

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 1529 / 2017

Plaintiff: **Saadullah Khan through Mr. Ali T. Ebrahim Advocate.**

Defendant: **Al-Baraka Bank (Pakistan) Limited through Mr. Fayyaz Ali Metlo Advocate.**

- 1) For hearing of CMA No. 11409/2017.**
- 2) For hearing of CMA No. 9546/2017.**
- 3) For hearing of CMA No. 9565/2017.**
- 4) For orders on CMA No. 15418/2017.**

Date of hearing: **25.10.2018.**

Date of order: **25.10.2018.**

O R D E R

Muhammad Junaid Ghaffar, J.

2 & 3) This is a Suit for Declaration, Permanent and Mandatory Injunction and through CMA Nos. 9546 and 9565 of 2017 (at Serial No.2 & 3), the Plaintiff has sought interim relief seeking restraining order(s) against the Defendant from terminating the employment of Plaintiff and or taking any other coercive measures and so also setting aside of suspension order dated 12.05.2017 and to restore status quo ante dated 28.02.2017 until final disposal of the Suit.

The precise facts are that Plaintiff was employed with Defendant since 15.06.2011 and after acquisition of the erstwhile Burj Bank Limited by the Defendant, he was officially assigned the designation and role of "Head of Trade Service / EVP" through an announcement dated 19.01.2017. It is further stated that Plaintiff's late father expired on 10.11.2016 and was a customer of Defendant bank and maintained his saving accounts with Shaheed-e-Millat Road, Branch and at the time of his death he was maintaining one PLS Account No. 0052013586000004 and one TDR Account No. 0052032586000212 having balance of Rs. 1,357,335/- and 12,000,000/- receptively. It is further stated that Plaintiff in his capacity as one of the legal heirs inquired from the Bank regarding release of the funds of his late father, and on 29.12.2016,

made a formal request to transfer funds from his deceased father's account into the joint account held by the Plaintiff and one of his brother bearing Account No. 0058001586000281. According to the Plaintiff, the Defendant bank informed that funds could be released from his father's account provided certain documentary formalities are completed and therefore, Plaintiff through an email forwarded the Family Registration Certificate which was thereafter, forwarded to the Company Secretary and Head of Legal Department seeking recommendations, who endorsed a favorable note on such request. It is further stated that after examining the record and documents, the funds lying in the Plaintiffs deceased father's account were duly released and transferred by the Defendant. However, after a passage of two months' time a Show Cause Notice vide email dated 28.02.2017 was issued to the Plaintiff which was replied again through email dated 07.03.2017 and on 12.5.2017 he was suspended, and matter was thereafter followed up by an internal inquiry and the Plaintiff being aggrieved filed instant Suit, whereas, on 13.06.2017 the Defendant was directed to continue with the inquiry along with suspension of the Plaintiff, but the services of the Plaintiff may not be dismissed / terminated.

Learned Counsel for the Plaintiff submits that the Plaintiff is in Banking Industry for the last three decades and his services and performance with the Defendant has gone unblemished; that the transfer of funds from the deceased father's accounts was done on the basis of proper documentation and within the ambit of the rules; that the Show Cause Notice and the suspension order are based on malafides and to penalize the Plaintiff due to personal enmity; that no misconduct could be attributed against the Plaintiff as the entire exercise was not influenced in any manner by the Plaintiff as an employee, but was processed and done as a customer's request; that the inquiry has been conducted in a discreet manner and Plaintiff has never been provided with such inquiry and Defendant is bent upon to terminate and dismiss the Plaintiff which will have very serious consequences on a long and unblemished carrier of the Plaintiff in the Banking Industry; that no proper procedure was followed by the inquiry committee more specifically as provided in Clause 3.1.1 and 3.1.2 of the Inquiry Procedure; that this is not a case simplicitor of a master and servant relationship, and even United Kingdom from where this term

originated, has moved forward; that there is no mandatory requirement in law to always obtain a Succession Certificate, whereas, the regulations of State Bank of Pakistan relied upon by the Defendant are not relevant and not applicable to the facts of the case of the Plaintiff and therefore, the Plaintiff is entitled for the relief claimed notwithstanding the fact that Defendant is a private bank; that in judgments reported as ***Sadiq Amin Rahman V. Pakistan International Airlines Corporation Limited and another (2016 PLC 335)*** and ***Shariq ul Haq and 3 others V. Pakistan International Airlines Corporation Limited and another (2018 PLC (CS) 975)*** the argument that in a case of master and servant no relief can be granted has been repelled and therefore, in the given circumstances the Plaintiff has made out a prima facie case and is entitled for the relief being claimed through these two applications. In support he has relied upon the above case law.

