

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Gulzar Ahmed, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

CIVIL PETITIONS NO.3587 TO 3589 OF 2020

[Against the judgment dated 20.11.2020, passed by the Islamabad High Court, Islamabad in Writ Petitions No.327, 340 and 342 of 2020]

Getz Pharma (Pvt) Limited, Karachi. (in all cases)
...Petitioner (s)

Versus

Muhammad Nafees and another. (in CP.3587 of 2020)

Saeed Akhtar Awan and another. (in CP.3588 of 2020)

Umar Farooq Khan and another. (in CP.3589 of 2020)

...Respondent(s)

For the Petitioner(s) : Mr. Faisal Siddiqi, ASC
(in all cases)

For Respondent No.1 : Mr. Muhammad Bashir Khan, ASC
(in all cases)

Date of Hearing : 24.03.2021

ORDER

GULZAR AHMED, CJ.- The petitioner-Getz Pharma (Pvt.) Limited, has filed these three petitions assailing the common judgment dated 20.11.2020, passed by the learned Single Judge of the Islamabad High Court, Islamabad (**the High Court**), whereby the three writ petitions filed by the petitioner were dismissed.

C.P.No.3587 of 2020

2. Respondent No.1-Muhammad Nafees (**the respondent**) was employed by the petitioner through letter dated 31.01.2005 as

"Territory Manager/Hearty". While working as a Senior Sales Manager (I.B. and A-5 North), through letter dated 04.07.2017, he gave one month's notice to the petitioner of his resigning from employment. Through letter dated 06.07.2017, the petitioner accepted the resignation of the respondent. The respondent filed an application under Section 15 of Payment of Wages Act, 1936 **(the Act of 1936)** before the Authority claiming following amounts as dues payable to him by the petitioner: -

Gratuity:	Rs.	15, 50, 670/-
Provident Fund:	Rs.	7,70,000/-
Pay of July, 2017:	Rs.	1,22,100/-
Last claimed expenses which have not been paid.	Rs.	65,000/-
Total:	Rs.	24,42,750/-

The petitioner contested the matter before the Authority. The Authority vide its order dated 26.12.2019, allowed the application of the respondent and directed the petitioner to pay the following dues to the respondent: -

Gratuity:	Rs.	15, 50, 670/-
Provident Fund:	Rs.	7,70,000/-
Pay of July, 2017:	Rs.	1,22,100/-
Total:	Rs.	24,42,750/-

The petitioner challenged the order of the Authority by filing of a writ petition in the High Court, which by the impugned judgment dated 20.11.2020, was dismissed.

C.P.No.3588 of 2020

3. Respondent No.1-Saeed Akhtar Awan **(the respondent)** was appointed as "Territory Manager/Bravo" vide

letter dated 10.12.2003. While working as a National Sales Manager (Alpha-II), he was issued a Show Cause Notice dated 30.11.2017. The respondent submitted his reply and thereafter, the petitioner *vide* letter dated 30.11.2017, dismissed him from service. The respondent filed an application under Section 15 of the Act of 1936 before the authority, claiming the following amounts as dues payable to him by the petitioner: -

Gratuity:	Rs.	32,90,000/-
Provident Fund:	Rs.	10,00,000/-
Pay of November, 2017:	Rs.	2,25,100/-
Last serving month expenses which have not been paid	Rs.	65,000/-
Total:	Rs.	45,15,000/-

The petitioner contested the matter before the Authority. The Authority *vide* its order dated 26.12.2019, allowed the application of the respondent and directed the petitioner to pay the following dues to the respondent:-

Gratuity:	Rs.	32,90,000/-
Provident Fund:	Rs.	10,00,000/-
Pay of November, 2017:	Rs.	2,25,100/-
Last serving month expenses which have not been paid	Rs.	65,000/-
Total:	Rs.	45,15,000/-

The petitioner challenged the order of the authority by filing of a writ petition in the High Court, which by the impugned judgment dated 20.11.2020, was dismissed.

