

## IN THE HIGH COURT OF SINDH, KARACHI

PRESENT:

***Mr. Justice Salahuddin Panhwar***  
***Mr. Justice Amjad Ali Sahito***

Constitution Petition No.7180 of 2021

Petitioner: Nadeem-ur-Rehman Baig S/o Mujeeb-ur-Rehman Baig through Ch. Muhammad Ashraf, Advocate

Respondents: through Mr. Muhammad Qasim, Assistant Attorney General representing the State  
through Mirza Arshad Baig, Advocate representing Respondent No.2

Date of hearing: **11.09.2024**

Date of order: **24.09.2024**

### J U D G M E N T

**AMJAD ALI SAHITO, J.** Through this Constitution Petition, the Petitioner has impugned the Order dated **12.10.2021** passed by National Industrial Relations Commission (**NIRC**), Full Bench at Karachi; whereby the appeal filed by Respondent No.2 was accepted and the Order dated **27.04.2017** passed by the Single Bench, NIRC was set aside and the grievance petition was returned to Respondent No.2.

**2.** Brief facts of the case are that the petitioner was appointed as Trainee Engineer in the Respondent company vide appointment letter dated 05.11.1999, thereafter he was promoted as Engineer on 01.10.2000 and then promoted as Senior Engineer w.e.f 01.06.2005. He was served with advance notice of termination of contract vide letter dated 29.04.2011. The Petitioner sent the grievance notice on 28.06.2011, the Respondent's company had informed the petitioner telephonically that the company agreed to withdraw the termination subject to signing of a new hiring contract to which he refused maintaining that he was regular employee and no such contract was acceptable to him. The

Petitioner filed his grievance petition in the Sindh Labour Court No.III Karachi. Upon notice, the Respondent contested the grievance petition by filing a written reply wherein a preliminary objection regarding non-maintainability was raised on the ground that the petitioner does not fall within the definition of the workman. The other contents of the grievance petition were denied on different legal and factual grounds. Thereafter, the grievance petition was transferred to National Industrial Relations Commission after the promulgation of the Industrial Relations Act, 2012.

**3.** The learned Single Bench after recording evidence and hearing arguments of both parties, passed the impugned order dated 27.04.2017 whereby the grievance petition of the petitioner was accepted. Being aggrieved from the said order, the Respondent filed an appeal whereby Full Bench of the **NIRC** passed the impugned order, which has been preferred before this Court through this petition.

**4.** Learned counsel for the petitioner contended that the impugned order passed by learned Full Bench is a result of mis-reading and non-reading of facts of the case; that the learned Single Bench has properly analyzed the facts of the case and passed the order; that the petitioner was employed as Trainee Engineer; that due to his hard work and better performance, he was promoted as Senior Engineer; that the Petitioner is a workman discharging his duties purely manually, physically and clerical in nature having no managerial, supervisory and administrative power; that though his designation was changed to Senior Engineer but he continued performing duties manually and physically; that the EV-Grade was given to the technical staff without any power and with the same nature of duties; that the Respondent's company revised pay scale of technical staff in 2019 including the Petitioner in E-V without vesting any executive powers and nature of duties; that Respondent's company admitted that no changes have been made in nature of duties after revision of pay scale; that Respondent's company failed to produce any documentary proof showing that the Petitioner had any

managerial or administrative powers; that he had no power to grant leave to any subordinate and he could not employ or terminate any person; that he clearly falls within the definition of a workman. He further contended that before passing the termination order, the Respondent's company had not observed codal formalities and due process of law; that the petitioner had not been issued any show cause notice or charge sheet; that no enquiry had been conducted against him; that the petitioner has served the Respondent's company for many years so he has attained the status of a permanent employee; that his services could not be terminated without observing codal formalities; that the termination order of the petitioner is illegal. Lastly, he prays for setting aside the impugned order, suspending the termination letter, and seeking directions to be given to the Respondent's company to reinstate the petitioner. In support of his contentions, he has relied upon the cases reported as; **(1) 1991 PLC 815 (S. Taseer Ali vs. Punjab Labour Appellate Tribunal and 3 others), (2) 1992 SCMR 1891 (National Bank of Pakistan vs. Punjab Labour Court No.7, Gujranwala), 2015 PLC 82 (MCB Bank Ltd. through Attorney vs. Muhammad Imran Bhatti and 2 others), (3) 2016 PLC 191 (Chief Executive Officer QESCO and another vs. Abdul Qadir), SBLR 2006 Sindh 181 (Mujeebur Rehman Qazi vs. Allied Bank of Pakistan & others), NLR 2009 Labour 9 (The Managing Director, etc. vs. 1. Munawar Khaliq 2. The Presiding Officer, Punjab Labour Court No.II, Lahore), 1997 PLC 162 (Pakistan Steel Mills Corporation through General Manager (A&P), Karachi vs. Wahid Hussain Burni and 2 others), 1995 PLC 641 (Rashid-ur-Rehman vs. M/s. Pakistan Steel, Karachi), 2009 PLC 171 (Muslim Commercial Bank Limited vs. District Judge/Presiding Officer, Labour Court, Islamabad and another), 1992 SCMR 505 (Abdul Razzaq vs. Messrs Ihsan Sons Limited and 2 others), 2018 PLC 287 (M/s. United Bank Limited through Executive Officers vs. Muhammad Afzal Solangi and 6 others), 1998 SCMR 1993 (Dr. Muhammad I\*slam vs. Government of NWFP through Secretary, Food, Agriculture, Livestock and Cooperative Department, Peshawar and 2 others), 1991 SCMR 2300 (Mst. Nur Jehan**

