

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P. NO.S-860 of 2014

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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Date of Hearing : 15.02.2018.

Date of Order : 15.02.2018.

Mr. Mumtaz Alam Leghari, Advocate for petitioner.

Mr. Ali Ahmed Soomro, Advocate for respondent No.3.

Mr. Wali Muhammad Jamari, Assistant A.G

ORDER

AGHA FAISAL, J: This petition was preferred against the order, of the Presiding Officer - Authority under Payment of Wages Act for Hyderabad, dated 20.05.2014 (hereinafter referred to as the "Impugned Order"). The contents of the Impugned Order are reproduced herein below:

"The Court has taken serious note of absence of R.G.M and non-compliance of directions without any cogent reason.

This is an admitted case by the respondent and put the applicant as well as this Court on false hopes that the case is finalized and put before committee for final approval. But they have continuously failed to pay the claim to the applicant. The law provides the payment of retirement dues immediately after the retirement but in the instant case the dues have not been paid despite lapse of '6' years and still committee's approval is being sought. Keeping in view of the admitted position and undue delay in the payment of legal dues, I allow the claim of the applicant with 0.1/2 time compensation. The respondent is directed to deposit the decretal amount of Rs.96,402/- with this Court within 30 days for onward payment.

Announced in open Court."

2. The present petition was instituted after a passage of about six months from the date of the above referenced Impugned Order having been passed and sought the following relief:

- (a) To declare that application under Section 15(3) of the Payment Wages Act filed by the respondent No.3 is without competence and without jurisdiction of respondent No.2.
- (b) To set aside the order dated 20.05.2014 passed by the authority in diary sheet which is illegal, colourable exercise of powers and against the law, rules and principles of natural justice as opportunity of hearing is not afforded to the petitioner.
- (c) Direct the respondent No.2 to pass speaking order after giving full opportunity of hearing to the parties.
- (d) To suspend and stay further proceedings of execution application No.4 of 2014 against the petitioner before the respondent No.2 till the final decision of the present petition.
- (e) Costs of the petition may be saddled upon the respondents.
- (f) Any other relief(s) which this Honourable Court deems fit, just and proper in favour of the petitioner.

3. Brief facts leading to the matter are as follows:

- (i) The respondent No.3 filed a claim before the relevant authority, being the respondent No.2, seeking the following relief:
 - (a) *It is, therefore, prayed that applicant may be declared the entitled to receive the revision of his pension amount on the basis of revise pay slip dated 09.06.2008 showing last pay drawn as Rs.9930/-.*
 - (b) *The Respondents may be directed to assess Severance pay, Commutation as well as Leave Encashment amounts in the light of revised pension amount.*
 - (c) *The Respondents may be directed to arrange early payments of all Arrears amount in respect of monthly pension, Severance Pay, Commutation and Leave Encashment amount since 18.02.2008.*

(d) *Any other relief, which this Honourable Court deems fit and proper under the circumstances and the nature of the case, may be allowed.*

(e) *Cost of the Application may also be granted.*

(ii) The present petitioner contested the said proceedings initially and then tendered an apparent admission of liability.

(iii) Despite having admitted its liability, the petitioner failed to carry out its undertaking to discharge the same.

(iv) The respondent No. 2 held in favour of the respondent No. 3 and entered its findings against the petitioner.

(v) Rather than preferring an appeal against the Impugned Order, as required under Section 17 of the Payment of Wages Act, 1936 (hereinafter referred to as the "Act"), the petitioner instituted the present petition.

