ORDER SHEET
HIGH COURT OF SINDH AT KARACHI

C.P.No.D-6572 of 2016

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before:-
Mr.Justice Muhammad Ali Mazhar
Mr.Justice Agha Faisal

Sultan Ahmed Shaikh.....Petitioner

Versus

M/s. Sui Southern Gas Company Ltd.
and others.....Respondents

Date of Hearing: 26.03.2019

Syed Abrar Ahmed Bukhari, Advocate for the Petitioner.

Mr. Asim Iqbal, Advocate for the Respondent No.1.

Mr. Jawad Dero, Additional Advocate General Sindh.

Muhammad Ali Mazhar, J: This petition has been brought to challenge an order passed by VIth Additional District & Sessions Judge, Karachi-East on 06.09.2016 in Civil Revision Application No.44/2015, by dint of which the revisional court set aside the order of dismissing the application by the IInd Senior Civil Judge, Karachi, East in Suit No.955/2013 filed under Order 7 Rule 11 CPC by the respondent No.1.

2. The transitory facts of the case are that the petitioner joined respondent No.1 organization in 1981. Subsequently he was confirmed as Junior Supervisor. The cause of distress is despite earning more than 60 points, a threshold required for promotion in Grade-V,

the petitioner was promoted to Grade-IV rather than Grade-V. Regardless of repeated requests, no action was taken by the respondent No.1 hence he filed a civil suit for declaration, specific performance and damages in the sum of Rs.50,00,000/- for depriving and or ignoring the case of petitioner for promotion as Deputy Chief Engineer Grade-V. In the trial court, the respondent No.1 filed an application under Order 7 Rule 11 CPC which was dismissed by the trial court with the following observation:

> **"After hearing learned counsel for both the parties, I have gone through the case file. Perusal of the record shows that plaintiff has filed instant suit for declaration, specific performance and damages amounting to Rs.50,00,000/- for wrongful ignorance of promotion as deputy chief engineer grade-V against the defendants. It is a matter of record that plaintiff claims to be promotion as Dy. Chief Engineer Grade-V being senior, however, the same has been denied by the defendant/SSGC. In these circumstances the matter requires deeper appreciation of evidence, hence instant application is hereby dismissed."**

3. Against the dismissal order of application, the respondent No.1 filed Civil Revision Application No.44/2015. The Revision Application was allowed vide order dated 06.09.2016 and the order passed by the trial court was set aside with the following observation:

> **"I also see worth in the arguments of learned counsel for the applicant that the contractual employee cannot enforce his contract by filing declaratory suit and suit of plaintiff/respondent No.1 is barred by section 21 and 42 of Specific Relief act. The services of the plaintiff/respondent No.1 are governed under the non-statutory rules which were framed by the company. In this respect I am also fortified from the case law reported in PLD 2008 SC 398, the Hon'ble Apex Court also held that promotion cannot vested by a servant. It is also further held that neither the promotion could take place automatically nor seniority alone is the deciding factor, as number of factors constitutes fitness for promotion. In another case law reported**

in 2010 PLC (C.S) 888 has also held that promotion is not such a guaranteed right as anyone can claim or seek enforcement through a Court, rationale behind seems to be the satisfaction of the ultimate competent authority in the hierarchy to which the civil servant may belong as the best judgment to determine the suitability of a particular person for the post vests with the competent departmental authority, interference with an assessment made by the departmental authority is rarely interfered with the Courts. The Hon'ble Superior Court in the case law reported in 1987 SCMR 598 has held that the competent authority is to determine suitability after assessment of all relevant considerations such as seniority, competence, rectitude, annual confidential reports and none of which is important than the other for preservation of purity and efficiency of public service.

The respondent No.1 counsel has incised that the respondent No.1/plaintiff has status and legal character, therefore, he can seek relief of declaration and specific performance but in my view, respondent No.1 is employee of applicant/defendant No.1 and his services governed under non statutory rules. The services of the respondent No.1/plaintiff also contractual with the company even action taken by the company against ex-employee as dismissal from service which can only be claimed by the employee by filing suit for declaration, therefore, case laws relied by the counsel for respondent No.1 are distinguishable from the facts and circumstances of this case.

Therefore, in the light of above discussion and decision of Hon'ble Superior Courts, I am in a firm view that the suit filed by the respondent No.1/plaintiff is barred by section 21 and 42 of Specific Relief Act and even he cannot claim damages against the applicant's company, hence the suit of plaintiff/respondent No.1 is not maintainable, therefore, the order passed by the learned trial court by dismissing the application under Order VII rule 11 CPC is not sustainable in law and same is hereby set aside and the instant civil revision application is allowed and the suit plaint bearing No. 955/2013 is rejected with no order as to cost."