***Begum through Legal Representatives vs. Syed Mujtaba Ali Naqvi).***

5. Learned counsel for the Respondent No.2 has supported the impugned order by stating that learned Full Bench has fully appreciated the evidence of the case; that at the time of termination, the petitioner was serving as Senior Engineer; that he is a highly qualified person and has attended courses in the NEPA Sindh; that he has been promoted to Pay Scale-E-V; that in the grievance petition the petitioner himself has stated that many other persons are junior to him; that he has executed various projects and has been awarded appreciation letters by the company/organization whose projects he had completed and accomplished; that in the grievance petition the petitioner has only stated that he is a workman but has not given the details of duties performed by him; that under the law it was for the petitioner to establish that he was a workman; that in the evidence the petitioner has not produced any evidence regarding the duties performed by him; that from the averments made in the grievance petition by the petitioner it is established that he applied his mental probabilities and got executed the projects from his subordinates; that the petitioner was not a permanent employee of the Respondent's company; that he was employed for specific period; that he has been terminated according to the terms of employment agreement signed and accepted by him; that the petitioner was not entitled to be reinstated. Lastly, he prays that the impugned order may be maintained and the petition may be dismissed.

6. The Learned Assistant Attorney General has also supported the impugned order and adopted the contentions so raised by Respondent No.2.

7. We have heard the learned counsel for the parties and perused the material minutely available in the file.

8. Before parting with this judgment, it is appropriate to reproduce the relevant section of the Industrial Relation Act, **(Act)** whereby the definition of worker and workmen has been provided.

**According to sub-section 2 (XXXIII) of 4 of the Industrial Relations Act, 2012 worker and workman is defined as under:-**

**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 relation 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.**

9. To appreciate the above proposition of law, there are certain classifications of Workmen under the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968, which are classified as under:-

1. Permanent,
2. Probationers,
3. badlis,
4. Temporary,
5. Apprentices,
6. Contract worker

10. **"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. Further, it provides definitions that are:-

- b) A **"permanent workman"** is a workman who has been engaged on work of permanent nature likely to last more than nine months and has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial or commercial establishment including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal lockout or strike) or involuntary closure of the establishment; and includes a badli who has been employed for a continues period of three months or for one hundred and eighty three days during any period of twelve consecutive months.
- c) **"Probationer"** is a workman who is provisionally employed to fill a permanent vacancy in a post and has not completed three months service therein. If a

- permanent employee is employed as a probationer in a higher post he may, at any time during the probationary period of three months, be reverted to his old permanent post.
- d) A "**badli**" is a workman who is appointed in the post of a permanent workman or probationer, who is temporarily absent.
  - e) A "**temporary workman**" is a workman who has been engaged for work which is of an essentially temporary nature likely to be finished within a period not exceeding nine months.
  - f) An "**apprentice**" is a person who is an apprentice within the meaning of the Apprenticeship Ordinance, 1962 (LVI of 1962)].
  - g) "**Contract Worker**" means a workman who works on contract basis for a specific period of numeration to be calculated on piece rate basis."

**11.** From the bare perusal of the above definition, the worker and workmen mean that a person not falling within the definition of "**employer**" who is employed as a supervisor or as an apprentice but does not include a person, who is employed mainly in managerial or administrative capacity. On the other hand, the 'employer' as defined in the Ordinance/Act includes a person, who is proprietor, director, manager, secretary, agent or officer or person concerned with the management of the affairs of the establishment. The term 'officer' is specifically mentioned in the definition of the term 'employer'.

