IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Mushir Alam
Mr. Justice Munib Akhtar

Civil Petition No.2743 of 2017
(On appeal from the order dated 13.6.2017 passed by the Lahore High Court, Rawalpindi Bench in W.P.No.2042 of 2016)

Aurangzaib **…Petitioner (s)**

vs

Medipak (Pvt) Ltd. and others **…Respondent (s)**

For the Petitioner : Mr. Abrar Ahmed, Advocate High Court (appeared with permission of the Court).
Syed Rifaqat Shah, AOR.

For the Respondent No. 1 : Mr. Abdul Rab Chaudhry, ASC.

Date of hearing : 14.09.2018

JUDGEMENT

Mubib Akhtar, J.- This leave petition (which is being disposed off as an appeal; see below) is directed against the order of a learned Single Bench of the High Court in WP 2042/2016 dated 13.06.2017. That petition, filed by the respondent No. 1 (which is a private limited company), was allowed. The result was that the petitioner's claim filed under the Payment of Wages Act, 1936 ("1936 Act" or the "Act"), stood dismissed. The petitioner had filed his claim in 2015, on which the final order in his favor was made by the authority under s. 15 (herein after referred to as the Commissioner) on or about 19.03.2016. The respondent No. 1's (herein after the company) appeal under s. 17 failed, but when it took the matter further to the High Court it succeeded in terms of the impugned order. The company had, from the beginning, raised a number of objections, of which only two now survive for consideration: (i) whether the claim was at all maintainable under the 1936 Act; and (ii) whether the petitioner was a "workman" within the meaning of the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 ("1968 Ordinance"). Before proceeding further, we may note that these statutes (as well as another law to which some reference will have to be made, being the Factories Act, 1934) have come to be within the exclusive provincial domain as a result of the 18th Amendment (while of course remaining in the federal domain for the Islamabad Capital Territory). The present litigation arises out of the Punjab. The

Punjab Assembly has, subsequent to the 18th Amendment, amended all of these laws and one of the changes made to the 1936 Act will have to be noticed in due course.

2. The petitioner was employed by the company on or about 28.10.1997 as a sales representative. The letter of appointment stated, *inter alia*, as follows ("you" being, of course, the petitioner):

> "4. JOB SPECIFICATIONS:
>
> You will be responsible for enhancement of sales activities in your assigned territory, aiming at introduction and promotion of Medipak products and increasing the sales and profitability to the maximum, making best use of the time available to you.
>
> You will maintain regular and close contact with medical professionals, hospitals, clinics and trade outlets in your zone. You will be reporting to your Area Sales Manager in your sales activities. Further details on your job specifications will be communicated by Area Sales Manager.
>
> You will be based at Rawalpindi. Please understand that your job specifications and location may be changed from time to time at Company's option, depending upon requirement of situation."

3. In 2010, the petitioner was promoted to senior sales representative but ultimately stood terminated from service with effect from 01.09.2012, by letter of the same date. Subsequently, as noted, he filed a claim under the 1936 Act. The petitioner made his claim under six heads. Evidence was led and after considering the same, as well as dealing with various legal and other objections taken by the company, the learned Commissioner dismissed three of the heads. As regards the remaining three, the learned Commissioner marginally reduced the amount claimed under two heads, and awarded a total sum of Rs. 290,288/-. Compensation equivalent to three times this amount was also awarded. (The three heads that were allowed will be considered in some detail subsequently.) The objection taken by the company regarding maintainability was repelled. Two of the heads under which the claim succeeded were based on the petitioner's assertion that he was a "workman" within the meaning of the 1968 Ordinance. The company took the objection that this was not so; this objection was also overruled. As noted, these are the two objections that now require consideration.

4. The company (but not the petitioner) filed an appeal against the Commissioner's order, to the concerned Labor Court as provided by s. 17 of the 1936 Act. The learned Labor Court was pleased to dismiss the appeal. Against this dismissal, the company invoked the constitutional jurisdiction of the High Court. In the impugned order, the learned High Court (in para 2) observed that "learned counsel for the petitioner has mainly challenged the maintainability of grievance petition filed by the respondent No. 1 before the Commissioner/Authority on the ground that respondent No. 1 did not fall

within the definition of 'workman' as provided in [the 1968 Ordinance] and Industrial Relations Ordinance, 2010". Although it was noted that the 1936 Act itself did not provide any definition of "workman", the learned High Court proceeded to consider, in detail, this term as defined in the 1968 Ordinance. Extensive reference was made to various decisions of this Court as also a High Court judgment, and it was then held as follows:

