IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan-ul-Karim Memon

High Court Appeal No. 15 of 2016

Karachi International Container Terminal Ltd.
Versus
Brig (Retd.) Arif Mahmud Malik

A N D

High Court Appeal No. 103 of 2016

Brig (Retd.) Arif Mehmood Malik
Versus
Karachi International Container Terminal Ltd.

Date of Hearing: 16.09.2019

Appellant in HCA 15 and respondent in HCA 103 of 2016:	Through Mr. Javed Asghar Awan Advocate
Respondent in HCA 15 and appellant in HCA 103 of 2016:	Through Malik Altaf Javed along with Mr. Muhammad Saleem Khaskheli Advocates.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These two appeals are arising out of judgment and decree passed by learned Single Judge of this Court in Suit No.369 of 2008 as both appellant and respondent have challenged the respective portions of the judgment/decree of which they are aggrieved of in their respective appeals.

2. For the purposes of deciding the controversy by a common judgment though they are independent in terms of their causes, High Court Appeal No.15 of 2016, being prior in time, is being considered as leading appeal only to identify the parties.

3. Brief facts are that respondent filed a suit for recovery of damages in shape of unpaid salary for the unexpired period of contract

i.e. 19 months and additional damages of Rs.20 lacs. The notices were issued and the appellant filed written statement. The Court framed following issues:-

i. Whether the suit as framed is not maintainable in law?
ii. Whether the letter dated 30.10.2007, issued by the defendants was in breach of the representations made to the plaintiff as well as in violation of the principles of natural justice?
iii. Whether any damages of the kind claimed in the plaint can be claimed where the governing law is the law of Master and Servant?
iv. Whether the plaintiff is entitled to the relief(s) as prayed for in the plaint?
v. What should the decree be?

4. The evidence was recorded. The respondent filed his affidavit-in-evidence as Ex.P. He produced appointment letter dated 04.05.2006 as Ex.P/1, termination letter dated 30.10.2007 as Ex. P/2, legal notice dated 28.11.2007 issued to appellant as Ex.P/3 and reply thereto of appellant dated 10.12.2007 as Ex. P/4.

5. On behalf of appellant Muhammad Yousuf Alam filed his affidavit-in-evidence as Ex. D. He produced following documents:

1. Full and final settlement of provident fund account as Ex. D/1;
2. Acknowledgement receipt regarding payment of provident fund as Ex.D/2;
3. Cheque dated 30.10.2007 amounting to Rs.239,253/- as Ex. D/3;
4. Settlement statement regarding gratuity fund as Ex. D/4
5. Acknowledgment of gratuity fund along with copy of cheque dated 30.10.2007 as Ex. D-5 to D-5/7;
6. Documents regarding organizational structure as Ex. D-6 to D-6/3.

6. The suit was held to be maintainable in terms of finding of issue No.1 whereas issue No.2 was decided in negative. Issue No.3 and 4 were replied accordingly and the suit was decreed partly as respondent was

held entitled for notice of 120 days or payment in lieu thereof instead of 30 days, as agreed between the parties in the contract.

7. We have heard the learned counsel and perused the material available on record. Since the main issue in High Court Appeal No.15 of 2016 is pertaining to maintainability, we would first discuss the same, before going into merits of the case.

8. The prior appeal i.e. HCA No.15 of 2016 was filed on 22.01.2016 and there were 24 office objections, which include certified copy of judgment and decree.

9. Along with memo of High Court Appeal No.15 of 2016 only a copy of the judgment was annexed without decree and there is no application or statement regarding non-filing of decree along with memo of appeal. Along with appeal appellant filed an application for interim relief, application under section 151 CPC for dispensing/exempting the requirement of filing original/certified copies of the annexures, excluding the judgment, and an application for urgent hearing. An application for depositing the Court fee within one week was also filed, supported by affidavit. Thus, record of the file shows that there was no such application disclosing reasons as to why the decree was not filed or that time for filing decree may be extended, if the same was not prepared by the office.

10. It appears that the application to obtain certified copy of the judgment was applied, as disclosed in the application bearing CMA No.655 of 2019, on 04.01.2016 and was ready on 05.01.2016 and accordingly this appeal was filed on 22.01.2016 only on the basis of judgment. Endorsements of copying branch on the certified copy of the judgment available with appeal also reveals the same facts.