On the other hand, learned Counsel for the Defendant submits that no cause of action has accrued to the Plaintiff as mere issuance of a Show Cause Notice is not an adverse action; that Plaintiff has come at a premature stage; that no termination order has been passed as yet; that the Suit is barred under Section 56(f) read with Section 21(b) of the Specific Relief Act; that a service contract cannot be specifically enforced; that the amount of salary involved does not fall within the pecuniary jurisdiction of this Court; that the conduct of the Plaintiff was not proper as apparently the regulations of State Bank of Pakistan were violated while seeking transfer of funds from the father's account without obtaining a proper Succession Certificate from the Court; that the Plaintiff being engaged in the banking industry ought to have been vigilant and restrain himself from seeking such a concession for his own benefit; that the Plaintiff sought encashment and transfer of funds knowingly and against the policy of the Bank which has exposed the Bank to breach of regulations and so also financial risk; that during pendency of these proceedings and order of the Court, salary of more than 1½ years has been paid despite being suspended; that as per contract and so also the terms and conditions of the service which have been accepted, inquiry procedure is to be kept confidential in terms of Clause 3.1.22 and therefore, no prima facie case is made out nor balance of convenience lies in favor of the Plaintiff, whereas, irreparable losses is being caused to the defendant bank. In support he has relied

upon ***United Bank Limited & others V. Ahsan Akhtar & others (1998 S C M R 68), Haider Ali Baig V. First Micro Finance Bank Ltd. and 3 others (2015 P L C (C.S.) 1412, Concentrate Manufacturing Company of Ireland and 3 others V. Seven up Bottling Company (Pvt.) Limited and 3 others (2002 C L D 77), Atco Lab. (Pvt.) Limited V. Pfizer Limited and others (2002 C L C 120), Pakistan International Airlines Corporation Limited & others V. Tanweer ur Rehman and others (P L D 2010 SC 676), Pakistan Red Crescent Society and another V. Syed Nazir Gillani (P L D 2005 SC 806), Messrs Agricides (Pvt) Ltd. V. Messrs Ali Agro Supply Corporation Ltd. (1988 C L C 59) and Ltd. Col. Shujauddin Ahmad V. Oil & Gas Development Corporation (1971 S C M R 566).***

I have heard both the learned Counsel and perused the record. Insofar as the merits of the case and the allegations levelled against the Plaintiff are concerned, at the very outset, I may observe that since it is a matter of inquiry and procedure which is being conducted by the Defendant bank, hence, any comments or observations as to the conduct of the Plaintiff in transferring of funds from the account of deceased father to another account may have effect on such proceedings, therefore, I have restrained myself from recoding any finding on this issue. I have only confined myself as to whether the injunctive relief being sought could be granted to the Plaintiff in view of the fact that the Defendant Bank is a private organization and not a public functionary. It is not in dispute that Plaintiff entered into a service contract with Defendant and was employed since 2011. The Plaintiff has not placed on record the service contract and other minute details; however, the same have been brought on record by the Defendant including the Standard Operating Procedure (Disciplinary) issued by the Human Resources Department of Defendant. Clause 3 thereof deals with the said procedure and provides a complete mechanism to be followed. In Clause 3.1.22, it has been provided that the investigation report as well as the inquiry report shall be a confidential document which shall not be shared with the accused employee. Though the Plaintiff may have a case that such a clause is confiscatory in nature; however, this is not under challenge before this Court, whereas, it appears to be an admitted fact that Plaintiff has entered into a contract and is bound by the terms and conditions of the contract including the inquiry procedure adopted the Defendant Bank.

Insofar as the objection that the principle of master and servant will not apply and it is even not applicable in United Kingdom as of now, from where it originated, it would suffice to observe that such contention is not appropriate and is rather misconceived. Merely, for the use of the word master and servant does not ipso facto makes the relationship as that in effect of a master as against a servant or slave. It has now only a notional classification of the relationship which can in the alternative be more appropriately termed as relationship of an employer with his employee. On the basis of the employment terms which have been placed on record by the Defendant, 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 such employment and now it is not the prerogative of the Plaintiff to plead against such terms and conditions. The inquiry procedure can be kept confidential as the said terms and at this injunctive stage, this Court cannot go beyond that.

In essence the Plaintiff through these two applications is seeking enforcement of his service contract, and that too beyond the agreed terms and conditions. It is settled law that insofar as a Private Corporation or Company is concerned, 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. No relief or decree as sought can be passed, (in absence of any contract for such relief), against the unwilling master that plaintiff is still its employee. Any consideration in support of such plea, will demonstrate the impossibility of its grant. Plaintiff's service with defendant No.1 is under a contract and not as a right. He has only one remedy and that is to sue for money. Reliance in this case may be placed on the case reported as **PLD 1961 SC 531** (*Messrs Malik and*

Haq and another v. Muhammad Shamsul Islam Chowdhury and two others), wherein a 5 Member Bench 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.”