4. In his arguments the learned Counsel for the petitioner stated that the complaint was filed by the respondent No.3 before the respondent No.2 under the Payment of Wages Act, 1936. It may be pertinent to reproduce the relevant content of the said Act herein below:

"15. Claims out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims.--- *The Provincial Government may, by notification in the official Gazette appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the authority to hear and decide for any specified are all claims arising out of deductions from the wages, [or non-payment of dues relating to provident fund or gratuity payable under any law] or delay in the payment of wages, of persons employed or paid in that area.*

(2) Where contrary to the provisions of this Act and deduction has been made from the wages of an employed person, or any payment of wages [or of any dues relating to Provident Fund or gratuity payable under any law] has been delayed, such person himself, or any legal practitioner, or any official of a registered trade union authorized in writing to act on his behalf or any Inspector under this Act [or of any heirs of an employed person who has died] or any other person acting with the permission of the authority appointed under sub-section (1), may apply to such authority for direction under sub-section (1), may apply to such authority for direction under sub-section (3).

Provided that every application shall be presented within [three years] from the date on which the deduction from the wages was due to be made, as the case may be:

Provided further that any application may be admitted after the said period of [three years] when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

(3) When any application under sub-section (2) is entertained, the authority shall hear the applicant and the employer or other person responsible for the payment of wages under section 3, or give them an opportunity of being heard, and, after such further enquiry (if any) as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the employed person [or if the applicant is one of the heirs of an employed person, the payment to such applicant] of the amount deducted, or the payment of the delayed wages, together, with the payment of such compensation as the authority may think fit, not exceeding ten rupees in the latter:

Provided that no direction for the payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to—

- (a) a bona fide error or bona fide dispute as to the amount payable to the employed person, or
- (b) the occurrence of an emergency, or the existence of exceptional circumstances, such that person responsible for the payment of the wages was unable though exercising reasonable diligence, to make prompt payment, or
- (c) the failure of the employed person to apply for or accept payment,

(4) *If the authority hearing any application under this section is satisfied that it was neither malicious or vexatious, the authority may direct that a penalty not exceeding fifty rupees be paid to the employer or other person responsible for the payment of wages by the person presenting the application.*

(5) *Any amount directed to be paid under this section may be recovered--.*

(a) *if the authority is a Magistrate by the authority as if it were a fine imposed by him as Magistrate, and*

[(b) *if the authority is not a Magistrate , by the authority as an arrear of land revenue, or in the prescribed manner, by the authority by distress and sale of the moveable property belonging to the person by whom the amount is to be paid, or by attachment and sale of the immovable property belonging to such person.]*

5. The learned Counsel for the petitioner argued that the heads, under which the claim of the respondent No.3 was filed, did not fall within the purview of the Act. It was further argued that the respondent No.2 did not have any jurisdiction to entertain the respondent No.3's complaint.

6. It was further contended that the claim filed before the respondent No.2 was barred by limitation as the said claim was filed on 07.02.2013, whereas the respondent No.3 ceased to remain in the employment of the petitioner with effect from 18.02.2008, and that the same is manifest from a bare perusal of the Paragraph No.1 of the claim filed by the respondent No.2, which states as follows:

"1. That the applicant had been serving as a bonafide Employee of PTCL in the cadre of Engineering Supervisor in BPS-17 (Non-Gazetted when he accepted voluntary separation scheme offered by the PTCL and retired on 18.02.2008 (Copy Enclosed at Annexure "A"). While his Application dated 13.12.2007 regarding his up-gradation date from BPS-16 to BPS-17 as per revised "INTER OFFICE MEMO" No:ADMN-II/1-6/206 dated 24.06.2006 issued by the Director Admin. Islamabad (Copy Enclosed at

Annexure “B”), was still under process in the office of the then General Manager STR-I, Hyderabad.”

7. The learned Counsel for the petitioner went on to argue that Section 1 sub-section (4) of the Act stipulates that the said Act applies only to the persons employed in any factory. It was pointed out to the learned Counsel that pursuant to the amendments to the said Act in 2001 and thereafter industrial and commercial establishments had also been included within the purview of the said Act.

8. A question was then put to the learned Counsel whether he sought to argue that the petitioner was neither an industrial nor a commercial establishment, the learned Counsel answered the said question in negative and then withdrew the argument as to the applicability of the Act to the petitioner altogether. Therefore, any further elucidation upon this specific issue is eschewed.