> "4. In view of above discussion, it is established that the petitioner's firm has rightly raised objection regarding maintainability of petition filed by respondent No.1 under Section 15(2) of The Payment of Wages Act, 1936 to the effect that respondent No.1 was a Sales Representative, who was subsequently promoted as Senior Sales Representative and thus was not a 'workman'. Such objection has not been taken into consideration by the forums below in a judicial and proper manner and while accepting the claim of the respondent, the forums below have reached to a conclusion, which has no backing in view of authoritative verdict of Hon'ble Supreme Court of Pakistan on the subject. The findings arrived at by the forums below vide impugned order and judgment dated 19.03.2016 and 28.07.2016 are not sustainable and the same are set aside."

5. Learned counsel for the petitioner defended the decisions that had gone in his favor and submitted that the learned High Court had erred in coming to the contrary conclusion. It was prayed that the facts and circumstances were such that the compensation awarded to the petitioner ought to have been ten (and not three) times the final determination of the claim, which is the maximum permissible under s. 15. Relief was prayed for accordingly. Learned counsel for the company on the other supported the impugned order and submitted that the learned High Court had correctly referred to, and applied, the law to the facts and circumstances of the case. Learned counsel submitted that the 1936 Act served only as a gateway that allowed a person who (and whose claim) came within its scope to apply for the remedy provided by the statute. However, the claim itself had to rest on substantive grounds that lay beyond the Act, and was liable to be determined accordingly. In the instant case, the petitioner was not a workman within the meaning of the 1968 Ordinance, and that (fatally) affected both the maintainability of the claim under the 1936 Act, as well as the specific heads that were based on this assertion. It was prayed that the leave petition be dismissed.

6. We have heard learned counsel as above and considered the record and the judgments referred to in the impugned order. In our view a proper disposal of the present matter requires consideration of the following questions of law:

a. Whether the petitioner's claim was maintainable under the 1936 Act?

b. Whether the petitioner was a "workman" within the meaning of the 1968 Ordinance?

c. If the answer to question (a) be in the affirmative but that to question (b) in the negative, would the petitioner nonetheless be entitled to the relief granted, and if so, on what basis?

7. We begin with the first question. This requires consideration of subsections (4), (5) and (6) of s. 1 of the 1936 Act. Up to 2001, these provided as follows:

> "(4) It applies in the first instance to the payment of wages to persons employed in any factory 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.
>
> (5) The Provincial Government may after giving three months' notice of its intention of so doing, by notification in the Official Gazette, extend the provisions of the Act or any of them to the payment of wages to any class of persons employed in any industrial establishment or any class or group of industrial establishments.
>
> (6) Nothing in this Act shall apply to wages payable in respect of a wage-period which over such wage-period, average more than three thousand rupees a month."

8. The first point to note is that subsection (4) referred to "persons employed" and not to "workers" or "workmen". Indeed, the latter two terms find no mention in the whole of the statute. Subsection (4) further attested that the Act was conceived initially ("in the first instance") to apply only to factories. "Factory" was defined in s. 2 as having the same meaning as in the Factories Act, 1934 ("1934 Act"). Subsection (5) made clear that the Act's scope could be expanded to include persons employed in "industrial establishments", which was a term defined in s. 2(ii) in broad terms. However, it appears that up to 2001 the Provincial Governments used the statutory power conferred on them very sparingly, with the result that the 1936 Act applied in the main only to persons employed in factories. The scope of the Act therefore turned essentially on what was meant by a "factory". When the definition of this term in the 1934 Act (s. 2(j) thereof) is considered, along with the term "worker" as used therein (which was also defined in s. 2(h)), it is clear that the 1936 Act operated within quite narrow confines. To this must be added the effect of subsection (6), which further limited the applicability of the Act only to those persons employed in factories as drew wages of not more than Rs. 3000/- in a wage-period. (This limitation initially started at Rs. 200/-, and gradually built up to the final figure over the decades.) Thus, although the 1936 Act did not use the term "workman", the combined effect of the three subsections under consideration was that, in practical terms, its scope was essentially limited to those persons who would come within such description or definition as used, e.g., in other labor legislation such as the 1968 Ordinance.