Similar view has been expressed by the Hon'ble Supreme Court in the case of **Marghub Siddiqui V. Hamid Ahmad Khan and 2 others (1974 S C M R 519)** while dealing with a more or less similar situation and has been pleased to hold as under:-

“Secondly it appears to us that none of the Courts have noticed that although *ad interim* injunctions are granted under Order XXIX, rule 1 of the Code of Civil Procedure the principles, which govern the grant of injunctions, contained in the Specific Relief Act have also to be kept in view. Under section 56, clause (f), one of the principles is that an injunction cannot be granted to prevent the breach of a contract the performance of which cannot specifically be enforced. Now it is well settled that contracts for personal service are not contracts which can be specifically enforced. The granting of an injunction, therefore, in a service matter, like the present one, is opposed to the principles governing the grant of such injunctions, for, by such an injunction the Courts really foist an employee upon an unwilling employer. Such an order for injunction made in disregard of these not only sound judicial principles but even statutory prohibitions cannot, in our view, be regarded as having been made in the proper exercise of the discretion of the Court.”

Very recently, I had the occasion of discussing this relationship vide order dated **11.10.2018** in **Suit No.1513/2018** (*Shariq Nadeem V. K-Electric*) wherein, the case of the Plaintiff was even on a higher footing, in that, the employer was K-Electric which was previously a public organization and through a detailed order in the following manner I have repelled such contention as to the non-applicability of the term master and servant or Employer and Employee in a private service

employment. It would be advantageous to refer to the relevant findings which reads as under:-

“7.As to the claim and the argument that Defendant K-Electric is a Public Body performing state functions and engaged in providing utility services, therefore, the rule of Master and Servant will not apply, is again based on misconception and is misconceived as well. In fact this issue already stands settled through a number of decisions of the Hon’ble Supreme Court and latest being the famous case of **Tanweer-Ur-Rehman (Supra)** as rightly relied upon by the learned Counsel for defendant. At para 12 the litmus test has been provided as to what is meant by the expression “performing functions in connection with the affairs of the Federation”. It has been held as follows;

“12. Now let us see what is meant by the expression ‘performing functions in connection with the affairs of the Federation’. The expression clearly connotes governmental or State functions involving an element of exercise of public power. The functions may be the traditional police functions of the State, involving the maintenance of law and order or they may be functions concerning economic development, social welfare, education, public utility services and other State enterprises of an industrial or commercial nature. Generally, these functions are to be performed by persons or agencies directly appointed, controlled and financed by the State; either by Federation or a Provincial Government. On the other hand, private organizations or persons, as distinguished from Government or Semi-Government agencies and functionaries, cannot be regarded as a person performing functions in connection with the affairs of the Federation or a Province, simply for the reason that their activities are regulated by laws made by the State. The primary test must always be:

(i) whether the functions entrusted to the organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power;

(ii) whether the control of the organization vests in a substantial manner in the hands of Government; and

(iii) whether the bulk of funds is provided by the State.

If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or a Province, otherwise not. [see *Salahuddin v. Frontier Sugar Mills & Distillery Ltd.* (PLD 1975 SC 244)].”

From the above pronouncement of the Hon’ble Supreme Court it can be seen that there are three crucial tests provided whereby it can be held that a company is performing such functions of the State. And it is to be kept in mind that these three are to be read together or differently worded, all these three ingredients must co-exist simultaneously and cumulatively, before it could be held that the company is providing state functions or is engaged in performing functions in connection with the affairs of the State. And it can be easily inferred from the above test, that defendant Company, in its post privatization, does not meet the said criterion. Admittedly, the control of defendant does not vests in the Government anymore, whereas, it is not funded by the Government either. Therefore, the ground that Defendant is a Public Company or is performing State Functions is wholly misconceived. Here with what the Court is concerned is the relationship of Employees / Plaintiff with Employer / Defendant, and at least in that context it can be safely held that the Defendant is a private organization viz-a-viz the Plaintiff(s). Though the Companies or Organizations falling within the criterion set

by the aforesaid judgment of the Hon'ble Supreme Court, may well have to be governed by their rules (statutory or otherwise), but as against a private company, while dealing disputes with its employees, it is the rule of Master and Servant (though not in its literal meaning), however still applies. The rule of Master and Servant can alternatively be re-worded as the Rule of Employer and Employee. And this is in most cases based on the individual contracts as against any Statutory Rule or Law. For understanding this dividing line, in like case, a distinction has to be drawn between the duties to be performed by the management of any such organization as provided in law as against the contractual provision simpliciter.

