

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.2421 of 2016

DATE

ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No.15984/2016 (U/O 39 Rule 1 & 2 CPC)

18-11-2016.

Mr. Muhammad Ali Lakhani, Advocate for the plaintiff.

Notices were issued in this matter and bailiff's report reflects that the dispatch clerk at the defendants' office refused to receive the notices as no responsible person was available and he has left the summons and notices at the office of defendants. In the circumstances, they stand served.

This is a Suit for Declaration, Permanent & Mandatory Injunction and Recovery of Damages in respect of Employment Contract dated 25.07.2016, whereby, the plaintiff was employed as Director Facilities Management with defendant No.1. Learned Counsel for the plaintiff submits that the plaintiff pursuant to the aforesaid agreement joined the services of defendant No.1, however, time and again he was not permitted to perform his duties to the optimum level at the behest of defendant No.2 and being aggrieved, a Suit bearing No.2318/2016 was filed before this Court and on 02.11.2016 while issuing notices to the defendants, the Court had ordered that plaintiff may not be harassed by the defendants. He submits that thereafter the impugned Letter of Termination dated 07.11.2016 has been issued, whereby, the plaintiff has been terminated from service with immediate effect. Per Learned Counsel such act on the part of the defendants is in violation of Law and settled proposition, wherein, various Courts have held that services of an employee cannot be terminated without due process and

assigning any reasons and more so without any notice to that effect. In support of his contention he has relied upon **PLD 2011 Lahore 563 (Samina Kanwal v. Director Public Forestry Research Institute, Faisalabad)**, **2016 PLC 335 (Sadiq Amin Rahman v. Pakistan International Airlines Corporation and 3 others)**, **PLD 2012 Supreme Court 132 (Muhammad Yasin v. Federation of Pakistan and others)**, **SBLR 2007 Sindh 495 (Muhammad Dawood & others v. Federation of Pakistan & others)** and **1997 CLC 1936 (Shahid Mahmood v. Karachi Electric Supply Corporation Ltd.)**.

I have heard the learned Counsel and perused the record. It appears that the plaintiff was employed in the services of defendant No.1 as Director Facilities Management and after exchange of offer and acceptance, an Employment Contract was entered into between the plaintiff and defendant No.1 on 25.07.2016. Insofar as earlier Suit No. 2318/2016 is concerned, the same appears to have been dismissed as infructuous after the services have been terminated vide impugned letter dated 7.11.2016. On perusal of the Employment Contract it appears that the same provided a probationary period of six months, whereas, it also provided a notice period by stating that the service during the probation period will be terminable at one month's notice from either side or salary in lieu of the notice and once the services are confirmed the termination notice will be of three months from either side or salary in lieu thereof. Through impugned notice dated 07.11.2016, the plaintiff has been informed that his services are terminated with immediate effect, since the same are no longer required. He has been further informed that he will be paid one month's salary in lieu of notice period as per the terms of letter of appointment dated 25.07.2016 and other dues, if any, to which he may be legally entitled, whereas, the details have also been provided in the Termination Notice, which includes Emoluments up to and including November 7, 2016, Salary for 7 calendar days' leave earned but not availed, Provident Fund as per rules and one month's salary in lieu of notice period. Neither the employment contract nor the probation period has been denied nor is it the case of the plaintiff that he has completed such period of probation. In the circumstances, it appears that the defendants have acted strictly in accordance with the terms of

Employment, which were admitted and acknowledged by the plaintiff at the time of joining the employment and therefore, now it does not lie in the mouth of the plaintiff to plead against such Employment Contract. Admittedly the employment contract does not provide that any notice would be issued prior to termination of the employee during probation.

Insofar as the case law relied upon by the learned Counsel for the plaintiff is concerned, it has to be understood that there is a marked difference insofar as employment with a Government and/or a Statutory Corporation (hereinafter referred to as "Corporation") and a private organization. There may be a situation that an employee of a Corporation can be aggrieved of the conduct and the manner in which his employment has been or is being terminated. The element of governance should be there as after all a Corporation working under the control of the Government has an element of public duty to perform and act within the mandate of its rules be it statutory or otherwise. However, an employee of a private concern cannot be imposed upon his employer by taking shelter in the garb of case law (though very little) which has been developed in respect of Corporation(s), whereby, it has been held that management of a Corporation cannot exercise powers at their own discretion in contravention of infringement of fundamental rights envisioned under the Constitution and that there is no concept of unfettered discretion in public law, whereas, all public power is in the nature of trust and is to be exercised reasonably, honestly, fairly and justly. (See ***Federation of Pakistan v. Muhammad Aslam-1986 SCMR 916, Shahid Mahmood v. Karachi Electric Supply Corporation Ltd-1997 CLC 1936 & Sadiq Amin Rahman v. Pakistan International Airlines Corporation-2016 PLC (CS) 335***)