9. The Labour Laws (Amendment) Ordinance 2001 ("2001 Ordinance") made substantial changes to the 1936 Act. Subsections (5) and (6) of s. 1 were omitted altogether. A new definition of "commercial establishment" was added to s. 2, and subsection (4) of s. 1 amended so that it now read as follows:

> "It applies 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, industrial establishment or commercial establishment) upon any railway by a railway administration or, either directly or through a subcontractor, by a person fulfilling a contract with a railway administration."

Subsection (4) has retained the foregoing shape since 2001, and therefore applied on all dates relevant for present purposes. It will be seen that the limiting words "in the first instance" have been omitted, which was of course consistent with the omission of subsection (5). Thus, the Act has now become applicable to persons employed in any factory, industrial or commercial establishment. The omission of subsection (6) means that the other limiting feature, namely that the Act only applied to wages up to a certain limit and not beyond, has also been removed. Thus, since 2001 only two things need be shown by a person who seeks to bring his claim within its scope: firstly, that he was a "person employed", and secondly that he was employed in either a "factory" or an "industrial establishment" or a "commercial establishment" (as defined). It is clear that the 2001 Ordinance has expanded the scope of the 1936 Act manifold. In one go, an extraordinarily large number of persons, employed in a great many different situations, have been brought within its fold, and have become entitled to bring a claim in terms thereof. One thing, of immediate relevance, may be emphasized. There never was, and certainly after the 2001 Ordinance no longer is, any requirement that the claimant establish himself to be a "workman", whether as defined under any labor legislation (including the 1968 Ordinance) or otherwise. The learned High Court, with respect, erred materially and misdirected itself in imposing this requirement when considering the question of maintainability. The reference to the judgments of this Court (which are considered below in relation to question (b)) was inapposite, since they did not involve any question arising out of the 1936 Act, and considered the definition of "workman" only in the context of other labor legislation. The learned High Court ought to have focused only on subsection (4) of s. 1, and not otherwise. This, unfortunately, it did not do; indeed, this subsection was not considered at all. With respect, it erred materially in allowing itself to be diverted towards other statutes and their provisions.

10. Before us, learned counsel for the company quite properly accepted that the petitioner was a "person employed" with the company within the meaning of subsection (4) of s. 1, and that the company was an "industrial establishment" within the meaning

of s. 2(ii). Since both requirements were fulfilled this meant that the petitioner's claim was maintainable. Question (a) posed in para 6 above must therefore be answered in the affirmative.

11. We turn to the second question. This requires examination of the three heads under which the learned Commissioner allowed the petitioner's claim, which was sustained in appeal by the learned appellate forum. The three heads were as follows:

I.	Contributory Provident Fund = Own Contribution + Company Contribution = 135000 inclusive of profit + 135000 inclusive of profit =	=Rs.270000/-
II.	Notice pay	=Rs.10,144/-
III.	Pay & Allowances for the month of August 2012	=Rs.10,144/-

The petitioner based his claim under the first two heads in terms of paragraphs 7 and 1, respectively, of Standing Order 12 of the 1968 Ordinance. The said provisions admittedly apply only to a "workman" as defined in its s. 2(i). The learned Commissioner held that the petitioner was indeed a workman within the meaning of this definition, a finding upheld in appeal. The learned High Court disagreed, though in the context of considering maintainability. It is necessary therefore to consider whether the petitioner came within the scope of the definition, which provides as follows:

> "'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".

12. The job description of the petitioner's employment has already been reproduced above. It is clear that the petitioner was employed as a salesman. The question therefore is whether a salesman can be a "workman" within the meaning of the definition. It is only in this context that, for present purposes, the decisions of this Court that were considered by the learned High Court ought to be examined, and we now turn to the same. The first case to consider is *Pakistan Tobacco Co. Ltd. v. Pakistan Tobacco Company Employees' Union and others* PLD 1961 SC 403. The matter arose under the Industrial Relations Act, 1947. It contained a definition of "workman" which in material part provided as follows: "any person employed… in any industry to do any skilled or unskilled manual or clerical work for hire or reward…." As will be seen this definition is very similar to the one found in the 1968 Ordinance. The question was whether a salesman was within the scope of the definition. This Court held that he did not, the learned Chief Justice observing as follows (pg. 40772 Tm -5(e)3(r)-7( )-10(w)1(5e)-16.0 1.0 rg 0.9ie

> perform the paper work connected with the operations of the Company. The work of salesmen 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"."