In the case reported as ***Shakeel Ahmed Shaikh v Agha Khan University*** [2017 PLC (C.S.) 1080], I had the occasion to deal with this issue (though on dissimilar facts in that the employee was on probation), regarding the nature of employment with a Government and or a Statutory Corporation and a private Company, but came to the following conclusion which is relevant for the present case;

Inssofar 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 inssofar 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)

Inssofar 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. No relief or decree as sought

can be passed, (in absence of any contract for such relief), against the unwilling Master that plaintiff is still its employee. Any consideration in support of such plea, will demonstrate the impossibility of its grant. Plaintiff's service with defendant No.1 is under a contract and not as a right. He has only one remedy and that is to sue for money.....”

In somewhat similar circumstances the Hon'ble Supreme Court in the case reported as ***Raja Iviz Mehmood and another Vs. Federation of Pakistan through Secretary M/o Information Technology and Telecommunication and others (2018 SCMR 162)*** had the occasion to deal with the plea of employees of the then Telegraph and Telephone Department (T&T), subsequently named and reorganized as Pakistan Telecommunication Company Limited (“PTCL”). In post privatization PTCL introduced various incentive packages including “Key Talent” package which offered new terms and conditions of service, including enhanced salary and other benefits being commensurate with the market for private companies. The employees who wished to avail this, were required to resign and enter into new contracts. Thereafter on the basis of the new contracts in which termination was provided, they were terminated. Being aggrieved with such termination, they approached Islamabad High Court and their petitions were allowed by a learned Single Judge. Being aggrieved PTCL filed Intra Court Appeal which was allowed and the impugned judgment of the learned Single Judge was set-aside, against which the employees approached the Hon'ble Supreme Court and the Apex Court has been pleased to dismiss the Appeals of the Employees. The discussion below is relevant for the present purposes and reads as under;

7. We find that once the petitioners opted to tender their resignations their existing status as transferred employees and the protection and safeguards available to such employees (except the safeguard of pension) came to an end. Their new contract represented a fresh arrangement based upon the principle of 'Master and Servant' and their service was governed by the terms and conditions of their fresh contract. The protection under section 36(2) as well as the agreement between M/S Etisalat and the Government of Pakistan cannot therefore be extended to the petitioners at this stage because now their relationship with their employer is governed by the principle of 'Master and Servant' on the basis of the terms and conditions of their new contract. Even otherwise, having voluntarily accepted an offer made by the employer and the same having been acted upon by both the sides, the petitioners are estopped from resiling from the same. The intent behind section 36 was to ensure that the terms and conditions of employment of the Transferred Employees were

protected from unilateral actions, without their consent and to their detriment. We have already held that NTC was accepted by the petitioners of their own free will consciously exercised and was ex facie not to their disadvantage. As such the petitioners cannot be allowed to blow hot and cold in the same breath and resile from their position and opt out of the contract and claim protection and safeguards which they had given up in bargain for higher salaries and benefits.

8. As far as termination of their services is concerned, one of the conditions of the contract of employment deals with the subject of termination. For ease of reference, the same is reproduced below:-

"TERMINATION OF APPOINTMENT. Your services can be terminated by giving one (01) month notice period or gross salary equal to one (01) month in lieu thereof by either side. However the appointment shall be terminated if any document or information provided by you proves fake or false."

9. It is clear and obvious from perusal of the termination clause that there was an option to terminate the services of employee by giving one month notice or payment of one month salary in lieu thereof by either side. The employer also had the power to terminate the services of the employee if any document or information provided by him was found to be fake or false. The petitioners have attempted to argue that they were neither given one month notice nor paid salary in lieu thereof. If that is the case, the remedy of the petitioners lies in recovering amounts claimed by them through the competent fora. However, non-service of notice or non-payment of notice fee cannot furnish basis for reinstatement. (Emphasis supplied)

Insofar as the case law relied upon by the learned Counsel for the Plaintiff reported as ***Sadiq Amin and Shariq Ul Haq (Supra)*** is concerned, the same could only be considered by the Court in case of a Public Company or Organization, and is not applicable in case of a private Companies, like the Defendant.

In view of hereinabove facts and circumstances of the case, since the principle of master and servant or for that matter employer and employee applies to the case of the Plaintiff who is in service of a private organization and has agreed to the terms and conditions of service as well as the rules of inquiry which even provides that the same could be kept confidential; hence, the Plaintiff has not been able to make out a prima facie case, whereas, balance of convenience also does not lie in his favour and it is the Defendant who will be caused irreparable loss if the injunctive relief is granted, whereas, if any termination order is passed against the Plaintiff, the appropriate remedy lies by way of claiming damages; therefore, by means of a short order on 25.10.2018 both these applications were dismissed in the following manner:-

“2 & 3) For reasons to be recorded later on, injunction applications at serial No. 2 & 3 are dismissed; however, the Defendant shall conduct and proceed with the inquiry in accordance with Chapter 3 of Standard Operating Procedure (Disciplinary) of the Human Resource Department placed on record through written statement.

1 & 4)Adjourned.”

The above are the reasons for such order.

J U D G E

ARSHAD/