

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

WP No.634 –P of 2015.

JUDGMENT

Date of hearing: 09.06.2015

***Appellant: President Meezan Bank Ltd, etc by
Barrister Babar Shahzad Imran, Advocate.***

***Respondent: Nasir Jalal Awan etc by M/S Aamir Javed
& Asif Ali Shah, Advocates.***

NISAR HUSSAIN KHAN, J.- Petitioners by way of

***instant petition have questioned the judgment of Full Bench of
National Industrial Relations Commission(NIRC) and sought setting
it aside and consequential dismissal of appeal or in alternative to
remand the case to respondent No.2/NIRC for cross-examination of
respondent No.1 and for decision afresh.***

**2. *Precisely stated facts as averred in the petition are
that respondent No.1 Nasir Jalal Awan was employed as Area
Service Quality Manager (ASQM) in the Meezan Bank Limited who***

during his employment allegedly committed misconduct, for which he was issued show cause notice, followed by enquiry and was consequently dismissed from service on 1.6.2010 when the misconduct was proved; that the employee/respondent No.1 served an incompetent grievance notice, addressed to President of Meezan Bank, instead of his appointing authority, the Executive Vice President (HR). Later on he filed grievance petition before the Labour Court, Haripur where the petitioners raised legal objections in their written statements including lack of jurisdiction and limitation. The grievance petition was, then, remitted to NIRC Peshawar Bench by the KPK Labour Appellate Tribunal; that during the proceedings before respondent No.2, petitioners' right of cross-examination was struck off, against which, they filed W.P.No.2386/13. However, in the meantime, NIRC accepted the grievance petition, reinstated respondent No.1, vide its order dated 24.10.2013 and writ petition was withdrawn. Petitioners filed appeal before the Full Bench of the NIRC Islamabad which was dismissed, vide impugned order dated 16.12.2014.

3. *Learned counsel for petitioners vehemently contended that petitioners' valuable right of cross-examination of witnesses has wrongly and illegally been struck off, in absence of*

which, evidence recorded by the respondents/NIRC is of no legal worth. In this regard he placed reliance on Mst.Saira Bibi Vs Muhammad Asif and others (2009 S C M R 946). He maintained that respondent No.1 does not fall within the definition of workman, so the NIRC has no jurisdiction and also because grievance petition was incompetently filed.

4. Learned counsel for respondent No.1 while responding to the arguments of learned counsel for petitioners maintained that petitioners have only questioned the order of Full Bench of the NIRC and have not challenged the order and proceedings of the Single Bench of the NIRC, hence this petition is liable to be dismissed on this score alone. He maintained that the grievance petition was against the Bank who has not challenged the order of the Full Bench of the NIRC; that instant petition is on behalf of officials of the Bank; that Wakalatnama has been signed by incompetent authority, so present petition is not maintainable in its present form. Learned counsel for respondent further contended that petitioners filed a writ petition before the Abbottabad Bench of this Court which was dismissed. He maintained that PWs were duly cross-examined but it was the petitioners who delayed the process as they were interested to prolong the proceedings, so single

Bench of NIRC was constrained to struck off their right of cross-examination and consequently, accepted the grievance petition. The petitioners have purposely withheld the order sheets of the lower fora, indicating their conduct. He maintained, on merits, that obtaining loan is neither an offence nor a misconduct whereas none of 11 employees, except Obaid ur Rehman, supported the case of the petitioners. While referring to different excerpts of the statements of the PWs, he laid emphasis that they were extensively cross-examined and no favourable answer could be solicited. He concluded the arguments with the contention that the petitioners have failed to prove misconduct of the respondent and prayed for dismissal of the instant petition.

5. *We have gone through the record in light of arguments advanced by both the sides.*

6. *Before proceeding to discuss merits of the case, the elementary question of jurisdiction of NIRC is to be resolved, which in turn is based on a question as to whether respondent falls within the definition of workmen or otherwise? The terms “worker” and “workman” are defined in Section 2 (xxxiii) of Industrial Relations Act, 2012 (Act No. X of 2012). According to it, a*

person not falling within the definition of employer, who is employed in an establishment or industry, including as a supervisor or as an apprentice but does not include a person, who is employed mainly in managerial or administrative capacity. The definition of “Worker” and “Workman” provided in the Industrial Relations Act, 2012 is replica of Section 2 (xviii) of the Industrial Relations Ordinance, 1969, except clause (b), which has not been made part of the ibid Act. The term “employer” by virtue of Section 2 (ix) of the ibid Act means a person or body of persons, whether incorporated or not, who employs workmen in the establishment under a contract of employment including a heir, successor or assignee and any person responsible for the management and control of the establishment. The terms “employer” and “workman” have been further distinguished by explanation to Section 2 (ix)(d) of the ibid Act, which provides that the officers and employees of a department of the Federal Government, who belong to the superior, managerial, secretarial, directorial, supervisory or agency staff, who have been notified in this regard in the official gazette shall be deemed to fall within the category of ‘employers’. While in terms of clause (e) in relation to any other establishment, the proprietor of such establishment and its director, manager, secretary, agent or

officer or person concerned with the management of the affairs thereof would be deemed as “employer”.