C.P.No.3589 of 2020

4. Respondent No.1-Umar Farooq Khan (**the respondent**) was appointed as "Territory Manager/Bravo-II" *vide* order dated

12.01.2005. While working as Senior Sales Manager (Bravo-II) Rawalpindi, he was issued a Show Cause Notice dated 30.11.2017. The respondent submitted his reply and thereafter, the petitioner *vide* letter dated 30.11.2017, dismissed him from service. The respondent filed an application under Section 15 of the Act of 1936 before the authority, claiming the following amounts as due to him payable by the petitioner:-

Gratuity:	Rs.	15,87,300/-
Provident Fund:	Rs.	6,00,000/-
Pay of November, 2017:	Rs.	1,21,100/-
Last serving month expenses which have not been paid	Rs.	45,000/-
Total:	Rs.	23,53,400/-

The petitioner contested the matter before the Authority. The Authority *vide* its order dated 26.12.2019, allowed the application of the respondent and directed the petitioner to pay the following dues to the respondent: -

Gratuity:	Rs.	15,87,300/-
Provident Fund:	Rs.	6,00,000/-
Pay of November, 2017:	Rs.	1,21,100/-
Total:	Rs.	23,08,400/-

The petitioner challenged the order of the Authority by filing of a writ petition in the High Court, which by the impugned judgment dated 20.11.2020, was dismissed.

5. Mr. Faisal Siddiqi, learned counsel for the petitioner has contended that the very applications filed by the respondents before the Authority were not maintainable for the reason that the respondents, in the first place, were not workmen and secondly, the respondent-Muhammad Nafees had resigned from service

under apprehension of his dismissal from service, as he was found to have formed a company by the name of Sun Health Care (Pvt.) Ltd. (**Sun Health Care**) doing business of pharmaceutical distributor/seller and also got the said company registered with the petitioner and started making supplies of the petitioner's medicines to the said company. He contended that on the same ground of forming the very said company, Saeed Akhtar Awan and Umar Farooq Khan, respondents in Civil Petitions No.3588 and 3589 of 2020 were dismissed from service by letters dated 30.11.2017. He contended that being dismissed employees, the respondents were not entitled to grant of dues claimed by them and both the Authority in allowing the claims of respondents and the High Court in maintaining the orders of the Authority committed serious error of law. He further contended that the Gratuity and Provident Fund, in terms of Section 15 of the Act of 1936, are payable under the law and the respondents in their application before the Authority, have not mentioned at all under what law the claim for Gratuity and Provident Fund has been made by them.

6. Mr. Muhammad Bashir Khan, learned counsel for the respondents, on the other hand, has contended that for making of claim under Section 15 of the Act of 1936, before the Authority, the respondents were not required to be workmen and the only requirement was to show that they were employed persons with the petitioner. He relied upon a judgment of this Court in the case of Aurangzaib vs Medipak (Pvt.) Ltd. and others (2018 SCMR 2027).

7. While replying the Court's query, as to under what law the respondents have based their claim for payment of Gratuity and Provident Fund, learned counsel for the respondents contended that it was based upon the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 (**the Ordinance of 1968**).

8. We have considered the submissions made by the learned counsel for the parties and have also gone through the record of the case.

9. All the three respondents have filed their applications before the Authority under Section 15 of the Act of 1936. Subsection (1) of Section 15 is relevant to the controversy in hand, which is as follows: -

"15. Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims.-- (1) The Provincial Government may, by notification in the official Gazette appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court or as stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in the payment of wages, [or non-payment of dues relating to provident fund or gratuity payable under any law,] of persons employed or paid in that area."

The very provision, *inter alia*, contains that non-payment of dues relating to the Gratuity and Provident Fund, are those which are payable under any 'law'.

