

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Syed Hassan Azhar Rizvi
Mr. Justice Adnan-ul-Karim Memon

C.P No. D-1919 of 2016

Petitioner: Muhammad Saleem through
Mr. Ch. Muhammad Ashraf Advocate.

Respondent No.1: Through Muhammad Aslam Butt, DAG.

Respondent No.2: M/s Sui Southern Gas Company through
Mr. Farmanullah Khan Advocate.

Date of hearing 15.08.2017

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- The Petitioner has impugned Order dated 21.03.2016 passed by the learned Full Bench of National Industrial Relation Commission, Islamabad in Appeal No. 12(369)2015-K filed by Respondent No. 2, whereby Appeal was accepted and both Orders dated 27.11.2014 and 27.07.2015 passed by learned Member, National Industrial Relation Commission, Karachi were set aside with direction to the Petitioner to return the entire amount received in the shape of salary from the Respondent No.2 after 26.01.2014.

2. Brief facts of the case are that on 20.04.1989 the Petitioner applied for the post of Security Guard in Respondent No. 2/Sui

Southern Gas Company Ltd. (hereinafter referred to as SSGC) on the basis of experience of 18 years in Pakistan Army. At the time of his appointment, Petitioner disclosed his date of birth as 26.01.1954 in application enclosed with his service record/ Certificate issued by Pakistan Army wherein his date of birth was mentioned as above. Per Petitioner he was not aware as to whether in the certificate issued by Pakistan Army his date of birth had been mentioned as 26.01.1954 instead of 26.01.1956. Petitioner further averred that in the month of January, 2013 when he applied for loan, he came to know for the first time that his retirement is due in the month of January 2014. Petitioner further added that on 25.02.2013 he submitted application to Respondent No. 2 for correction of his date of birth on the basis of his C.N.I.C and certificate issued by the concerned Town Committee but, Respondent No.2 instead of correction of date of birth from the concerned quarters asked Petitioner to get corrected his date of birth from the office of Pakistan Army because his date of birth was entered by the said office in service record. It is further stated that on 19.08.2013 and 30.08.2013 Petitioner submitted two applications to Respondent No. 2 for correction of his date of birth in the certificate issued by Pakistan Army but to no avail. Petitioner feeling aggrieved filed grievance Petition No. 4B (101) 2013-K on 23.09.2013 before learned Single Bench of National Industrial Relation Commission, Karachi, but due to non-availability of the Bench of NIRC Petitioner approached this Court in C.P No.D-165/2014 on 16.01.2014. This Court order dated 20.01.2014 directed the parties to maintain status-quo

in respect of service of the Petitioner. Therefore, this Court order dated 22.01.2015 dismissed the said Petition as withdrawn. The learned Member, NIRC, Karachi proceeded ex-parte against the Respondent No.2 and allowed the above said Grievance Petition vide Order dated 27.11.2014 with direction to the Respondent No. 2 to make correction in date of birth of the Petitioner. The Respondent No. 2 being aggrieved by and dissatisfied with the said Order passed by learned Member, NIRC filed Appeal under Section 58 of the Industrial Relation Act, 2012 before the Full Bench of NIRC, Islamabad which was disposed of vide Order dated 27.01.2015 with direction to Respondent No.2 to move an application before the learned Member, NIRC, Karachi Bench for setting aside the ex-parte Order dated 27.11.2014. In compliance of said Order, Respondent No.2 filed an application before the learned Member, NIRC, Karachi which was also dismissed vide Order dated 27.07.2015. Respondent No.2 being aggrieved by and dissatisfied with both the above specified Orders impugned the same before Full Bench of NIRC Islamabad in Appeal No. 12(369) 2015-K which was allowed vide impugned Order dated 21.03.2016.

3. Mr. Chaudhary Muhammad Ashraf Khan, learned counsel for the Petitioner has contended that the impugned Order is sketchy, contrary to law and judgments passed by this Court as well as Hon'ble Supreme Court of Pakistan. Hence, the same is liable to be set-aside; that Full Bench of NIRC has failed to appreciate that the Petitioner was not paid wages without having

performed any work for the Respondent establishment; that the learned Bench has committed error while holding that service record of the Petitioner was "fake" because it has not been able to spell out the reasons of this unfounded and imaginary conclusion; that the learned Bench has failed to understand that the Petitioner continued his service pursuant to the Orders passed by this Court, which allowed the Petitioner to continue his work; that the learned Full Bench has even ignored the fact that Respondent took work from the Petitioner and paid him salary on the basis of Interim Order; that the learned Bench has failed to consider that it is an appellate forum of the Single Bench of the Commission and not that of High Court; that the learned Bench has committed serious error in law by setting aside both the Orders passed by the learned Member, NIRC which are even otherwise within the parameters of law; that learned Bench has ignored the legal position that it has no power to review its own order. He lastly prayed for modification of impugned Order to the extent of recovery of salary from the Petitioner for the work done by the Petitioner with Respondent No.2. In support reliance is placed on the case of Karachi Metropolitan Corporation Vs. Rehmat Masih & others (2003 PLC 16) Khawaja Naseeruddin Vs. Chairman, PNSC, Karachi & others (2004 PLC 453), Muhammad Bashir Sulehria Vs. M.C.L. through Administrator, District City Government, Lahore (2005 PLC 114).

