IN THE HIGH COURT OF SINDH, KARACHI

C.P. NO. D- 8620 of 2017

PRESENT:
Mr. Justice Khadim Hussain Shaikh
Mr. Justice Arshad Hussain Khan

M/s. Pakistan International Container Terminal Ltd.
vs.
The Sindh Labour Appellate Tribunal & another

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Petitioner: Through Mr. Javed Farooqui, Advocate

Respondent No.1 Through Mr. Abdul Jalil Zubedi, AAG

Respondent No.2: Through Mr. Imdad Khan, advocate

Date of hearing: 11.03.2019.

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The petitioner through instant constitutional petition challenging the judgment dated 16.11.2017 passed by learned respondent No.1 [the Sindh Labour Appellate Tribunal, Karachi], in Appeal No.KAR-45/2017, has sought the following reliefs:-

> "1. Declare that the impugned judgment dated 16.11.2017 passed by the respondent No.1 in appeal No.KAR-45/2017 is unlawful and of no legal effect.
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> 2. Set-aside the impugned judgment dated 16.11.2017 passed by the respondent No.1 in Appeal No.KAR-45/2017.
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> 3. suspend the operation of impugned judgment dated 16.11.2017 passed by the respondent No.1 in Appeal No.KAR-45/2017 till disposal of this petition.
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> 4. Grant any other relief deem fit and appropriate in the circumstances of the case."

2. Brief facts leading to the filing of the present petition as mentioned therein are that a grievance petition No. 08 of 2016, for reinstatement in service along with all back and consequential benefits was filed by respondent No.2 (Muhammad Zeeshan) against the

petitioner before the Sindh Labour Court No. V, Karachi. On 06.02.2017, the said petition was disposed of whereby learned Labour Court awarded compensation of Rs.2,00,000/- in favour of Respondent No.2. The said order of Labour Court was challenged by Respondent No.2 before learned Respondent No.1 (the Sindh Labour Appellate Tribunal, Karachi) in Appeal No. KAR-45/2017. The said appeal was subsequently disposed of by the learned member of respondent No.1 on 16.11.2017 whereby respondent No.2 was awarded a lump sum amount of Rs.500,000/- as full and final payment for severance of his employment relationship with the petitioner. The said judgment is impugned by the petitioner in the instant Petition, inter alia, on the grounds: that the impugned judgment is untenable in law as compensation was granted under repealed Industrial Relations Ordinance, 2002, which is no more in the field; that there is no provision in standing Order 15 (3) (e) of Industrial Employment (Standing Orders), 1968, and Sindh Industrial Relations Act, 2013, for grant of compensation to the employee who has been dismissed from service on admitted charge of being habitual absentee; that the impugned judgment has been passed in violation of Article 4 and 10A of the Constitution of Islamic Republic of Pakistan, 1973; that the appeal filed by respondent No.2 before respondent No.1 was time barred. Further the judgments passed by the forums below while passing the orders have completely failed to take into consideration the evidence available on the record.

3. Upon notice of the present petition, though the counsel for respondent No.2 appeared and filed vakalatnama in the case, however, he did not file any counter affidavit either to the main petition or to any application filed by the petitioner. He insisted to argue the case without filing any reply to the petition. As according to him the judgment impugned before this Court was passed with the consent of the parties and the petitioner after giving consent cannot challenge the said order and as such the present petition is not maintainable in law and liable to be dismissed.

4. From the record, it also appears that the petitioner pursuant to the directions of this Court on 22.12.2017, in the present petition,

deposited an amount of Rs.500,000/-, the compensation awarded to the respondent No.2 in the impugned judgment, with the Nazir of this Court.

5. Learned counsel for the petitioner during the course of his arguments has contended that the impugned judgment is not sustainable in law and liable to be set-aside as both the forums below while passing the orders have failed to consider the fact that respondent No.2 was dismissed from the service on account of his habitual absence from the service whereupon initially he was issued warning letter, however, when he failed to mend his ways and continued to remain absent from the work, he was issued show cause notice. In reply to the said show cause notice respondent No.2 did not dispute his absence, however, the ground mentioned for his absence was found not justifiable. Consequently, an enquiry was initiated and ample opportunity was afforded to respondent No.2 to defend himself. After recording evidence, enquiry was concluded and respondent No.2 was found guilty of the charge of misconduct; resultantly he was dismissed from the service. It is argued that respondent No.2 also failed to prove his case for re-instatement before the learned Labour Court, yet the learned Labour Court awarded compensation of amount of Rs.200,000/- to respondent No.2. It is further argued that learned respondent No.1 after perusal of the record and hearing of arguments though held that *"finding of enquiry officer and Labour Court that respondent No.2 remained absent without leave and without any unavoidable reason, are unexceptionable"***,** yet it enhanced the award of compensation to the tune Rs.500,000/-. It is also argued that the award of compensation was enhanced on wrong assumption that both the parties agreed for compensation. Further argued that it was wrongly assumed by respondent No.1 that the petitioner agreed to pay Rs.361,222/- as full and final payment. Learned counsel further argued that the petitioner having no other alternate remedy filed the present petition. He further argued that the impugned judgment is void and this Court under supervisory jurisdiction can entertain constitutional petition. Lastly, argued that this Court in its constitutional jurisdiction is vested with the power to undo any action or order, which is a result of an arbitrary exercise of authority, passed without jurisdiction.