10. Learned counsel for the respondents has contended that the respondents have claimed Gratuity and Provident Fund under the Ordinance of 1968. In order to appreciate this very contention of the learned counsel for the respondents, it is

essential to examine the provision of the Ordinance of 1968. The Standing Order 12 (6) and (7) are as follows:-

“12. Termination of employment.—

(6) Where a workman resigns from service or his services are terminated by the employer, for any reason other than misconduct, he shall, in addition to any other benefit to which he may be entitled under this Ordinance or in accordance with the terms of his employment or any custom, usage or any settlement or an award of a Labour Court under the Industrial Relations Ordinance, 1969 (XXIII) of 1969), be paid gratuity equivalent to [thirty days], wages, calculated on the basis of the [wages admissible to him in the last month of service if he is a fixed-rated workman or the highest pay drawn by him during the last twelve months if he is a piece-rated workman], for every completed year of service or any part thereof in excess of six months:

Provided that, where the employer has established a provident fund to which the workman is a contributor and the contribution of the employer to which is not less than the contribution made by the workman, no such gratuity shall be payable for the period during which such provident fund has been in existence [* * *] [:]

[Provided further that if through collective bargaining the employer offers and contributes to an “Approved Pension Fund” as defined in the Income Tax Ordinance, 2001 (XLIX of 2001), and where the contribution of the employer is not less than fifty *per cent* of the limit prescribed in the aforesaid Ordinance, and to which the workman is also a contributor for the remaining fifty *per cent* or less, no gratuity shall be payable for the period during which such contributions has been made.]

(7) A workman shall be entitled to receive the amount standing to his credit in the provident fund, including the contributions of the employer to such fund, even if he resigns or is dismissed from service.”

11. The reading of the above provisions shows that they apply to workman and Gratuity is payable to such a workman whose services have been terminated or who has resigned from employment. It provides for payment of Gratuity and lays down the manner in which it is to be calculated. It further provides that where the employer has established Provident Fund to which workman is a contributor and contribution of the employer is no less than the contribution of a workman, no such Gratuity shall

be payable during which the Provident Fund has remained in existence. The Provident Fund including contribution of employer is payable to a workman, who resigns or is dismissed from service.

12. The first moot question is whether the respondents are at all workmen under the Ordinance of 1968 to qualify them to be entitled to the benefit of Gratuity and Provident Fund under this Ordinance. Section 2(i) of the Ordinance contains the definition of the term "Workman", which is as follows: -

"(i) "workman" means any person employed in any industrial or commercial establishment to do any skilled or unskilled, manual or electrical work for hire or reward."

13. Muhammad Nafees, respondent in Civil Petition No.3587 of 2020, was employed as Senior Sales Manager when he resigned from service. Saeed Akhtar Awan, respondent in Civil Petition No.3588 of 2020, was employed as National Sales Manager when he was dismissed from service. Umar Farooq Khan, Respondent in Civil Petition No.3589 of 2020, was employed as Senior Sales Manager when he was dismissed from service.

14. Learned counsel for the respondents has relied upon the case of Aurangzaib (supra), wherein this Court was also dealing with a question as to whether petitioner Aurangzaib, who was a Senior Sales Representative, was at all a workman. After examining the job description of the petitioner and the law laid in Pakistan Tobacco Company Ltd. vs. Pakistan Tobacco Company, Employees' Union, Dacca and others (PLD 1961 Supreme Court 403), Chairman, Brooke Bond (Pakistan) Ltd., Karachi vs. General Secretary, Union Karkunane Brooke Bond (Pakistan) Ltd., Rawalpindi (PLD 1969 Lahore 717), Brooke Bond (Pakistan) Ltd.

vs. Conciliator and 6 others (PLD 1977 Supreme Court 237) and Syed Matloob Hassan vs. Brooke Bond Pakistan Limited, Lahore (1992 SCMR 227), this Court has answered the question in negative i.e. Senior Sales Representative will not come within the definition of the term "workman" as defined under the Ordinance of 1968.

