

JUDGMENT SHEET**PESHAWAR HIGH COURT, ABBOTTABAD BENCH****JUDICIAL DEPARTMENT****Writ Petition No.136-A of 2017****JUDGMENT**

Date of hearing.....17.06.2019.....

Petitioner(s) ...(Telenor Pakistan (Pvt.) Limited) by Mr. Tanveer ul Islam, Advocate.....

*Respondent(s)...(Presiding Officer, Labour Court, Haripur and others) ...by RM/S Sardar Muhammad Asif, Assistant Advocate General, Mr. Tahir Mehmood Abbas, Mr. Sajid Iqbal and Muhammad Jehangir Khan, Advocates
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IJAZ ANWAR, J.- By this common judgment, this Court shall also dispose of **Writ Petition No.137-A/2017**, ‘*Telenor Pakistan (Pvt) Limited Vs. Presiding Officer, Labour Court, Haripur and others*’ and **Writ Petition No.138-A/2017**, ‘*Telenor Paksitan(Pvt.) Limited Vs. Presiding Officer, Labour Court, Haripur and others*’, as they involve common questions of facts and law and are directed against identical orders dated 07.01.2017 passed by respondent No.1.

2. In essence, the petitioner in all the above mentioned constitutional petitions has prayed for:

'It is respectfully prayed that this Hon'ble Court may graciously be pleased to:

- I. Declare the order dated 07.01.2017 passed by respondent No.1 in petitioner's appeal as having been passed without lawful authority and of no legal effect and accordingly set aside the same; and*
- II. Remand the matter back to respondent No.1 directing him to decide the petitioner's appeal afresh on merits.*

It is further respectfully prayed that till the final disposal of the captioned petition, respondent No.2 may be restrained from recovering the amount directed to be paid by the petitioner in his order dated 07.01.2016.

Any further/better relief which this Hon'ble Court may deem just and appropriate may also kindly be granted.'

3. Arguments of learned counsel for the parties heard and available record perused.

4. For the purpose of brevity, I will not reproduce the arguments advanced from both the sides, however, will deal with their respective pleas at relevant place in this judgment. In the instant matter, the main controversy is regarding maintainability of the claim petition filed by the respondents/employees (hereinafter to be referred as employees) under the provisions Khyber Pakhtunkhwa Payment of Wages Act, 2013 (hereinafter to be referred as PWA of 2013). The employees were allegedly performing security services on the Telenor Towers in District

Haripur. The admitted position is that the employees were appointed by the Private Security Services i.e. respondents No.5 to 16 (hereinafter to be referred as the Service providers). The claim petition filed by the employees under section 15 of the Khyber Pakhtunkhwa Payment of Wages Act, 2013 (PWA of 2013) proceeded on merit and ultimately it was allowed vide order dated 07.01.2017. The appeal filed by the petitioner was dismissed on the ground that the mandatory pre-condition of deposit of amount payable under the direction appealed against was not complied with. Section 17 of the PWA of 2013 provides right of appeal before the Labour Court. The same being relevant for the purpose of present controversy is reproduced below:

“17. Appeal.---(1) An appeal against a direction made under sub-section (3) or sub-section (4) of section 15 may be preferred within thirty days of the date on which the direction was made before the Labour Court constituted under the Khyber Pakhtunkhwa Industrial Relations Act, 2010 (Khyber Pakhtunkhwa Act No. XVI of 2010), within whose jurisdiction the cause of action to which the appeal relates arose-

(a) by the employer or other person responsible for the payment of wages under section 3, if the total sum directed to be paid by way of wages and compensation exceeds five thousands rupees:

Provided that no appeal under this clause shall lie unless the memorandum of appeal is accompanied by a certificate of the Authority to the effect that the appellant has deposited with the Authority the amount payable under the direction appealed against; or

(b) by an employed person or, if he has died, by any of his heirs, if the total amount of wages claimed to have been withheld from the employed person or from the unpaid group to

- which he belonged exceeds three thousands rupees; or
- (c) by any person directed to pay a penalty under sub-section (4) of section 15;
- (2) Save as provided in sub-section (1), any direction made under sub-section (3) or sub-section (4) of section 15 shall be final.”