**12.** The controversy involved in this petition is only whether the Petitioner is a workman or not. It is a well-settled principle of law that the mere nomenclature of an assigned post is not relevant in determining the status of an employee and assessing whether he is performing the duties of a worker or workman, or a manager, officer or supervisor, rather the paramount and predominant consideration is the nature of the job, and if any employee claims that he was performing the duties of a worker/workman, the burden lies on him to discharge if he claims contrary to the job description assigned to him separately or by means of appointment letter or subsequently made any change in the job description through

up-gradation or promotion which detached or estranged the status of an employee from workman to managerial or supervisory post so in all fairness and evenhandedness, the litmus test is the nature of job actually being performed rather than the nomenclature of the job simpliciter. Moreover, it has been established that this burden of proof is to be discharged by the claimant through documentary and oral evidence supporting his claim that the nature of his work is, in fact, manual or clerical. This requires the production of evidence, documentary or oral, which shows the nature of duties and the functions of the claimant according to his claim that he is a workman. It has been clarified that even if there does not exist the power to hire or fire any person, the nature of the job as performed by the person must be evident from the holistic view of the record produced and that it has to be determined through overall record whether he was employed as a workman doing manual and clerical work and whether he was discharging his functions in a managerial and supervisory role. Accordingly, it's vital for the court to consider all the evidence and to ascertain the duties and functions of the person claiming to be a workman, and to ensure that the workman has discharged his burden with the required evidence. Reliance is placed in the case of **(2024 SCMR 71) AMAN ULLAH-Petitioner V. UNITED BANK LIMITED through President and others---Respondent and un-reported case of Messrs PAK TELECOM MOBILE LIMITED. V MUHAMMAD ATIF BILAL and 2 others** (Civil Petition No. 34 of 2022, decided on 30th January 2024).

**13.** Learned counsel for the petitioner submits that the petitioner was working as a Senior Engineer and falls within the definition of workman. On the other hand, learned counsel for the respondent argued that the petitioner does not fall within the definition of a workman and National Industrial Relations Commission (**NIRC**) has no jurisdiction to adjudicate upon the matter. It suffices to say that in rebuttal the learned counsel for the petitioner argued that the petitioner was initially appointed as a trainee engineer since 1999 and finally promoted to Senior

Engineer. The service of the petitioner was also of a permanent nature, based upon laborious/technical/physical/manual and clerical. He further submits that his nature of duties was installation, reinstallation, and maintenance of VAST/DXX for more than 24 years.

**14.** We have also perused the material available on the record as well as the order passed by Single Bench, no evidence has been brought on the record by the respondents that the petitioner falls within the definition of workman nor has such evidence been adduced before the Single Bench that he was working in the capacity of the officer. On the other hand, the petitioner has proved through evidence that he is a workman. In cross-examination, the respondent admitted that ***“the main business of the company is Data Net Work for point to point VAST and DXX but the installation, re-installation and maintenance are also part of our business.”*** The witness/respondent further admitted that ***“It is correct to suggest that the installation, re-installation and maintenance as the business of the company are done physically and manually...The petitioner has visited to the different companies by the directive of the company... It is correct to suggest that the petitioner worked in the company throughout his tenure honestly and hard-workingly and he is dedicated, diligent and honest worker and no complaints arose against the petitioner. It is correct to suggest that no supervisory and managerial powers were given by the company to the petitioner. It is correct to suggest that no administrative work was given to the petitioner. I see the Annexure-J to the counter affidavit at page No.377 and say that the petitioner is working as clerical work. It is correct to suggest that the business was going smoothly at the time when Mr. Nadeem–ur-Rehman was working. Voluntarily says that there is over staffing of the company, especially engineers. It is correct to suggest that no reason was given in the advance notice of termination to the petitioner.”***



**15.** Things did not end here when the petitioner had filed a grievous petition/application against his termination order before the Sindh Labour Court. The respondents filed their legal objection and claimed that the petitioner is neither a worker nor a workman under the provision of the Standing Order (Ordinance), 1968 and the grievance petition is not maintainable under the law and this court has no jurisdiction to entertain this application/petition. The petitioner may approach before a civil court having jurisdiction. After filing this application notice was issued to the petitioner to decide the maintainability/jurisdiction of the court/petition. At the time of arguments, Mr. A. Gaffar advocate for the respondent was present and requested to the court that he did not press the application at this stage which was dismissed as not pressed and proceeding before NIRC was continued. Meaning thereby the respondents have assumed the jurisdiction of the NIRC/court. Further, the evidence was recorded before the Single bench. Not a single question was put by the respondent to the petitioner during cross-examination that he was working as an employer, and his nature of job was administrative. No evidence was produced by the employer/respondent No.2 to the effect that the employee had supervisory authority, or that he was assigned the duty of some administrative and managerial work or that he was having the power to hire and fire. On the contrary, he/petitioner was fired by the respondent after advance notice having 24 years of service. At the later stage, the respondents have raised the plea that the NIRC has no jurisdiction, which is not sustainable in the eyes of the law. It is a general principle of law that at the time of cross-examination when no question was put to the witness and remained unchecked in cross-examination, would amount to admission on the part of cross-examining party. Admittedly no question was put to the petitioner at the time of cross-examination by the respondents that you are an employer and not a workman. **(2012 CSMR 954)**