15. We may note that in the case of Pakistan Tobacco Company Ltd. (supra) so also in Chairman Brooke Bond Pakistan Ltd., case (supra), the question that came up for determination and decided by this Court was that whether a Salesman could be considered as a workman under the Industrial Relations Act, 1947, Industrial Dispute Ordinance, 1959 and Industrial Relations Ordinance, 1969. While in the case of Syed Matloob Hassan (supra) the Court considered the application of definition of term workman given in the Industrial Relations Ordinance, 1969 so also in the Ordinance of 1968. The Court dealt with the matter as follows:-

8. A plain reading of the above subsection (1) of section 25-A of the Industrial Relations Ordinance shows that a worker or a workman, who falls within the definition given in above clause (xxviii) of section 2 of the Ordinance can invoke the above provision of the Industrial Relations Ordinance in respect of any right guaranteed or secured to him by or under: -

- (i) any law; or
- (ii) any award; or
- (iii) any settlement for the time being in force.

Whereas, the above clause (3) of Standing Order 12 contemplates that the services of a workman shall not be terminated nor shall a workman be removed, retrenched, discharged or dismissed from service, except by an order in writing containing the reason for the action. It further provides that in case a workman is aggrieved by the termination of his services or removal, retrenchment, discharge or dismissal, he may take action in accordance

with the provisions of section 25-A of the Industrial Relations Ordinance and thereupon the provisions of the said section shall apply as they apply to the redress of an individual grievance. In other words, the above clause (3) of Standing Order 12 incorporates the provisions of section 25-A of the Industrial Relations Ordinance by reference for the purpose of enabling a workman as defined in clause (i) of section 2 of the Ordinance to get redress against termination of his services or removal or retrenchment, discharge or dismissal, in violation of above clause (3) of the Standing Order 12.

9. We may observe that as pointed out hereinabove, a workman falling within the definition of "workman" and "worker" given in clause (xxviii) of section 2 of the Industrial Relations Ordinance can press into service the provisions of section 25-A for the enforcement of any right guaranteed or secured to him by any law or any award or settlement. If the right which is sought to be enforced, is guaranteed or secured by the provisions of the Industrial Relations Ordinance or by the terms of an award or settlement, it is enough that the workman comes within the ambit of the definition given in the above clause (xxviii) of section 2 of the Industrial Relations Ordinance, but in case, the claim of the workman concerned is founded on a provision of any other law, in that event if such law provides definition of a "workman", he should besides being covered by the above definition provided for in clause (xxviii) of section 2 of the Industrial Relations Ordinance should also be covered by the definition given in the relevant law. For example, if a workman seeks the enforcement of the rights guaranteed under the various provisions of the Standing Orders Ordinance, he should also fall within the definition of the "workman" given in clause (i) of section 2 of the Ordinance. However, in case of termination of employment in violation of clause (3) of Standing Order 12 as pointed out hereinabove, it is sufficient that the workman concerned falls within the definition of the "workman" given in clause (i) of section 2 of the Ordinance and he need not be covered by the definition of the "workman" and "worker" given in clause (xxviii) of section 2 of the Industrial Relations Ordinance."

The Court also dealt with the observation made by Cornelius, C.J., as his lordship then was, in Pakistan Tobacco Company Ltd's case (supra) which is as follows: -

"I consider that it admits of no doubt, that persons who are engaged exclusively in the field of distribution through proper agencies of the products of the Company, are not assimilable either to the group of workers whose manual labour contributes to that product, or those of the clerical establishment who perform the paper work connected with the operations of the Company. The work of salesman is in a wholly

different category from manual work or clerical work, and I feel no hesitation in agreeing with the decision of the Tribunal upon this point, namely, that salesmen do not fall within the definition of "workmen".

Thus, the consensus opinion of the Court in the cited cases is that salesman does not fall within the ambit of the term workman.