13. The next case to consider is *Chairman, Brooke Bond (Pakistan) Ltd. v. General Secretary, Union Karkunane Brooke Bond (Pakistan) Ltd.* PLD 1969 Lahore 717, a decision of a learned Division Bench. The matter arose out of the Industrial Disputes Ordinance, 1959 (which had replaced the aforementioned Act of 1947). It contained a definition of "workman" in terms identical to that found in the repealed statute, and hence very similar to the one found in the 1968 Ordinance. Again, the question was whether a salesman was within the scope of the definition. It was held that he did not. Reliance in this regard was placed by the appellant on the aforementioned judgment of this Court. An attempt by the respondent to distinguish it was repelled.

14. The next case is *Brooke Bond (Pakistan) Ltd. v. Conciliator and others* PLD 1977 SC 237. This case arose under the Industrial Relations Ordinance, 1969 ("1969 Ordinance", which had of course replaced the aforementioned Ordinance of 1959). Again, the question was whether the employees concerned, being salesmen, were workmen. The 1969 Ordinance also contained a definition of "workman", but it was cast in terms materially different from those found in the Act of 1947 and the Ordinance of 1959 (and hence the 1968 Ordinance). Reference was made to the two decisions cited above, and it was observed as follows:

> "The definition of the term "workman" in the Industrial Disputes Act, 1947 as well as in the Industrial Disputes Ordinance, 1959 was substantially the same. Workman means any person employed, including an apprentice, in any industry to do any skilled or unskilled manual or clerical work for hire or reward. It was on the basis of this definition that in the two reported cases discussed above it was held that a salesman was not a workman as from the nature of his duties it appeared that he was not engaged in manual or clerical work. But this definition was not adopted in the Industrial Relations Ordinance, 1969." (pg. 271)

> "A salesman in this Company, as his designation implies, is to go round the market in the area for which he is appointed for the distribution and sales of its products. A branch manager is in charge of the administrative control and Management of the affairs of a depot. Primarily the salesman as such is not concerned with Management. Incidentally, however, in his capacity as a salesman he has to account for daily and weekly sales and submit his returns to the manager in charge of the depot. But all this is an insignificant and a minor part of the duties for which he is appointed as a salesman. In my opinion, therefore, a salesman in this Company is a "workman" within the definition of the term in section 2(xxviii) of the Industrial Relations Ordinance, 1969 and respondent No.3 was lawfully constituted as their Collective Bargaining Agent. Accordingly the objection raised by the Company in this behalf has no force and is repelled." (pg. 272)

15. Finally, we come to *Syed Matloob Hassan v. Brooke Bond Pakistan Ltd.* 1992 SCMR 227. This case involved consideration of both the 1968 Ordinance and the 1969 Ordinance, and the definitions of "workman" to be found respectively in the two statutes. Again, the question was whether the appellant, a salesman, was a workman. In the majority judgment (authored by Ajmal Mian, J. (Abdul Shakurul Salam, J. dissenting)) it was noted that leave to appeal had been granted to consider whether the appellant's case was covered by the *ratio* of *Brooke Bond (Pakistan) Ltd. v. Conciliator and others* PLD 1977 SC 237 (pg. 231). The appellant's grievance was that he had been terminated from service in violation of Standing Order 12 of the 1968 Ordinance. He therefore filed a grievance petition under s. 25-A of the 1969 Ordinance. The respondent took the objection that the petition was not maintainable as the appellant was not a "workman" within the meaning of the definition contained in the 1968 Ordinance. The appellant argued that his petition was maintainable, as he was a "workman" within the meaning of the 1969 Ordinance. This issue was resolved in the majority judgment as follows (pp. 234-5; emphasis supplied):

> "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 passage from *Pakistan Tobacco Co. Ltd. v. Pakistan Tobacco Company Employees' Union and others* PLD 1961 SC 403 reproduced above was cited, as was the first of the two passages reproduced from *Brooke Bond (Pakistan) Ltd. v. Conciliator and others* PLD 1977 SC 237. It was finally concluded as follows (pg. 236):

> "In the above case of 1977, since the right which was pressed into service was guaranteed or secured by the provisions of the I.R.O., it was held that respondent No.3, which was a registered trade union representing workers including salesmen and vanmen, was lawfully constituted as their collective bargaining agent as the salesmen fell within the definition of "workmen" as

> given in clause (xxviii) of section 2 of the I.R.O. The question, whether the salesmen were covered by the definition of clause (i) of section 2 of the Ordinance, was not involved and, therefore, the above case has no application to the instant case. The ratio of the earlier judgment of this Court in the case of Pakistan Tobacco Company Ltd. v. Pakistan Tobacco Company Employees' Union, Dacca and others (supra) is very much applicable to the present case. The above appeal has no merits and, therefore, it is dismissed."