**16.** Furthermore while deciding the issue involved in this case the learned Single Bench also considered all aspects of the case and decided that the petitioner was a workman. It is appropriate to reproduce para 14 of the order which reads as under;-

***“14. The question of maintainability is involved in the petition that whether the petitioner is a workman or not, therefore it should be adjudicated first. In this respect, the learned counsel Respondent have filed written synopsis/arguments but he did not touch the answering point of workman of the petitioner, perhaps after evidence he had realized/admitted that the nature of job of the petitioner was manual, skill, technical and clerical for this reason, he did not bother to further dispute the question of workman of the petitioner. However, in written statement of the Respondents, they pleaded that the petitioner was performing the function of Senior Engineer and petitioner was not performing the duties as clerical or manual and is not workman under the Standing Orders Ordinance, 1968 as he is highly qualified person. The Respondent also filed application for deciding the maintainability of the case on the legal ground repeating the similar objections as taken in their written statement, but the learned counsel for Respondents on 03.04.2012 endorsed on their own application submitted for deciding the question of maintainability of the petition in the simple words that “I DO NOT PRESS THIS APPLICATION”, and thereafter the said application was disposed of accordingly. Here, I would like to refer the following case law reported as under:***

**2012 SCMR 954**

**EVIDENCE UN-CHANGED AND UN-RABATTED-**  
***Evidence – Admission, facts not challenged during the evidence, Effect – where a facts asserted by one party remains un-challenged.***

**2010 MLD 604**

**QANUN-E-SHAHDAT, UN-CHALLENGED AND UN-RABATTED-**  
***Evidence – Admission, statement of such witness of plaintiffs deem to be have admitted and the same would be relied upon by the court.***

**2007 PLC 75**

**UN-CHALLENGED AND UN-RABATTED.**  
***If the statement of a witness, which was material the controversy of the case, is not challenged in Cross-Examination then Un-challenged statement will be given full credit and will stand accepted.***

**2004 PLD (SC) 682**

**UN-CHALLENGED AND UN-RABATTED- Facts in Examination-in-Chief no cross examined Effect-Such part of the statement given in examination-in-chief is deemed to be admitted and accepted.**

**2001 SCMR 1700**

**CROSS EXAMINED, UN-CHALLENGED AND UN-RABATTED. If remain unchecked in cross-examination, would amount to admission on the part of cross-examining party.**

**1986-PLC-1034**

**EVIDENCE IN REBUTTAL- Employer producing no evidence to rebuttal claim of employee to be workman. Employee was not afforded any opportunity to produce his evidence in support of his claim – such employee held, would be deemed to be a workman doing work of clerical nature.**

**JUDGMENT OF HONORABLE LAHORE HIGH COURTS IN CIVIL REVISION NO.1518/2010, UN-CHALLENGED AND UN-RABATTED. It is by new settled principal of law that whenever a deposition is made to a particular fact and the same is not challenged in cross-examination, the same shall be deemed to be admitted and true.**

***It has been held that if the employee pleads that he has working manually and clerical in his affidavit-in-evidence and the Respondent did not put any question in this regard, it shall be deemed proved that the employee is workman.***

**17.** In view of the above discussion, we have reached to the conclusion that the duties assigned to the petitioner were clerical and manual in nature, therefore, we concur with a view taken by the Single Bench through its order dated 27.04.2017. The learned Full Bench (**NIRC**) has not evaluated the evidence in its true perspective and thus arrived at an erroneous conclusion by holding that the impugned order suffers from misreading and non-reading of evidence and appeal was allowed and the impugned order was set aside. Resultantly, the instant Constitution Petition is **allowed**. The impugned order dated **12.10.2021** passed by Learned Full Bench (NIRC) is set aside. The order dated **27.04.2017** passed by the Learned Single Bench is hereby upheld/maintained.

**JUDGE**

**JUDGE**