9. In conclusion, the learned Counsel argued that the Impugned Order was *void, coram non-judice* and against the principles of natural justice.

10. In support of the petitioner’s contention, learned Counsel cited the case of *MST. NASIM AKHTAR V/S. MUNICIPAL COMMITTEE, DEPALPUR*, reported as *2003 PLC 184* and drew the Court’s attention to the following paragraph:

“Burden of establishing a point of fact which may likely deprive the employee of their intended benefit shall, therefore, not be put on the employees or the Institution; more so, then the main application has been instituted on behalf of the employers. The employer has to shoulder the onus by proving that the laboratory at Hyderabad is inescapably a different entity having no concern with the notified laboratories at Karachi.”

11. Learned Counsel for the petitioner in support of his contention cited the case of *FARZAND RAZA NAQVI & 05 OTHERS V/S. MUHAMMAD DIN THROUGH LEGAL HEIRS & OTHERS*, reported as 2004 SCMR 400 and drew the Court's attention to the following paragraph:

"4. There is no cavil to the proposition that if the remedy of appeal is available to a party under the statute, without availing such statutory remedy, the Constitutional jurisdiction of the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 cannot be invoked and the remedy of writ petition cannot be allowed to be availed as substitution of appeal. Following the above rule, the High Court undoubtedly in the normal circumstances, should not entertain the Constitution petition if an alternate remedy under the relevant statute is available to a party but this rule does not create bar of jurisdiction rather it regulates the Constitutional jurisdiction of High Court and thus in exceptional circumstances, the High Court may exercise its Constitutional jurisdiction in a matter in which the statutory remedy of appeal or revision as the case may be, was available but could not be availed."

12. Learned Counsel also relied upon the case of *PAKISTAN TELECOMMUNICATION COMPANY LIMITED V/S. MOHAMMAD DISPAZEER ABBASI & OTHERS*, reported as 2016 PLC 367, to buttress his arguments that the complaint filed by the respondent No.3 could not have been entertained by the respondent No.2 if the same was filed beyond the period of limitation, and also drew the Court's attention to the following dictum of the said judgment:

----Ss. 33, 54 & 2 (xxxiii)---Grievance petition---Limitation---Grievance notice by workman---Scope---Employer company floated Voluntary Separation Scheme for its employees---Petitioners---employees received dues as provided under the Voluntary Separation Scheme---Petitioners---employees filed grievance petition that their date of commencement of employment had erroneously been mentioned---Grievance petition was accepted concurrently---Validity---Voluntary Separation Scheme had accepted concurrently---Validity---Voluntary Separation Scheme had been opted by the employees voluntarily without any coercion or duress and terms and conditions mentioned therein were accepted---Employees had not proved coercion/inducement and they were estopped from challenging/questioning the terms of

Voluntary Separation Scheme---Employees were not dismissed/retrenched, laid off due to industrial dispute rather had voluntarily opted to leave the employer company---Employees were not worker/workman to invoke the jurisdiction of National Industrial Relations Commission nor could serve grievance notice on the employer company--Impugned orders were set aside and grievance petitioner dismissed---Constitutional petition was allowed circumstances [pp. 372, 373, 374, 375, 376, 377], A, B, C, D, E & F”

13. The learned Assistant A.G appearing for respondent No.1 confined his arguments to the issue of maintainability and stated that the said petition could not be entertained in presence of a statutory remedy provided under Section 17 of the Act, which reads as under:

“17. Appeal.--- (1) *An appeal against the 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 Industrial Relations Ordinance, 1969 (XXII OF 1969) 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 three hundred 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 employer person or, if he had 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 fifty rupees, or]

(c) by any person directed to pay a penalty under sub-section (4) of Section 15.