16. Having considered the case law as above, and the job description of the petitioner's service, we are of the view that the petitioner, being a salesman, was not a "workman" within the meaning of the 1968 Ordinance. The *ratio* of the judgment of this Court in *Pakistan Tobacco Co. Ltd. v. Pakistan Tobacco Company Employees' Union and others* PLD 1961 SC 403 is clearly applicable to the facts and circumstances of the present case. The near complete identity between the definitions contained in the Act of 1947 and the 1968 Ordinance, and the analysis contained in *Syed Matloob Hassan v. Brooke Bond Pakistan Ltd.* 1992 SCMR 227 establish that it is the 1961 decision that is the controlling authority. The second question posed in para 6 above must therefore be answered in the negative.

17. The above conclusions bring us to the third question. Since the petitioner's claim was maintainable under the 1936 Act, but he was not a workman within the meaning of the 1968 Ordinance, was he still entitled to the relief granted? The three heads in terms of which relief was granted can, it at all claimable, sound only in contract. In relation to each head, question (c) can therefore be bifurcated into two sub-questions: (i) was the petitioner entitled to relief under that head in contractual terms; and if so, (ii) whether that portion of the claim came within the scope of "wages" as defined in s. 2(vi) of the 1936 Act? As regards the first head, learned counsel for the company, very fairly, did not dispute that the petitioner would be entitled to the relief even though he was not a workman within the meaning of the 1968 Ordinance. The first sub-question must therefore be answered in his favor. As regards the second sub-question, it may be noted that up to the 18th Amendment (i.e., when the 1936 Act lay in the federal domain) the definition of wages ended with certain exclusions in clauses (a) to (e), i.e., any amount that came within those clauses was not "wages" within the meaning of the Act. One exclusion, contained in clause (b), was in respect of "any contribution paid by the employer to any pension fund or provident fund". After the 18th Amendment, the Punjab Assembly amended the 1936 Act in 2014 such that, *inter alia*, clause (b) was omitted. Thus, when the petitioner filed his claim in 2015, both contributions to the provident fund, i.e., as made by him as well as the company, came within the definition of "wages" and thus relief could be granted accordingly under the 1936 Act. The second head of the claim related to payment of wages of one month in lieu of notice upon termination of service. The letter of appointment specifically provided for this in clause 3. Thus, both the sub-questions are to be answered in the

affirmative as regards this head. The final head, which was essentially payment of wages for the month of August, 2012 must receive a like answer. Therefore, the petitioner's claim, as allowed by the learned Commissioner, though sounding only in contract was within the definition of "wages" and was relief that could be, and was, rightly granted. It follows that question (c), as posed in para 6 above, must be answered in the affirmative.

18. This leaves only the question of the compensation which ought, according to learned counsel for the petitioner, have been granted at the maximum ten times permissible. Learned counsel for the company submitted that no such compensation ought to have been granted at all. We have considered the point. In our view, the learned Commissioner was justified, in the facts and circumstances of the case, in awarding compensation. The quantum was within his discretion, and we can see no reason to interfere with the same. Since the petitioner did not challenge the Commissioner's order in appeal on this (or indeed any other) point, he cannot now be allowed to agitate the matter before us.

19. In view of the foregoing, this petition is converted into an appeal to consider the three questions of law set out in para 6, which are answered in terms of the discussion above. The appeal accordingly stands allowed and the impugned order of the learned High Court is set aside. The orders of the learned Labor Court and the learned Commissioner, to the extent that they contain anything inconsistent with what has been said herein above, are also set aside. However, the relief granted to the petitioner in terms of para 7.8 of the order of the learned Commissioner is affirmed and restored. The company is hereby ordered to forthwith make payment of the said amount. The amount payable shall, in any case, be deposited with the Commissioner within fifteen days, failing which the petitioner, for purposes of recovering the said amount (but without prejudice to any other right or remedy, including any action that may be taken under the 1936 Act), be at liberty to move an application in the High Court (in the disposed off writ petition) under Article 187(2) of the Constitution for appropriate execution of the order of this Court.

20. The leave petition, converted into an appeal, is allowed and disposed off in the above terms.

Judge

Judge

Announced in Open Court at Islamabad on 3/10/2018.

Judge.

APPROVED FOR REPORTING