4. The learned counsel for the petitioner argued that the revisional court failed to apply its independent mind and without considering the averments made in the plaint as well as the documents attached to the plaint, allowed the

application moved under Order 7 Rule11 CPC and rejected the plaint. It was further contended that besides claiming the declaration and specific performance, the petitioner had also claimed damages on account of non-granting promotion to the petitioner at the relevant time. The trial court passed the order on correct elucidation of law which has been disturbed and upset by the revisional court without any lawful justification.

5. The learned counsel for the respondent No.1 argued that there was a contractual relationship between the petitioner and respondent No.1 under the principle of master and servant. The petitioner could not have claimed his promotion as a vested right. He further argued that there are no statutory rules of service of the respondent No.1, therefore, neither any legal right can be claimed nor the employer can be compelled to grant permission. He further argued that according to previous promotion policy, the criteria for promotion from grade-II to Grade-III was based on the principle of completion of three years' service but according to new promotion policy notified in the month of January, 1997, the requirement of efficiency/performance was also added. As per promotion policy, ACR/PMS ratings of executives are crucial for eligibility of promotion. The promotion policy is impartial, unbiased and transparent. Since the performance of the petitioner was found below average or below expectation, therefore, he was not considered for promotion. The learned counsel further contended that promotion is not a vested right nor it can be granted with retrospective effect. In support of his contention, the learned counsel cited 1987 SCMR 598, 2004 SCMR 497, 2008 PLC (C.S) 255, 2008 PLD S.C. 395, 2010 PLC (C.S)

888, 2016 SCMR 1021, 2018 PLC (C.S) 398, PLD 2003 S.C. 110 and 2004 MLD 542.

6. Heard the arguments. Undoubtedly, the relationship is of master and servant. The respondent establishment has no statutory rules of service which could have been invoked by the petitioner for redress of his grievance by filing constitution petition in this court for appropriate relief. Keeping in mind the severities and rigidities of principle of master and servant, he could only file a civil suit for alleviation and extenuating his grievances. He sought the directions against the defendant No.1/respondent No.1 to consider his case for promotion as Deputy Chief Engineer Grade-V being senior and eligible for promotion. He further sought the declaration that the promotion of the defendant Nos.2 and 3/respondent Nos.2 and 3 in Grade-V is against the promotion policy and besides this, the petitioner had also claimed damages in his lawsuit in the sum of Rs.50,00,000/- for ignorance of his promotion case including the mental agony and torture which the plaintiff/petitioner allegedly suffered due to promotion of his junior officers.

7. The learned trial court rightly observed that in the plaint the plaintiff/petitioner also claimed the damages, therefore, the matter could not be decided without adducing evidence but the revisional court held that the suit was barred by Sections 21 and 42 of the Specific Relief Act. It was further held by the revisional court that the petitioner even cannot claim damages. It was further held that the relationship is governed according to the principle of master and servant. However it was acknowledged by the revisional court that according to

promotion policy, the promotion may be due after completion of three years. In fact this was the precise claim of the petitioner in the suit that despite completing the required length of service his case was not considered for promotion. No doubt that the promotion cannot be claimed as a vested right but this can be granted on fulfilment and meeting the eligibility criteria provided under the promotion policy of the management but an important facet cannot be overlooked and disregarded that eligibility and fitness criteria are two different attributes and characteristics which could be decided only by Departmental Promotion Committee constituted by the management. A person may be eligible but he may not be found fit by DPC. Here nothing was placed on record that the case of petitioner was ever sent for consideration by the DPC/Promotion Board but it was turned down. Mere articulating that the petitioner was found below average in performance without producing any minutes of meeting of DPC/Promotion Board is beside the point and inconsequential.

8. It is well entrenched principle and exposition of law that in case of relationship of master and servant, the only remedy that can be claimed by any such employee is to file lawsuit for damages. If the revisional court was of the view that no declaration could be granted or specific performance was not possible, even then according to averments made in the plaint the plaint was not liable to be rejected in which specific prayer for damages was also made by the plaintiff which was ignored by the revisional court and without applying proper application of mind the plaint was rejected. In the case of **M/s. Aroma Travel Services (Pvt.) Ltd. & others versus Faisal Al Abdullah**