11. Much after the preparation of decree, R & P of the suit file was also called from the office of this Court to ascertain the facts regarding

preparation of the decree etc. The decree was prepared on 22.02.2016 i.e. the day when appeal was filed and application bearing CMA No.655 of 2019 in this appeal was filed on 20.02.2019 along with certified copy of the decree after three years of the decree drawn by office. Order 41 Rule 1 requires that every appeal shall be preferred in the form of Memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by copy of decree appealed from and (unless the appellate Court dispense there with) of the judgment on which it is founded. Thus, it was inevitable for the appellant to have filed certified copy of decree along with memo of appeal, which was not filed as it was not prepared, as claimed.

12. The record shows that decree was prepared on 20.02.2016 and application to obtain such copy was filed on 19.02.2019. In the application under section 151 read with order 41, supported by affidavit, it is only claimed that on 04.01.2016 the appellant has applied to obtain certified copy of the judgment and decree however he could only receive copy of the judgment. It is claimed by the learned counsel for appellant that it is settled principle of law that provisions of Order 41 CPC are directory in nature and that in exercise of power under section 151 CPC this objection of not filing a decree can be condoned.

13. We are certain that provisions of Order 41 insofar as it relates to decree are not directory in nature, rather it is mandatory and penal in consequence. The original Court does not enjoy the jurisdiction to dispense appellant from filing certified copy of the decree as in the case of a judgment. The decree might not have been prepared by office at the time when the appeal was preferred along with certified copy of judgment but that does not absolve the appellant from filing certified copy of decree within the time stipulated by law, which could have been

done by filing application to obtain certified copy of decree on the day when judgment was passed or on the day when decree was prepared. It is only claimed that appellant applied to obtain certified copy of the judgment and decree on 04.01.2016 however if a part of that application has remained unperformed that certified copy (of decree) could have been obtained on the same application subsequently when it was prepared on 20.02.2016, which is not the case here. Furthermore, there is neither any application available on record to demonstrate that the earlier application was filed to obtain certified copy of the both i.e. judgment and decree nor it was responded by appellant when the objections were raised by the office at the time of filing the appeal.

14. What has transpired from the record is that an application to obtain certified copy of the decree was filed on 19.02.2019, which was delivered to the appellant on the same day and it was presented to this Court on 20.02.2019 along with application under consideration i.e. application under section 151 read with order 41 CPC. It is well settled and as discussed above, a memorandum of appeal must be accompanied by a copy of decree and where it is not so accompanied, it is not validly presented as the Court cannot dispense with the filing of the decree. In the instant case certified copy of the decree was filed after expiry of period of limitation and the question of deduction of the period in obtaining certified copy of the decree is not available at all under section 12 of the Limitation Act since appellant himself delayed the matter in filing an application to obtain certified copy of the decree by almost three years. Thus the date of filing of decree is a date to be reckoned as date of filing of the appeal, and the advantage of Section 12 of Limitation Act is not available to appellant to render appeal within time.

15. The date-wise events are disclosed as under:-

1. Judgment announced on 04.01.2016
2. Decree prepared on 22.02.2016
3. Application to obtain judgment filed on 04.01.2016
4. Application to obtain decree filed on 19.02.2019
5. Decree filed in High Court Appeal No.1 of 2016 on 20.02.2019

16. In the case of Muhammad Mast v. Inayat, reported in 1987 SCMR 364 the Bench of Hon'ble Supreme Court while considering the requirement of a decree to be attached with the memo of appeal laid down that order 41 rule 1 CPC insofar as it relates to decree, is indispensible.

17. Similarly in the case of Apollo Textile Mills Ltd. v. Soneri Bank Ltd. reported in 2012 CLD 337 by the Hon'ble Supreme Court dilated upon the provisions of Order 41 CPC insofar as it relates to the decree.

18. In another case of Abdul Rashid v. Abdul Ghani reported in 2011 MLD 1597 the Division Bench of this Court held that filing of copy of decree along with appeal is sine qua non and if the appeal is filed without the same, it will not be presumed to be validly presented.

19. In the case of Baseer Ahmad Siddiqui v. Shama Afroz reported in 1988 SCMR 892 the time was condoned as the Hon'ble Supreme Court held that appellant therein was unable to obtain copy. Appellant in this case never pleaded that he was prevented by any reason to obtain certified copy of decree.

20. The right of appeal always arises out of the Statute and no such law could be declared to be a good law if it does not provide a remedy of appeal. However, in the absence of such provisions a remedy of appeal cannot be availed i.e. unless it is expressly provided by the law, a remedy of appeal could not be available and if a Statute provides a remedy within a time frame, it is to be followed in letter and spirit. In the absence of any such procedure for appellate forum or appeal if not

provided, the alternate efficacious remedy however could be availed but not otherwise.