(underline provided for emphasis)

It is pertinent to mention here that before Eighteenth Constitution amendment the Payment of Wages Act, 1936 was applicable to the whole Pakistan but since labour matters were entrusted to the Provinces, as such, PWA of 2013 was promulgated by Khyber Pakhtunkhwa. Section 17 of the PWA of 2013 is Pari-Meteria to the time tested law i.e. Payment of Wages Act, 1936.

5. The appeal of the petitioner was dismissed by the Labour Court vide order dated 07.01.2017 on the ground that the Memorandum of appeal was not accompanied by the Certificate of Authority that the amount payable under the direction appealed against was deposited. This question needs no further deliberation in view of the consistent view of the Superior Courts on precondition of deposit certificate for filing appeal under section 17 of the Payment of Wages Act, 1936. Reference may be made to the case of *‘Ibrahim Abdullah/Abdullah & Sons through Managing Director Vs. Abdul Latif*

and 124 others' (2018 PLC 20), '*Messrs Duty Free Shops Limited Vs. Ishaq Rashied and 2 others'* (2013 PLC 302), '*Messrs Cummins Sales and Services Pakistan Limited formerly Messrs Diesel Power Systems Ltd. Through Manager Vs. Waheeduzzaman and 2 others'* (2009 PLC 30), '*Haji Sheikh Noor Din and sons(Pvt.) Ltd. Through Managing Director Vs. Muhammad Intizar and others'* (2006 PLC 606), '*Kawality Paper Mills (Pvt.) Limited through Managing Director Vs. Presiding Officer, Labour Court No.1, Lahore, and 2 others'* (2005 PLC 6), '*Saadi Cement Ltd. Through Chairman and another Vs. Fazal-e-Qadir and another'*(2002 PLC 253), '*Agricultural Engineer, Agricultural Machinery, Thatta Division, Thatta Vs. Tajub Ali and 2 others'*(2000 PLC 383), '*Province of the Punjab through Divisional Forest Officer, Gujrat Forest Division Vs. Punjab Labour Appellate Tribunal and another'*(2001 PLC 672), '*Municipal Corporation, Sialkot through the Administrator Vs. Younis Masih and others'*(1998 PLC 336), '*Syed Match Company Ltd. Through Managing Director Vs. Authority under Payment of Wages Act and*

others'(2003 SCMR 1493) and '*Tehsil Nazim, T.M.A. Okara Vs. Abbas Ali*' (2010 PLC 259).

6. Learned counsel for the petitioners laid much stress that for maintaining appeal before the Wages Authority deposit of the decretal amounts to negating the right of appeal and also to the effect that in such cases writ petition can be maintained as the remedy of appeal cannot be considered as efficacious or alternative. However, this argument fails in view of judgments of the august Supreme Court of Pakistan on this ground too that till such time the remedy of appeal exists on the statute book and condition of deposit of decretal amount is mandatory, the same cannot be bye-passed to invoke the constitutional jurisdiction of the High Court . Reference may be made to the case of '*Tehsil Nazim, T.M.A. Okara Vs. Abbas Ali*' (2010 PLC 259), '*Syed Match Company Ltd. Through Managing Director Vs. Authority under Payment of Wages Act and others'*(2003 SCMR 1493), '*Mughal Surgical (Pvt.) Ltd. And others Vs. Presiding Officer, Punjab Labour Court No.7 and others*' (2006 SCMR 590) and '*Haji Sheikh Noor Din & Sons through Managinger*

***Director and others Vs. Muhammad Fayyaz and 2 others'*(2006 PLC 623).**

7. Now coming to the main objection about the maintainability of the claim/petition before the Wages Authority on the ground that the petitioner being Trans-provincial Establishment within the meaning of Industrial Relations Act, 2012, as such, the Provincial Wages Authority established under the PWA of 2013 cannot entertain petition against such establishment. In the arguments reference was made to the case of '***Messrs Sui Southern Gas Company Ltd. And others Vs. Federation of Pakistan and others'*** (2018 SCMR 802), '***Pakistan Telecommunication Company Ltd. Vs. Member NIRC and others'*** (2014 SCMR 535) and '***Habib Bank Limited through President and 2 others Vs. Authority under payment of Wages Act and another'*** (2016 PLC 61 Lahore).

