which were generated by me, I used to tally the same with original record...”

15. The evidence adduced by Gul Kiaz, Senior Vice President of the BoK (RW-1) makes it clear that according to the BoK’s protocol, the statement of affairs is checked by Manager Operations on a daily basis. His depositions show that respondent No.1’s duties (settlement and clearing of cheques) had been supervised by the Manager Operations.

16. Shahid Ahmed Khan from the Human Resource Department of the BoK appeared as RW-2 and deposed *inter-alia* as follows:-

“...The job of the petitioner was checking and clearing. It is correct that the petitioner was under the direct supervision of bank Manager and Manager Operations. It is correct that according to her job description she can neither appoint nor dismiss or fire any person...”

17. By taking into consideration the aforementioned evidence on the record, I would tend to agree with the learned Full Bench, N.I.R.C. that the nature of respondent No.1’s duties as Officer Grade-III were not managerial or administrative so as to take her out of the ambit of a “worker” or “workman” as defined in Section 2(xxxiii) of the I.R.A. Admittedly, respondent No.1 did not have the power to hire or fire employees. True, the burden of proving that respondent No.1 was a worker so as to make her grievance petition before the N.I.R.C. competent was on her and not the petitioners but after respondent No.1, in her evidence, deposed as to the nature of her duties, which are clearly not managerial or administrative in nature, the petitioners did not come up with any evidence in rebuttal to show that the nature of her duties were not clerical.

18. Section 2(xxvi) of the I.R.A. defines an “*industrial dispute*” to include any dispute or difference between employers and workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any person. The dispute between respondent No.1 and the BoK resulting from the former's removal from service or the rejection of her grievance notice would fall within the meaning of industrial dispute.

19. In view of the above, the instant writ petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

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