7. *The Industrial and Commercial Employment (Standing Orders) Ordinance VI of 1968 defines “Workman” in Section 2 (i), which states that any person employed in any industrial or commercial establishment to do any skilled or unskilled, manual or clerical work for hire or reward is a workman. In the same Order the term “employer” has been defined in Section 2 (c), which provides that the owner of an industrial or commercial establishment to which this Ordinance applies including a factory manager or any other industrial or commercial establishment, any person responsible to owner for the supervision and control of such establishment is an employer. When both the definitions of “employer” and “workman” are juxtaposed, it evolves that owner of a commercial establishment or industry, any manager of the factory in terms of the Factory Act, 1934, or any person responsible to the owner for the supervision and control of an establishment would be deemed as an “employer” while rest would be considered as “workmen”. Both the terms, with reference to industrial and commercial establishment, are mutually exclusive. Since there is no other class of employees or officers in relation to industrial or*

commercial establishment, except employer and workman, thus, one may reach at irresistible conclusion that except the person defined as employer, rest all would be deemed as workmen.

8. *The definition of workman with reference to his designation in light of job description had remained a matter of debate in most of the cases and was consistently held by the august Supreme Court that status of a person to be a 'workman', depends not upon his designation but on the nature of the duties performed by him. The same principle was laid down by the august Supreme Court in case titled "Mustehkum Cement Limited through Managing Director versus Abdul Rashid and Others"(1998 S C M R 644). Para 13 of which, elucidates the same proposition, which is re-produced herein below:-*

"As to the question whether a person is or is not a workman, it is now well-established that the same would depend not upon his designation but on the nature of duties mainly performed by him. The nature of duties mainly performed by the respondent, reference to which was earlier made in this judgment, indicates that, he had been assigned the work of maintaining accounts and distribution of different kinds of edibles to the other workers while sitting at a counter. The respondent also used to sell articles and maintain a record thereof. Although, other persons were also working under him, but admittedly, he did not

exercise any power of hire or fire over them. He could not even recommend grant of leave to them. Such duties, therefore, clearly fell within the ambit of 'manual' or 'clerical' work. No doubt, the respondent was designated as Manager, nevertheless the nature of his duties indicate that he belonged to the category of workers defined as 'workman' in clause (i) of section 2 of the Standing Orders Ordinance."

9. *Undeniably, respondent was appointed as Area Service Quality Manager (ASQM) in Meezan Bank Limited, whose job description has been annexed by petitioners as mark 'A' with C.M No.493-P/2015, which for ready reference and to better resolve the controversy is re-produced herein below:-*

Responsibilities	<ol style="list-style-type: none"> 1. Ensure that all bank customers / Walk-in customers are properly greeted and welcomed with smile by the Floor Manager. 2. Ensure that customers are well looked after within the bank's policies & procedures by providing them personalized service & proper guidance. 3. Manage Floor Time Management. 4. Act as a focal point between branch and Service Quality department at HO. 5. Make sure that ATM Card/ PIN record is properly kept, timely delivered to customers and destroyed undelivered Cards / PIN at the given time frame. 6. Assist and guide the customer for issuance of cheques books, ATM,
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	<p>balance confirmation certificates, duplicate statement of accounts COILs, MMCs, Pos, DDs, TTs and other banking instruments in close coordination with the relevant department.</p> <ol style="list-style-type: none"> 7. Ensure adequate inventory of customer interface forms / applications and product brochures maintained at the branch. 8. Liaise closely with operations and teller counter to ensure timely processing and prompt, quick & accurate delivery of service to the customer. 9. Conduct monthly Service Huddle in the branch. 10. Ensure the implementation of Service quality Policies issued by Head Office from time to time. 11. Collect feed back from customers on products and services. 12. Initiate complains in CRM system of internal and external customers. 13. Ensure overall cleanness and pleasant atmosphere in the branch premises. 14. Proper maintenance of the notice board. 15. Analysis of the monthly branch performance report with an attempt to focus from the highlighted most affected areas and work towards eradicating the issues. 16. Maintain a list of complaints of branch customers and follow up / coordinate its resolution with the concern. 17. Account opening and closing (no editing) in the system (data feed in only), once the form is completed from all aspects and authorized by the concern staff. 18. Ensure cleanliness and proper care of
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	<p>the server room.</p> <p>19. Provide suggestions to the branch manager and service quality department on improvement in customer services.</p>
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10. *The detail of job description enumerated hereinabove as assigned to respondent by petitioners includes : Manager, Floor Time Management, shall make sure that ATM Card / PIN record is properly kept, timely delivered to customers and destroyed undelivered Cards/PIN at the given time frame, assist and guide the customer for issuance of cheque books, ATM, balance confirmation certificates, duplicate statement of accounts, ensure adequate inventory of customer interface forms/applications and product brochures maintained at the branch, conduct monthly service huddle in the branch, ensure overall cleanness and pleasant atmosphere in the branch premises, proper maintenance of the notice board and ensure cleanliness and proper care of the server room (emphasis supplied). All the tabulated responsibilities are indicative of the fact that these are the duties manually performed by respondent and not of a managerial or administrative task. He did not exercise any power of hire and fire over any of the employees. The duties so performed by the respondent were substantially of manual and clerical nature*