[(1-A) All the appeals pending before any District Court under this section immediately before the commencement of Labour Laws (Amendment) Ordinance, 1974 shall on such commencement stand transferred to, and be disposed of by the Labour Court within whose jurisdiction the cause of action to which the appeal relates arose.]

(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.”

14. The learned Counsel for respondent No.3 opened his arguments by stating that the claim of the respondent, including the quantum thereof, was duly admitted by the petitioner and that the same was manifest *inter alia* from the Diary Sheet of the respondent No.2 in terms of the notation therein dated 15.04.2014, the contents of the said order are as follows:

“15.04.2014: The respondent excuses for delay due to his personal problems. He assures to pay the dues within this month. Given chance till 28.04.2014”

15. On the issue of limitation, the learned Counsel argued that this was a matter for the respondent No.2 to determine, as it had inherent powers to do so under Section 15 of the Act.

16. The learned Counsel went on to state that the respondent No.3 had been pursuing the matter diligently with the petitioner and a record of the correspondence to such effect was demonstrated from the record available in the Court’s file.

17. It was argued that only when the respondent No.3 finally realized that the petitioner was not going to honour its obligation that the respondent No.3 filed a complaint before the respondent No.2.

18. Learned Counsel for respondent No.3 cited the case of *PAKISTAN TELECOMMUNICATION COMPANY LIMITED through General Manager V/S. EMPLOYEES’ OLD-AGE BENEFIT INSTITUTION through Chairman & another*, reported as 2012 PLC 460 and drew the Court’s attention to the following paragraphs in order to demonstrate that the petitioner was in fact a commercial establishment:

“6. The main contention of the petitioner is that the petitioner company is a statutory body and EOB Act is not applicable to its employees. The contention of learned counsel for the petitioner that the petitioner company is a statutory body is not correct. Section 34 of the Pakistan Telecommunication (Re-organization) Act, 1996 provided that as soon as may be, after the commencement of this Act, the Federal Government shall establish a company to be known as the Pakistan Telecommunication Company, limited by shares and cause it to be incorporated under the Companies Ordinance, 1984. Therefore, the petitioner company was established under the direction issued by the statute, but the company itself was had not come into existence through a statute. As such, it cannot be considered as a statutory body. Similarly, the exclusion of an industry or establishment from EOB Act and the petitioner company does not fall in any provisions of section 47 ibid. Learned counsel for the petitioner submitted that subsection (F) of section 47 ibid provides that the act shall not apply to the person, in service of statutory body. Elaborating this argument further, the learned counsel submitted that before becoming a company, the petitioner Mr. Shahid Ahmed Shaikh, D.P.G an authority known as Pakistan Telecommunication Authority, being controlled by the Federal Government. The petitioner company had come into existence through an act; it was exempted from taxes and for the employees of the company, a trust was created. The trust maintains pension fund etc and since the Act provided that the same had overriding effect, therefore, the petitioner company is not to be considered as an ordinary company, rather for all practical purposes, it is an establishment. The learned counsel further submitted that since there is trust of the company, which provides pension etc, therefore, burdening the petitioner company for payment under EOB Act would amount to double taxation.

7. The contention of learned counsel for the petitioner is not correct. The petitioner company cannot be considered as a statutory body, simply on the basis of presumptions and whims. There is no denial of the fact that the petitioner company has been incorporated under the Companies Ordinance, 1984 and is limited by shares. As such, it cannot be considered as a statutory organization and it would not fall outside the ambit of EOB Act. The EOBI is not a tax, but its object is to afford employees and workers survivor benefits. Its purpose is to protect the indigent with a social safety net by offering them subsistence benefits such as old-age pension, old-age grants, disability and sections of Pakistan’s employment class. As such, it cannot be said that the EOBI is a tax. The fact that other benefits are available for workers of the petitioner company, would not exclude the application of EOB Act.”

19. It was further contended by the learned Counsel for the respondent No.3 that the petitioner did not make full disclosure of the facts in the subject petition and drew the Court's attention to numerous documents, which although pertaining to the dispute, were not filed by the petitioner.