Al Faisal Al Saud. (2017 YLR 1579) (authored by Muhammad Ali Mazhar-J) It was held that Order VII Rule 11 CPC enlightens and expounds rejection of plaint if it appears from the statement sculpted therein to be barred by any law or disclosed no cause of action. The court is under obligation to must give a meaningful reading to the plaint if it is manifestly vexatious or meritless in the sense of not disclosing a clear right to sue, the court may reject the plaint. Even if the expression of the statement in the plaint is given a liberal meaning, documents filed with the plaint may be looked into but nothing more. With the aim of deciding whether the plaint discloses cause of action or not, the court has to perceive and grasp the averments made in the plaint and the accompanying documents. The court has also to presume the facts stated in the plaint as correct and for the determination of any such application, court cannot look into the defence. In case of any mix question of law and facts, the right methodology and approach is to let the suit proceed to written statement and discovery and determine the matter either on framing preliminary issues or regular trial. This Rule does not justify the rejection of any particular portion of the plaint or in piecemeal as the concept of partial rejection is seemingly incongruous to the provisions of Order VII Rule 11 CPC. Nevertheless court is bound to reject the plaint if it does not disclose any cause of action but at the same time a plea that there is no cause of action for the suit is different from the plea that the plaint does not disclose a cause of action. Astute drafting for creating illusions of cause of action are not permitted in law but a clear right to sue ought to be shown in the plaint. A plea that the plaint does not disclose a cause of action can be taken

only when on that plea the plaintiff can be entirely non-suited. Where there is a joinder of a number of causes of action on some of which at least a decree could be passed, no plea of demurrer may be admitted to reject the plaint. Where there are several parties and the plaint discloses a cause of action against one or more of them then also the plaint cannot be rejected as what is required in law is not the piecemeal reading of the plaint but reading it in its entirety. In the case of **Rana Imran versus Fahad Noor Khan (2011 YLR 1473),** the expression cause of action has been discussed comprehensively that the word "cause of action" means bundle of facts which if traversed, a suitor claiming relief is required to prove for obtaining judgment. Nevertheless, it does not mean that even if one such fact, a constituent of cause of action is in existence, the claim can succeed. The totality of the facts must co-exist and if anything is wanting the claim would be incompetent. A part is included in the whole but the whole can never be equal to the part. It is also well understood that not only the party seeking relief should have a cause of action when the transaction or the alleged act is done but also at the time of the institution of the claim. A suitor is required to show that not only a right has been infringed in a manner to entitle him to a relief but also that when he approached the Court the right to seek the relief was in existence. At this juncture, we would like to rely on a judgment "Ghulam Ali v. Asmatullah" reported in 1990 SCMR 1630, in which, the honourable Supreme Court has held that assertion made in the plaint had to be seen for the purposes of determining whether plaint disclosed any cause of action. Lack of proof or weakness of proof in circumstances of the case did not furnish any

justification for coming to conclusion that there was no cause of action shown in the plaint. In another judgment reported in case of Jewan v. Federation of Pakistan, 1994 SCMR 826, the honourable Supreme Court has held that while taking action for rejection of plaint under Order VII, Rule 11, C.P.C., the Court cannot take into consideration pleas raised by the defendants in the suit in his defence as at that stage the pleas raised by the defendants are only contentions in the proceedings unsupported by any evidence on record. However, if there is some other material before the Court apart from the plaint at that stage which is admitted by the plaintiff, the same can also be looked into and taken into consideration by the Court while rejecting the plaint. In the case reported in PLD 2008 Supreme Court 650 (Saleem Malik v. Pakistan Cricket Board (PCB)), it was held that the rejection of plaint on technical grounds would amount to deprive a person from his legitimate right of availing the legal remedy for undoing the wrong done in respect of his such rights, therefore, the Court may, in exceptional cases, consider the legal objection in the light of averments of the written statement but the pleading as a whole cannot be taken into consideration for rejection of plaint. Subject to the certain exception to the general principle, the plaint in the suit cannot be rejected on the basis of defence plea or material supplied by the opposite party with the written statement. This is settled law that in case of controversial questions of fact or law, the provision of Order VII, Rule 11, C.P.C., cannot be invoked rather the proper course for the court in such cases is to frame issues on such question and decide the same on merits in the light of evidence in accordance with law."