though he was designated as Area Service Quality Manager. His job description clearly elucidates that he falls within the definition of “worker and workman”, in view of criteria and principle laid down hereinabove. Thus first objection of petitioners that respondent couldn’t maintain a grievance petition before the NIRC is ill-founded, hence, repelled.

11. *Learned counsel for petitioners laid much emphasis on petitioners’ right of cross examination on the respondent. The statements of PW-1, PW-2 and PW-3, indicate that the witnesses were subjected to lengthy and searching cross examination. It is evident from the statement of respondent as PW-4, recorded on 18.2.2012 that right of cross examination was reserved on petitioners’ request. When the case was posted for 3.3.2012, respondent was partially cross examined and case was adjourned for 17.3.2012 for his further cross examination and then on 7.4.2012, he was again cross examined on the said date and matter was adjourned for 14.4.2012 for remaining cross examination. On said date, case was again adjourned due to absence of counsel for the parties. On 26.5.2012, respondent alongwith counsel was present, on which, petitioners filed application for transfer / return of petition, which was replied by counsel for respondent on the same*

date. This application was argued and decided on 2.6.2012 and the matter was kept pending. Ultimately, learned Member NIRC on 1.8.2013, directed the petitioners to make sure presence of their counsel for completion of cross examination on next date or else, evidence of petitioner shall be closed by drawing inference that petitioners are not interested to further cross examine the witness.

12. *Since counsel for petitioners was not present on next date of hearing i.e. 7.8.2013, so evidence of petitioners was closed and respondent was directed to file affidavit of witnesses within three days. It is pertinent to mention that certified copies of all these order-sheets produced by learned counsel for respondent during the course of hearing, were withheld by petitioners, and thereby material facts were concealed and court was strived to be misled by vehemently emphasizing that petitioners were not afforded any opportunity of cross examination, while record speaks otherwise, which suggests that he was continuously cross examined for two dates and case was posted for further cross examination, which was not availed despite warning issued by the Member NIRC. In the given circumstances, the objection of the petitioners is unfounded because facts available on the record speak louder than the words as argued before the Court. With all*

humility and respect, the case of "Mst. Saira Bibi Versus Muhammad Asif and others" reported as 2009 S C M R 946 is distinguishable because in that case prosecutrix was cross examined and her statement during cross examination was considered as more important as that of examination in chief, whereas, it is not the case of petitioners herein because they agitate their right to further cross examine the respondent, which they have already exercised for two consecutive dates. The right of cross-examination is not an unfettered one which may be stretched out of proportion at the whims of cross-examiner. Rather, Court is supposed to control and check the unwarranted exercise of prolonged and purposeless cross-examination. The object is to dig out the truth through vehicle of cross-examination. It cannot be allowed to use as a tool to harass a witness by cross-examining him for an indefinite period. In this respect reliance placed on case titled Muddassar alias Jimmi Vs. The State (1996 SCMR-3) and titled Muhammad Shafi & others Vs. The State (P L D 1967 Supreme Court- 167). Hence, petitioner's this objection is also untenable.

13. *It appears from the record that petitioners, being unwilling employers, are dragging the respondent in multifarious*

applications at different forums to prolong the matter as long as they can.

14. *The allegation of petitioners, on which , respondent was issued show cause notice followed by inquiry and his termination from service, was that he obtained loan from his colleagues but during trial of the grievance petition, the petitioners/bank has failed to prove the charge against him because none of those persons except Obaid-ur-Rehman appeared before the enquiry officer to substantiate the allegation. Even if, any loan was obtained, that by itself does not tantamount to misconduct. Borrowing money from a colleague is no offence. It is no where the case of petitioners / bank that respondent received any illegal gratification or bribe, which might have constituted misconduct. There is no allegation or proof about his misconduct or breach of discipline during discharge of his official duties with reference to his job. Thus in view of such backdrop of facts and lack of evidence, the Single Bench of NIRC was justified to strike down the termination order and the Full Bench of NIRC, has rightly maintained the same, to which, no exception can be taken.*