6. Conversely, learned counsel for respondent No.2, in his arguments without touching the merit of the case has contended that the present petition is not maintainable in law as the impugned judgment was passed by consent of the parties, hence the same cannot be opened here. The learned counsel in this regard referred to paras No. 23 and 24 of the impugned judgment. It is also argued that the impugned judgment is just, fair and equitable hence the same is not liable to be set aside. Lastly, argued that respondent No.2 is a poor person who after dismissal from the service of the petitioner is jobless and having no means of earnings, he has to look after his old aged ailing parents. In the circumstances, the amount so deposited by the petitioner in this case may be ordered to be released to respondent No.2.

7. Learned Additional Advocate General, Sindh, supports the impugned judgment.

8. We have heard learned counsel for the parties and the documents available on record.

9. From the record, it transpires that the learned Labour Court after considering the evidence available on the record passed the judgment in grievance petition No. 08.2016. The learned Labour Court while deciding the issues "(3) *Whether the respondent's action of dismissing the applicant from the service on the ground of being habitual absentee was based upon the time barred act of misconduct? If yes, what is its effect? and (4) What should the order be? passed following orders:*

> " **Issue No.3:** Learned counsel for the petitioner has challenged the petitioner's dismissal order being based upon the time barred act of habitual absentee/misconduct and has referred to sub-clause 4 of the standing Orders 15 of Industrial & Commercial Employment (Standing Orders) Ordinance 1968, wherein it is provided that no order of dismissal shall be made unless a workman concerned is informed in writing of the alleged misconduct or of the date on which the alleged misconduct comes to the notice of the employer. To support his contention, learned counsel has also relied upon the case of Muslim Commercial Bank Ltd. v/s Chairman Sindh Labour Appellate Tribunal & 2 others reported as 1992 PLC 1023, wherein the Hon'ble High Court of Sindh was pleased to dismiss the petition of the employer, beside other also on the ground of issuing the charge sheet to the workman beyond the period prescribed under clause 4 of Standing Order 15 of Industrial & Commercial Employment (Standing Orders) Ordinance 1968. In the instant case, admitted as per show cause notice, the last absence of the

petitioner was on 31.07.2015, whereas the respondent establishment on account of above stated absence, has issued show cause notice to the petitioner on 20 10.2015, after expiry of 30 days period of the date of last self-granted leave. The learned counsel for the respondent has not controverted the above legal aspect of the case nor has brought on record, the date on which the respondent management, came to the notice of the petitioner's absence/misconduct, as such I am of the view that the dismissal order dated 21.12.2016 of the petitioner being based upon the time barred act of habitual absentee/misconduct is not sustainable in the eyes of law. issue No.2 is decided in affirmative.

Issue No.4: While deciding the issue No.2, I have observed that the petitioner is habitual absentee, which amounts to misconduct, however in view of the findings of the issue No.3, the petitioner's dismissal order being issued in contravention of clause 4 of Standing Order 15 of the Industrial & Commercial Employment (Standing Orders) Ordinance 1968, is not sustainable. The record also indicates the strain relationship of employee (workman) and employer between the petitioner and the respondents. In such circumstances, the petitioner's reinstatement in service will not be viable and productive, therefore it will not be proper to impose unwanted worker upon the unwilling employer, therefore, I feel it proper to award compensation to the petitioner in lieu of his reinstatement in service. Accordingly, while exercising the powers vested in section 45 sub-clause 4 (g), I award Rs. 2,00,000/-(Two Lacs) as compensation in addition to the legal dues, if any to be paid to the petitioner within 30 days in lieu of his reinstatement in service. Issue No.4 is decided accordingly."