The above controversy cropped up after Eighteenth Constitutional Amendment when the concurrent legislative list was done away and some Federal Ministries including Labour Ministry were devolved upon the provinces. Every province has

promulgated their respective labour laws but the confusion was created when the Federal Government promulgated Industrial Relations Act, 2012 (Act X of 2012). In the Act of 2012 the powers and functions of the Labour Courts were also entrusted to National Industrial Relations Commission established under the provisions of Act of 2012, while no provision was retained for the establishment of Labour Court. In accordance with the preamble of the Industrial Relations Act, 2012;

‘Industrial Relations Act, 2012 (Act, 2012) is an Act to regulate the relations between employers and workmen working in the Islamabad Capital Territory and in trans-provincial establishment and industry.’

Similarly, ‘Trans-provincial’, as defined in section 2(xxxii) of Act 2012 means:

‘Trans-provincial’ means any establishment, group of establishments, industry, having its branches in more than one province’.

Likewise, the jurisdiction to entertain petition in matter of the workers/union vests in the ‘Commission’, as defined in section 2 (vi) of the IRA, 2012.

‘Commission’ means the Industrial Relations Commission constituted under section 53.’

8. In all the above judgments of the Apex Court, the main issue was related to the Trans-provincial

establishment and the jurisdiction of the Labour Courts in accordance with the IRA, 2012 and respective provincial IRAs. While, in the instant case, the applicability of two legislations are very important and relevant; first is the Khyber Pakhtunkhwa Payment of Wages Act, 2013 and the second is the Khyber Pakhtunkhwa Minimum Wages Act, 2013. In the claim petition filed by the employees they brought the grievances for not paid the monthly wages in accordance with the minimum wages fixed by the Provincial Government at the relevant time. In accordance with section 1(2) of PWA of 2012, the Act shall extend to the whole of the province of Khyber Pakhtunkhwa. Similarly, section 1(3) of PWA of 2012 is relevant, it is reproduced:

- “(3) It shall apply to-
- (a) persons employed in factories or industrial establishment or commercial establishment;
 - (b) the payment of wages to persons employed (otherwise than in a factory) upon any railway by a railway administration; and
 - (c) all persons employed directly or through a contractor, sub-contractor, headman, middleman;
 - (d) persons employed in the factories, industrial establishments or commercial establishments under the control of Federal Government, as the case may be, situated in the territorial jurisdiction of the province.”

(underline provided for emphasis)

There is no objection on the status of the petitioner establishment to be commercial, as such, to fully

understand the definition of ‘commercial establishment’, the definition contained in section 2(ii) of the PWA of 2012 is reproduced:

“(ii) “commercial establishment” for the purpose of this Act, 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 with the owner of any commercial establishment or industrial establishment, employs worker, 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 theater, private health centres, clinical laboratories, private security agencies, other establishment or class thereof which run on commercial and profit basis, and such other establishment or class thereof, as Government may, by notification in the official Gazette, declare to be a commercial establishment for the purposes of this Act;”

In Section 2(xii), ‘railway administration’ is defined, it is reproduced.

“(xii) “railway administration” has the meaning assigned to it in clause (6) of section 3 of the Railways Act, 1890 (IX of 1890).”

The word ‘wages’ has been defined in section 2(xiv), as under:-

(xiv)“wages” means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable, whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed or otherwise, to a person employed in respect of his employment or of work done in such employment and includes Basic Pay and all statutory and non-statutory allowances, any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment, but does not include,-

- (a) any contribution paid by the employer to any pension fund or provident fund;
- (b) any traveling allowance or the value of traveling concession;
- (c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge.”