4. Mr. Farmanullah Khan, learned counsel for Respondent No. 2 supported the impugned Order dated 21.03.2016 passed by

learned Full Bench of NIRC and prayed for dismissal of instant Petition. Learned counsel for the Respondent No. 2 in support of his contention has placed reliance upon the case of Professor Dr. Muhammad Salam Baloch vs. Government of Balochistan and others (2014 SCMR 1723).

5. We have heard learned counsel for the parties, perused the entire material available on record as well as case law cited at the bar.

6. It appears from the record that the Petitioner was appointed on retired Army Personnel Quota and at the time of recruitment, he had submitted copy of Service Certificate issued by the Pakistan Army disclosing the date of birth as 26.01.1954. The Petitioner was mindful of the fact that in the said certificate his mentioned his date of birth as 26.01.1954 instead of 26.01.1956. We have noted that the Petitioner has not filed his case for correction of his date of birth before the Department within the period of two years from the date of his joining in service as provided under the law, rather after 24 years of his service when his retirement came near, he filed representation before the department for the above relief Petitioner on the other hand has failed to give any explanation for such inordinate delay in seeking correction of his date of birth and on the other has not placed on record any material warranting indulgence by this Court in this matter. The Hon'ble Supreme Court has already settled the issue in the case of Shahid Ahmed Vs. Oil and Gas Development Company Ltd and others (2015 PLC CS 267). In the light of dicta

laid down in the said case of Shahid Ahmed the instant Petition cannot be maintained under Article 199 of the Constitution.

7. Reverting to the plea taken by the learned counsel for the Petitioner that the Petitioner is entitled to receive salary for the disputed period i.e. from 26.01.2014 to 25.01.2016, during which he has worked for Respondent-Company. In this regard, he has referred to the letter dated 18.10.2016 issued by the Respondent-Company that the Petitioner was relieved from duty with effect from 25.01.2016 meaning thereby that Petitioner worked for the Respondent-Company till 25.01.2016, therefore, the Petitioner was entitled to get salary of the said period.

8. We are of the considered view that the issue is of recovery of salaries from the Petitioner after his retirement on 26.01.2014, the learned Full Bench of NIRC vide the impugned order dated 21.03.2016. has observed at Para-8 as follows:-

“8. The respondent taking the benefits of the Court order has passed two years after due date of retirement which was 26.01.2014 and as such he has received unjustified remuneration/salary from the appellants who paid him due to the order of the Commission which was obtained through submission of fake documents. The respondent was completely aware about his date of birth because he had already served in the Army and as Security Guard.”

9. We are of the considered opinion that the principle of locus poenitentiae would not apply in this case because the Petitioner has retired from his service on 26.01.2014 and his date of birth 26.01.1954 instead of 26.01.2014 and his date of birth i.e. 26.01.1954 instead of 26.01.1956 was not altered by the Respondent No.2 and the Petitioner stood retired from service on

26.01.2014 and he remained in service upto 25.01.2016 as he was not forced by the Department to work for the Respondent-Company but the Petitioner continued to receive salary from the Respondent No.2 who paid him due to the orders passed on 27.11.2014 and 27.07.2015 by the learned Member NIRC.

10. Perusal of record explicitly shows that there are service allegations against the Petitioner that he was paid the remuneration/salary by the Department due to the order of the learned NIRC which was obtained through submission of fake documents. Since the disputed questions of facts are involved in the present matter, therefore, the same cannot be entertained in a Writ Petition by invoking Constitutional Jurisdiction of this Court.

11. The case law cited by the learned counsel for the Petitioner is quite distinguished from the peculiar facts and circumstances of the case.

12. We are fortified on this issue by the case law decided by the Hon'ble Supreme Court in the case of the Engineer in Chief Branch and another Vs. Jalaluddin (PLD 1992 SC 207) and un-reported case of Rauf Akhtar Farooqi Vs. Province of Sindh (Civil Petition No. 45-K 2015) wherein it has been held at para 3 & 4 as follows:-

“3. We are also of the considered view that recovery of the salaries and or other perks from the date of his retirement i.e. 25.10.12 till 03.01.2015 when he relinquished charge are not sustainable. In the first place his date of birth was altered in 1992

by the Competent Authority and secondly a suit was filed by the petitioner before the learned High Court seeking alteration of his date of birth in which interim order were operative and on the basis of such orders, he continued in the office till he relinquished his charge by virtue of impugned judgment, which otherwise, does not direct such an action.”

13. In the light of above dicta laid down by the Hon’ble Supreme Court, it is for the Respondent-Company to decide the issue whether Respondent No.2 intends to recover amount from the Petitioner for the disputed period of service or not, which he received from the Respondent-Company after 26.01.2014 in the shape of salary for which Petitioner has worked for the Respondent-Company.

14. In view of what has been discussed above, the instant Petition is dismissed along with listed application(s).

JUDGE

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