[Emphasis supplied]

The petitioner did not challenge the above said judgment, however, respondent No.2, having been aggrieved of the judgment, preferred appeal No. KAR-45.2017 before respondent No.1, who after hearing the counsel for the parties disposed of the appeal through judgment dated 16.11.2017, which is impugned in the present proceedings. Relevant portion whereof for the sake of ready reference is reproduced as under:

"23. In this case, both parties agreed for compensation. It was only the amount of compensation on which they could not agree. The respondent agreed to pay Rs.3,61,222/- as full and final payment; while the appellant demanded Rs.700,000/- as full and final payment.

24. According to the pay slip of the appellant for the month of September 2015, his total per month pay along with allowance was Rs.25,007.00. The total period of his service was five years and nine months. Keeping in view all the facts and

> circumstances, of the case, including per month pay and allowances of the appellant, length of his service, conditions of unemployment prevailing in the country, and status of the respondents, the amount of compensation awarded by the labour court appears to be on lower side. It will be, therefore, just and proper to increase it reasonably. Accordingly, the appellant is awarded a lump sum amount of Rs.500,000/- (rupees five hundred thousand) as full and final payment for severance of his employment relationship with the respondents, which the respondents are directed to deposit within 60 days for payment to the appellant. The appeal is disposed of accordingly."
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> [Emphasis supplied]

10. From the perusal of both the aforesaid orders, it appears that the decision of the Labour court was not upset by learned respondent No.1, and in fact the said decision was modified only to the extent of enhancement of the compensation that too as full and final settlement. Since, the petitioner accepted the decision of the Labour Court as they did not challenge the same, therefore, it is not open for the petitioner to challenge the decision of the learned respondent No.1 on facts/ merit and that too in the writ jurisdiction of this Court. Moreover, the question pertaining to appreciation of facts cannot be resorted to in exercise of constitutional jurisdiction as by doing the same it would amounts to converting the petition into a revision or second appeal.

11. It is well settled that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this Court may exercise its constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not

to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this Court has to comprehend what illegality or irregularity and/or violation of law has been committed by the courts below which caused miscarriage of justice. Reliance is placed on the case *Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others* ***(2015 PLC 259)***.

12. Reverting to the case in hand, the precise ground to challenge the impugned judgment is that the petitioner never agreed for giving the compensation. From the record, it appears that the petitioner did not challenge the order passed by the learned Labour Court, which awarded the compensation to respondent No.2 in addition to the legal dues. The said act of the petitioner alone reflects that they agreed for giving compensation. Furthermore, from the perusal of the impugned judgment, [relevant portions whereof have been reproduced in the Para 9 above], it appears that learned member of Respondent No.1 has mentioned a specific amount Rs.3,61,222/- which appears to have been given by the petitioner, otherwise there was no occasion for the learned member to quote such figure. The learned counsel for the petitioner also attempted to argue that since the authorized officer and/or the representative of the petitioner was not present before respondent No.1 at the time of argument, therefore, the question of giving any consent for compensation as mentioned in the impugned judgment does not arise. This contention of the learned counsel has no force. For giving any consent on behalf of a party, personal appearance of the party itself or any representative on its behalf before the court is not necessary as the counsel appearing on its behalf is competent enough to give any consent on behalf of its client, which authorization/power is usually mentioned in the *vakalatnama* of a counsel representing his client, like in the present petition also the counsel appearing for the petitioner, inter alia, has such power. In the present petition, the petitioner neither filed the *vakalatnama* of its counsel who appeared before respondent No.1, nor filed his personal affidavit to the extent that neither the petitioner nor he on behalf of its client has given consent for compensation as mentioned in the impugned judgment. In view of the

above, it can be safely presumed that the consent of petitioner for payment of compensation was communicated to the learned member of Respondent No.1, who mentioned the same in the impugned judgment. Furthermore, from the perusal of the impugned judgment it also appears that the learned member of Respondent No.1, has enhanced the award of compensation as full and final payment for severance of respondent No.2 while keeping in view all the factors including pay per month and allowances of respondent No.2, length of service, conditions of unemployment prevailing in the Country and status of the petitioner. Learned counsel for the Petitioner also could not point out any substantial error and/or any illegality, infirmity or jurisdictional error in the impugned judgment, which could warrant interference by this Court in extra ordinary jurisdiction of High Court as such the judgment impugned herein is well reasoned, fair, equitable and in accordance with law.

13. The upshot of the above discussion is that the present petition being devoid of merit is dismissed. The amount so deposited by the petitioner with the Nazir of this Court along with profits accrued thereon, if any, may be handed over to respondent No.2 upon proper verification and identification.

Judge

Judge

Karachi
Dated: 22. 03.2019