16. On reading of the judgment of this Court in Aurangzaib's case (*supra*), it is quite evident that this Court has been taking consistent view that a salesman by very nature of his work is not a workman and does not fall within the ambit of the term workman. In Syed Matloob Hassan's case (*supra*), a 5-Member Bench of this Court has in clear terms held that on the basis of admission and keeping in view the duties of the appellant, i.e., a salesman did not predominantly involve manual or clerical work and as such was not considered to be a workman within the meaning of Ordinance of 1968.

17. Now coming to the present case, the application under Section 15 of the Act of 1936, filed by all the three respondents before the Authority, the respondents have claimed that they have joined the petitioner's company as a Territory Manager. In para-5 of their applications, the respondents have averred that according to the judgment of the Supreme Court of Pakistan and Labour Laws, the petitioner is liable to pay damages and interest at bank rate to the applicants till date of payment. The respondents have not at all claimed themselves or pleaded in their applications before the Authority that they were workmen. The petitioner in its reply/written statement has taken a specific plea that

respondents were not employed as worker or workman and that they were employed as Territory Manager and at the time of resignation/dismissal of the respondents, they were working as National Sales Manager/Senior Sales Manager and were employed on contractual terms and on managerial positions .

18. It seems from the record and also from the order of the Authority that no evidence in the case was led by the parties. We note that where the respondents themselves claim the dues of Gratuity and Provident Fund and that too, under the Ordinance of 1968, on the principle as laid down by this Court in Syed Matloob Hassan's case (*supra*), it was incumbent upon the respondents to have alleged or taken a specific plea in their applications before the Authority that they are workmen under the Ordinance of 1968 and in case where the employer disputes and denies such allegation/plea, the burden to prove the fact that respondents were employed as workmen will be upon the respondents, and after they have discharged such burden by leading of positive evidence, the burden will shift upon the petitioner/employer to establish the fact that the respondents were not workmen. In the absence of the evidence from the side of the respondents and on the basis of pleadings of the parties, as stood before the Authority, can it be said that the respondents have succeeded in establishing the fact that they were workmen under the Ordinance of 1968. The answer will be altogether in negative, for there is neither any allegation or plea in the applications of the respondents before the Authority that they were workmen under the Ordinance of 1968 nor they recorded their evidence before the Authority to establish

the fact that they were workmen and performing manual or clerical work in terms of Section 2(i) of the Ordinance of 1968.

19. The other aspect that was emphasised by the learned counsel for the respondents is that in order to avail the benefit of payment of dues of Gratuity and Provident Fund, the respondents were not required to establish that they were workmen and it was sufficient for them to have established that they were employed persons. This very submission of the learned counsel for the respondents fails to take into consideration that where an employed person has to claim his dues of Gratuity and Provident Fund under Section 15 of the Act of 1936, the dues of Gratuity and Provident Fund have to be those, which are payable under any "law". The word payable under any law, in our view, could not be anything else than the law as made by the competent legislative authority and will not stretch to the dues of Gratuity and Provident Fund payable under the contract. The respondents, by virtue of their contract of employment, as placed on record, were entitled to be paid Gratuity and Provident Fund. This contract of employment of the respondents with the petitioner could not be termed as a law but at best could be considered as to whether it is enforceable in law or not.

20. On the basis of the above discussion, we are of the considered view that the respondents have failed miserably to establish their claim that they were entitled to the grant of Gratuity and Provident Fund as claimed by them in their applications before the Authority.

21. We, therefore, convert all the three civil petitions into appeals and allow the same by setting aside the orders dated 26.12.2019 of the Authority and the impugned judgment 20.11.2020, where it allows granting of Gratuity and Provident Fund to the respondents and claim of the respondents to the extent of payment of Gratuity and Provident Fund is accordingly dismissed.

CHIEF JUSTICE

JUDGE

Bench-I
Islamabad
24.03.2021
'APPROVED FOR REPORTING'
Rabbani/*

JUDGE /