20. In order to address this petition, it may be pertinent to seek guidance from the pronouncements of the superior Courts upon the said issue.

21. In the case of *SYED MATCH COMPANY LTD. though Managing Director V/S. AUTHORITY UNDER PAYMENT OF WAGES ACT & OTHERS*, reported as 2003 SCMR 1493, the august Supreme Court of Pakistan has held as follows:

"9. Learned High Court in the last para of the impugned judgment observed as under:

"However, in order to meet the ends of justice we observe that the petitioner-Company shall be at liberty to file an appeal in the appropriate forum and time spent by the petitioner-Company in this Court shall be excluded from the computation of the period of limitation prescribed in the law"

10. We are of the view that in order to nullify the effect of section 17(1)(a) of the Act, the jurisdiction of High Court was invoked and it was mala fide. The amount, determined by the respondent No.1 as wages, was never deposited by the petitioners. Accordingly, we set aside the above quoted observations of the High Court and leave it to the appropriate Forum/Appellate Authority to decide the issue of limitation on merits having taken into consideration all the circumstances of these cases. In fact, High Court had no justification to pre-empt the decision of the First Appellate Court on the point of limitation.

Clause (a) of subsection (1) of section 17 of the Act reads as under:

"(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 three hundred 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]

22. There is also a Divisional Bench judgment of this Court in the case of *NAWAB AHMED KHANZADA V/S. AUTHORITY UNDER PAYMENT OF WAGES ACT, 1936 AND COMMISSIONER WORKMEN'S COMPENSATION FOR HYDERABAD & 02 OTHERS*, reported as *2013 PLC 402*, wherein it has *inter alia* been held as follows:

"10. Keeping in view hereinabove facts and circumstances of the instant case, we are of the opinion that instant petition, besides being devoid of any merits, has been filed with mala fide intention to circumvent the legal requirement of deposit of the amount in terms of Proviso to clause (a) subsection (1) of section 17 of the Payment of Wages Act, 1936, and to bypass and abandon the forum as provided under the statute. A party cannot be allowed to bypass or abandon the forum provided for the purposes of redressal of grievance under a statute without any lawful and reasonable excuse...."

23. It is clearly evident from the foregoing that the judgments of the superior Courts do not encourage the circumvention of the remedies prescribed by statute. The two cases mentioned supra were predicated upon the facts similar to those in the present petition and the resort to the writ jurisdiction of the High Court, as an alternative to filing an appeal as provided under the statute, was clearly deprecated.

24. The constituents of the claim filed by the respondent No.3 against the petitioner before the respondent No.2 could not be claimed to be outside the ambit of the Act for the reasons *inter alia* that it is apparent from the record of the respondent No.2 that the same stood duly

admitted by the petitioner, as was reflected in the order dated 15.04.2014.

25. The issue of jurisdiction also appears to have been agitated by the petitioner before the respondent No.2 by filing an application under Order VII Rule 10 of CPC. This fact was not adverted to by the petitioner during the arguments and came to the attention of this Court while reviewing the diary sheet of the respondent No. 2. The order dated 28.10.2013 is reproduced herein below:

“The point of jurisdiction has been argued by learned counsel for respondent. The documents A-31 on court record shows last posting of the applicant as Engg: Supervisor on 19.12.02 on the strength of telegraph Division, Hyderabad. No subsequent transfer/posting is on the record of this Court. Therefore this Court has jurisdiction to adjudicate this case. Hence the application U/O VII (10) CPC is dismissed. Next date is fixed 11.11.2013 for cross of applicant.”

26. This clearly shows that the contention of the regarding the respondent No.2, being *corum non-judice*, was infact considered and dispelled by the respondent No.2. The record also shows that the petitioner accepted the said order as the same was never assailed before any forum whatsoever.