It is pertinent to mention here that section 3 of the PWA of 2012, provides ‘Responsibility for payment of wages’:

“3. **Responsibility for payment of wages.**---Every employer including a contractor, sub-contractor, headman, middleman or agent shall be responsible for the payment to persons employed by him of all wages required to be paid under this Act:

Provided that, in the case of persons employed otherwise than by a contractor, sub-contractor, headman, middleman or agent,-

- (a) in factory, the manager;
- (b) in industrial establishment or commercial establishment, if there is a person responsible to the employer for the supervision and control of the industrial establishment or commercial establishment, as the case may be; and
- (c) upon railways (otherwise than in factories, or industrial establishment or commercial establishment), if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned,

the person so named, the person so responsible to the employer or the person so nominated, as the case maybe, shall be responsible for such payment.”

(Underline provided for emphasis)

Similarly, section 5(1)(a, b) of PWA of 2012 being relevant is reproduced below:

“5. **Time of payment of wages.**---(1) The wages of every person employed upon or in-

- (a) any railway, factory or industrial establishment or commercial establishment, as the case may be, upon or in which less than one thousand persons are employed, shall be paid before the expiry of seventh day; and
- (b) any railway, factory or industrial establishment or commercial establishment, as the case may be, shall be paid before the expiry of the tenth day, after the last day of the wage-period in respect of which the wages are payable.”

9. While going through the above provisions it is clear that only the “person Employed” can approach the Authority under the Khyber Pakhtunkhwa Payment of Wages Act, 2013.

Similarly, section 1(3)(d) made applicable the provisions of PWA of 2012 also to all factories, industrial and commercial establishments under the control of Federal Government or Provincial Government which are situated in the territorial jurisdiction of the province. The purpose of referring to the above provisions of law is mainly aimed that the jurisdiction of the wages Court has been extended to all the industrial and commercial establishments constituted in the province of Khyber Pakhtunkhwa and in the PWA of 2013 the trans-provincial establishment, as defined in the IRA, 2012, have not been excluded. I have also examined the provisions of Khyber Pakhtunkhwa Minimum Wages Act, 2013(Act No.XII of 2013), wherein too, similar provisions exist in the definition clause and specifically 'Pakistan Railway', finds mention which is a Trans-provincial organization. Thus, the arguments advanced at the bar and the judgments relied upon by the learned counsel for the petitioner are not applicable to the proceedings before the wages authority. The argument that after the promulgation of IRA, 2012, the jurisdiction of the wages Court has

been completely ousted is misconceived because the Payment of Wages Act, 1936 still hold the field, besides every province has promulgated its own law and both these legislation are not in any manner overriding or contradicting each other. The jurisdiction of the National Industrial Relations Commission established under section 54 of the IRA, 2012 remained the same as it had jurisdiction either under the repealed IRA, 1969, IRO, 2002 or IRA, 2008 with a little modification that earlier its jurisdiction was restricted to unfair labour practice and matters of Registration of Union and now it can also adjudicate industrial disputes and individual grievances under section 33 of the IRA, 2012.

10. The arguments of the learned counsel for the petitioner and of the respondents regarding the merits of the case cannot be answered in the constitutional jurisdiction of this Court, firstly, on the ground that in writ jurisdiction reappraisal/appreciation of evidence is not permissible and, secondly, I have held that this writ petition is not maintainable, because the petitioner has failed to deposit the decretal amount in terms of section 17 of

PWA of 2013 and having failed to comply with the mandatory provision in availing statutory remedies, making this petition as not maintainable.

11. For the reasons stated above, this and the connected writ petitions being misconceived are not maintainable, hence, dismissed accordingly.

Announced.
Dt.17.06.2019.

J U D G E

M.Saleem/*

(SB) Mr. Justice Ijaz Anwar