9. The learned counsel for the respondent No.1 acknowledged that the terms and conditions of the services of the petitioner were governed under the principle of master and servant but at the same time he relied upon judicial precedents pronounced in the case of civil servants which do not germane to the principle of master and servant. No doubt under the civil servant laws or under the labour laws the promotion cannot be claimed as a vested right but the petitioner instituted his lawsuit in the trial court on the notion that he was eligible for promotion due to certain length of service plus requisite scores/marks and nothing was adverse against him, even though he was not considered and his juniors were promoted to higher grade, therefore, in our standpoint a fair opportunity should have been afforded to the petitioner to produce requisite evidence in the trial court to justify his claim of damages but he was nonsuited by the revisional court in cursory and perfunctory manner, whereas the trial court in its right wisdom and acumen felt it appropriate to allow the parties to adduce evidence which was correct approach of law. At least in two cases (authored by one of us Muhammad Ali Mazhar-J), the corpus and concept of the principle of master and servant has been discoursed in the following terms:-

1. **Sadiq Amin Rahman Vs. PIAC (2016 PLC Lab. 335).**

10. The dictum laid down by the Supreme Court in the case of Tanweer-ur-Rehman (supra) made it amply visible that due to non-statutory service rules, the petition under Article 199 does not lie against the PIAC (defendant No.1) but principle of master and servant will apply. Obviously when the petition is barred then the only remedy available to the plaintiff is to file the civil suit for the redress of his grievance. Recently in the

case of PIAC vs. Syed Suleman Alam Rizvi, reported in 2015 SCMR 1545, the hon'ble Supreme Court while referring to the case of Tanweer-ur-Rehman, Abdul Wahab & others v. HBL & others (2013 SCMR 1383), Pakistan Defence Officers' Housing Authority & others v. Lt.Col. Syed Jawaid Ahmed (2013 SCMR 1707) and Syed Nazir Gilani v. Pakistan Red Crescent Society & another (2014 SCMR 982) reaffirmed that no petition lies in the matters pertaining to the terms and conditions of service of employees of a Corporation, where such terms and condition are not governed by statutory rules. It was further held that the terms and conditions of the employees of the appellant corporation are not governed by any statutory Rules and is now well settled that the relationship between the appellant corporation and its employees is that of a "master and servant". The only course left to the employees is to file a suit for redress of their grievances.

18. The learned counsel for the defendants forcefully argued that in the relationship of master and servant, the plaintiff has no right to claim declaratory relief or injunction except damages. Every now and then statutory corporations or institutions those have no statutory rules of service come up with the same plea. In my view, there must be some distinction and differentiation between the relationship of master and servant and master and slave. We are living in Islamic Republic of Pakistan in 21st Century where a range of fundamental rights are guaranteed and secured in our Constitution..... Under Article 3 of our Constitution it is responsibility of the State to ensure the elimination of all forms of exploitation and the gradual fulfillment of fundamental principle from each according to the ability to each according to his work and under Article 11 there is no concept of slavery which is non-existent and forbidden and no law permits or facilitates its introduction into Pakistan and in any form while under Article 37 (Principles of Policy) it is the responsibility of the State to ensure equitable and just rights between employer and employees and provide for all citizens, within the available resources of the country facilities of work and adequate livelihood with reasonable rest and leisure and now under Article 10-A of the Constitution, right to fair trial and due process is also a fundamental right of great magnitude.

19. An employee of industrial and commercial establishment, if he is workman, he may approach to the labour court and or NIRC under the labour laws as the case may but employees performing managerial or supervisory duties are excluded from the definition of workman. Likewise in the statutory corporations having no statutory service rules/regulations or commercial and industrial establishments, if their employees are covered under the definition of workmen, they may approach to the labour court and or NIRC for redress of their grievance but in the case of any injustice, inequality or discrimination with the employee not covered under the definition of workman or workmen, the only remedy is to file the civil suit and when the suit is filed for declaration, injunction for protection of their rights, the defence is articulated that no declaration or injunction can be granted by the civil court as in this case also the learned counsel for the defendant adopted the same line of argument. If this argument is sustained then virtually the said set of employees cannot claim any relief of reinstatement or setting aside their unfair or wrongful dismissal or termination orders. In our judicial system especially in civil suits we all know the rigors and

exactitudes of procedures where number of years are consumed and delay occasioned for various reasons and sometimes during pending adjudication, person who claimed the damages against his wrongful dismissal or termination dies before the judgment or decision and other side turns up with the famous maxim "Actio personalis moritur cum persona" (a personal right of action dies with the person) consequently the suit abates with the end of story. Sometimes in the suit filed for reinstatement of service, the matter delays to such an extent for various reasons that during pendency, the person reaches to the age of superannuation and nothing left to decide. So in my view, vibrant and dynamic approach is required to dissect and explore this archaic legal phrase that is used to describe the relationship between an employer and employee. My research reveals that the Master and Servant Acts or Masters and Servants Acts were laws designed to regulate relations between employers and employees during the 18th and 19th centuries. The United Kingdom Act 1823 described its purpose as the better regulations of servants, labourers and work people. This particular Act greatly influenced industrial relations and employment law in the United States, Australia (1845 Act), Canada (1847 Act), New Zealand (1856 Act) and South Africa (1856 Act). These Acts were generally regarded as heavily biased towards employers, designed to discipline employees and repress the combination of workers in trade unions. The law required the obedience and loyalty from servants to their contracted employer with infringements of the contract punishable before a court of law often with a jail sentence of hard labour. It was used against workers organizing for better conditions from its inception until well after the first United Kingdom Trade Union Act 1871 was implemented which secured the legal status of trade unions. Until then, a trade union could be regarded as illegal because of being in restraint of trade.