Even otherwise, the matrix of this case is even on a lower pedestal as the plaintiff was on probation. The Oxford dictionary has defined probation *as a process of testing or observing the character or abilities of a person who is new to a role or job*. Insofar as a Private Corporation or Company is concerned, it is a settled proposition of law that a servant cannot be forced upon his Master. The Master can always refuse to continue with the employment of any of his employee and may come forward to pay compensation for breach of contract of services and can always say that the employee would not be re-engaged in services. Even

otherwise in terms of Section 21(b) of the Specific Relief Act, 1877, a contract for personal services cannot be specifically enforced. Whereas, a breach of contract in these circumstances can give rise to only two relief(s) i.e. Specific Performance and Damages and if Specific Performance is barred in law, then the only relief(s) available are damages. Once the Master allegedly in breach of his contract refuses to employ the services, the only right which survives for the employee is the right to damages and nothing else. Reliance in this case may be placed on the case reported as **PLD 1961 531 (Messrs Malik and Haq and another v. Muhammad Shamsul Islam Chowdhury and two others)**, wherein a large bench (5 Members) of the Hon'ble Supreme Court has been pleased to hold as under:-

“This appeal should succeed for the simple reason that in the absence of any statutory provision protecting the servant it is not possible in law to grant to him a decree against an unwilling master that he is still his servant. A servant cannot be forced upon his master. The master is always entitled to say that he is prepared to pay damages for breach of contract of service but will not accept the services of the servant. A contract for personal service as will appear from section 21 (b) of the Specific Relief Act cannot be specifically enforced but it is not even necessary to invoke section 21 (b) for such a contract is unenforceable on account of section 21 (a) wherein it is provided that a contract for the non-performance of which compensation in money is adequate relief cannot be specifically enforced. In a case where there is a contract between a master and a servant the master agreeing to pay the salary and the servant agreeing to render personal service it is obvious that money compensation is full relief, for all that the servant was entitled to under the contract was his salary. A breach of contract can give rise to only two reliefs: damage or specific performance. If specific performance be barred the only relief available is damages. When a master, in breach of his contract, refused to employ the servant the only right that survives to the servant is the right to damages and a decree for damages is the only decree that can be granted to him.”

Insofar as the case law relied upon by the learned Counsel for the plaintiff is concerned, there is no cavil to such proposition, but with respect I may observe that the facts of instant case are entirely on a different plane inasmuch as this is a case of probationary period, hence does not create any entitlement whatsoever. Secondly, all the cases relied upon are in respect of Corporations, either, having statutory rules or even non-statutory rules / regulations in respect of their employees, and are not in respect of employment contracts with private organizations.

Not only this but even in cases of Civil Servants there exists no right during the probationary period to claim protection under the maxim “*audi alteram partem*” for issuance of a show cause notice before

any termination can take effect as it is against the spirit and true meaning of putting an employee on probation. The Hon'ble Supreme Court in the case of ***Muhammad Iqbal Khan Niazi v. Lahore High Court through Registrar [2003 PLC (CS) 282]*** has been pleased to observe as under;

As regards the principle of natural justice enshrined in the maxim "Audi alteram partem" suffice it to say that it has been held in Rehan Saeed Khan and others v. Federation of Pakistan (2001 PLC (C.S.) 1275) that a probationer has not vested right to continue in service, therefore, his services can be terminated without a show-cause notice and the question of violation of the principles of audi alteram partem does not arise except in case of mala fides. It is scarcely necessary to mention that the impugned order cannot be termed as mala fide by any standard.

In view of hereinabove facts and circumstances of the case, I am of the view that no relief for injunction can be granted to the plaintiff in this matter as the plaintiff was in the employment of a private organization on a probationary period and the Contract of Employment specifically provided that the same can be terminated within a period of six months, whereas, the Termination Notice has taken care of the Emoluments, which were required to be paid in such a situation and therefore the plaintiff has failed to make out any prima facie case for indulgence, whereas, neither balance of convenience lies in his favor nor any irreparable loss would be caused to him as adequate compensation through damages has already been claimed. Accordingly, listed application is dismissed.

J U D G E

Ayaz