27. In regard to the question of limitation, reliance is once again placed upon the aforementioned pronouncement of the august Supreme Court of Pakistan in the case of *SYED MATCH COMPANY LTD through Managing Director V/S. AUTHORITY UNDER PAYMENT OF WAGES ACT & OTHERS*, reported as 2003 SCMR 1993, wherein it was held that the issue of limitation was to be determined by the appellate authority and that the High Court would have no justification to pre-empt the decision of the appellate forum on the point of limitation.

28. In any event the respondent No. 2 was empowered by the Act to condone any delay. Whether in fact any such condonation was specifically granted and if so then whether the same was based on sustainable grounds were issues which only the appellate forum could have determined.

29. There is also an earlier judgment of this High Court in the case of *NAIMAT KHAN V/S. SINDH LABOUR COURT NO.VII AT HYDERABAD & OTHERS*, reported as *1987 PLC 619* where the Court has held as under:

“As far as the second argument advanced by Mr. Muhammad Ahmed is concerned the learned Labour Court after considering the evidence before it came to the conclusion that the application filed by the petitioner before the authority was time-barred and no cogent grounds for condonation of the delay could be established by the petitioner before the authority. The question, whether the delay should have been condoned or not on the basis of the evidence produced by the petitioner was a question of fact which has been determined by the learned Labour Court after taking into account such evidence.”

30. The question of limitation is one that could always have been raised by the petitioner, albeit before the appropriate forum. However, invocation of this argument may not be made a basis of circumventing statutorily prescribed process of adjudication altogether.

31. The contention of the petitioner that the Impugned Order was *void* and/or *coram non-judice*, hence it could not be assailed before the forum of appropriate jurisdiction, as prescribed in Section 17 of the Act, was without substance.

32. The raising of such arguments with the primary objective of compelling the High Court to assume the jurisdiction of another forum cannot be appreciated.

33. The petitioner's contention that the Impugned Order is against the principles of natural justice is once again dispelled by the diary sheet of the respondent No.2 wherein it is apparent that the petitioner was provide ample opportunity to state its case and it was in fact the conduct of the petitioner that was delaying proceedings even after liability had been accepted for payment by the petitioner.

34. The plaintiff's reliance upon the cases of *MST. NASIM AKHTAR V/S. MUNICIPAL COMMITTEE, DEPALPUR (2003 PLC 184)* and *PAKISTAN TELECOMMUNICATION COMPANY LIMITED V/S. MOHAMMAD DISPAZEER ABBASI & OTHERS (2016 PLC 367)*, is unmerited as the determination of issue of limitation was also the purview of the appellate forum and not that of this Court.

35. The plaintiff's reliance upon the case of *FARZAND RAZA NAQVI & 05 OTHERS V/S. MUHAMMAD DIN THROUGH LEGAL HEIRS & OTHERS*, reported as *2004 SCMR 400*, is also unfounded in view of the fact that there is an adequate alternate remedy available to the petitioner, which remedy was callously not exercised by the petitioner. In such circumstances, it may be unsafe for the High Court to exercise its discretion and assume the jurisdiction to adjudicate the matter.

36. There is also a question that arose regarding latches. It was noted by the Court that the Impugned Order is dated 20.05.2014, however, the subject petition was presented on 20.11.2014, after a passage of 06 months. There appears to be no satisfactorily justification for the same on record and neither any cogent argument in regard thereof has been placed before this Court by the learned Counsel for the petitioner during his arguments.

37. In view of the record available before this Court and in reliance upon the binding ratio of the pronouncements of the superior Courts, cited supra, it is held that the subject petition is not maintainable and is thereby dismissed accordingly.

38. Accordingly, this petition was dismissed vide a short order dated, 15-02-2018, which stipulated *“Heard each of the three Counsel at length and the Court appreciates the assistance rendered. For the reasons to be recorded later on, this petition is hereby dismissed”*. These are the reasons for the said short order.

JUDGE

Shahid