2. Shariq-ul-Haq & others versus Pakistan International Airlines Corporation Limited. (2018 PLC (C.S) 975

26. In my view there are two genres of lawsuits encompassing the relationship of master and servant. One scenario leads to the claim of dismissed or terminated employee who approaches to the court of law for reinstatement or in alternate award of damages/compensation against his wrongful dismissal/termination in which proceedings the master may say that he is prepared to pay damages for breach of contract of service but will not accept the services of the servant. The other genre in the same relationship is the case where an employee though in service and performing his duties satisfactorily but he is denied salary/wages and some other benefits payable to him during service. In this distinct and discrete class of cases, I have no reluctance and disinclination to hold that all such employees who are neither covered under the definition of workers or workmen so that they may approach labour courts or NIRC nor they are civil servants to move Services Tribunal nor they can file Constitution Petition under Article 199 of the Constitution of Islamic Republic of Pakistan 1973 in the High Court due to lack and nonexistence of statutory rules of service so the only remedy is left with them to file civil suit for satisfaction of their claims accrued to

them during service including damages for the loss sustained due to nonpayment or refusal/denial of such service benefits by the employer without any lawful justification. There may be other point of view that in this particular situation also, the only remedy is to claim damages and not anything more but with all humility and self-efficacy, if an employee is forced to ask damages alone on each and every refusal or denial of service benefit or on each and every cause of action independently in the form of suit for damages solitary under the sacrosanct relationship of master and servant rather than lodging his claim for recovery and or restoration of that particular service benefit denied to him while in service then this would not only sheer violation of Article 10-A of our Constitution where fair trial and due process of law is guaranteed as a fundamental right but there shall also be a complete turmoil and chaos across-the-board in which situation, the employee during service till his superannuation would be continuously litigating only for claim of damages which does not meant for the relationship of master and servant but this is in fact exploitation and seems to be a relationship of master and slave. Laws exist to protect the fundamental human rights of the members of society and to ensure that they do not have to protect rights through their own actions. The function of the court is to do substantial justice and not to knockout or nonsuit the party on technicalities. At this juncture I would like to quote very celebrated phrase that *"Law is made for man and not man for the law".*

10. The High Court under its constitutional jurisdiction can obviously set foot in to examine the legality of an order passed by the courts below and can rectify, rescind and alter the order if the courts below acted beyond the sphere of their domain and jurisdiction. The honourable Supreme Court held that a judicial order must be a speaking order manifesting by itself that the court has applied its mind to the resolution of the issues involved for their proper adjudication because litigants who bring their disputes to the law courts with the incidental hardships and expenses involved do expect a patient and a judicious treatment of their cases and their determination by proper orders **[Ref: Gouranga Mohan Sikdar vs. The Controller of Import and Export. PLD 1970 S.C. 158].** The order of certiorari issues out of High Court and is directed to the Judge or officer or an inferior tribunal to bring proceedings in a cause or matter

pending before the tribunal into the High Court to be dealt with in order to ensure that the applicant for the order may have the more sure and speedy justice. It may be in either civil or criminal proceedings. **[Ref: Halsbury's Laws of England, 4th Edition, Volume-1, para 1531].** The writ of certiorari is issued for correcting error of jurisdiction, when an inferior Court or tribunal acts without jurisdiction or in excess of it or fails to exercise it; when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction; when it decides without giving an opportunity to the parties to be heard or violates the principles of natural justice and if there is an error apparent on the face of the record.

11. No case of involving any illegal assumption, non-existence or irregular exercise of jurisdiction was made out while dismissing the application under Order 7 Rule 11 C.P.C. by the trial court, nor while doing so, the trial court exercised any jurisdiction not vested in it or failed to exercise a jurisdiction vested in it nor acted in the exercise of its jurisdiction illegally or with material irregularity therefore the interference by the revisional court was unwarranted. As a result of above discussion, the impugned order passed by the revisional court is set aside and case is remanded to the learned trial court for deciding the suit of the petitioner on merits. The petition is allowed in the above terms.

Judge

Judge

Karachi:-
Dated. 31.5.2019