21. Though at the time when this appeal was filed the appellant did move an application seeking exemption from or dispensing with requirement of filing original/certified copies of annexures except the judgment but under no stretch of imagination this exemption or dispensation could be stretched to be applied to the decree though it was otherwise never prayed for. Firstly it only seeks exemption of those documents which were attached with the appeal (decree was never attached), secondly the Bench was not empowered to dispense with requirement of filing certified copy of the decree in terms of Order 41 rule 1 CPC. Thus, appellant could not take shelter of order passed on CMA No.225 of 2016, which is exemption application, which has no application insofar as controversy that relates to filing copy of the decree is concerned.

22. We have looked at this appeal from another angle for its disposal on merit since another appeal was preferred by employee/plaintiff. The subject matter of two appeals are different and thus there is no lawful justification and valid reason available to hear this appeal on merit along with appeal of employee. This is not even void order that limitation can be ignored. We have added another reason in Para 38 later for not considering the merit in this appeal, which could further rationalize the reasoning hereinabove.

23. Now adverting to the High Court Appeal No.103 of 2016, since employee i.e. plaintiff had also challenged the judgment/decree of learned Single Judge passed in the suit to the extent as it does not provide damages/compensation as prayed for, which was also heard by us, we deem it appropriate to discuss the merits of the case while

considering the case of respondent/plaintiff in their appeal only. There is however no question of limitation involved in this appeal.

24. The respondent filed suit for recovery of damages. Perusal of plaint disclose that perhaps first part of the damages, as claimed, were in the shape of left over salary of unexpired period of contract i.e. compensation and other claim i.e. of damages of Rs.20 lacs. Insofar as claim of damages of Rs.20 lacs is concerned, there is not an iota of evidence in support of such claim hence no interference is required as far as this category of damages is concerned.

25. We now deal with other category of damages as claimed in the shape of unpaid salary of unexpired period of contract.

26. The learned Single Judge in the impugned judgment has considered the issue of 30 days' notice in terms of clause 4.2 of the appointment letter, which letter is being treated as contract between the parties, as inappropriate.

27. 30 days' notice only relates to end the relationship of Master and Servant which may be terminated earlier than the period disclosed in contract. The first part of clause 4.2 relates to the probation period regarding which it was agreed that service can be terminated without notice. However, the parties further agreed that after successful completion of probation both i.e. company and the employee shall have the right to terminate employment by giving either party 30 days written notice in advance or payment in lieu thereof. The appellant has made an attempt to terminate the contract by virtue of letter of 30.10.2007 whereby 30 days salary in lieu of 30 days' notice period was paid to respondent. The respondent acknowledged the amount however filed the suit for recovery of salary of left over period of the contract which to our understanding is 17 months since 30 days salary in lieu of notice period was paid i.e.

i) Date of appointment 4.5.2006

ii) Date of termination 30.10.2007

iii) Total months of contract – 36 months (04.05.2006 to 03.05.2009)

iv) Leftover period – 17 months

28. Thus, by calculating period of service rendered by respondent it appears that allegedly 17 months were left out of the contract as notice period was paid, for which the suit was filed. It is now to be seen (i) whether contract was breached by appellant/employer and (ii) whether respondent was entitled to claim the salary of the left over period of the contract and has discharged the burden, he was required to.

29. In response to the pleadings of respondent i.e. plaint, the appellant filed written statement and took shelter of the aforesaid clause i.e. 4.2 of contract in paragraph 3. The issues were framed and the evidence was recorded. In the affidavit-in-evidence filed by the appellant, for the first time it was disclosed in paragraph 8 that the termination was on account of restructuring and reorganization of the company and some charts disclosing the designation of different employees under Chief Executive Officer and Head of HR Services were filed. It is the case of the appellant that they were coerced to terminate service of the respondent on account of structural changes in service.

30. Without prejudice to anybody's right, as no board's resolution regarding re-structuring of the posts were filed to make it official, we looked at this alleged structural changes in the designations of employees. The respondent was providing services to company as Manager Admin & Support Services M-9 under Chief Executive Officer at the time of his appointment whereas alleged structural changes shows that though the post of Manager Admin and Support Services is not available in the re-designed service format but Muhammad Saad Usmani who was head of Human Resource Department was saddled with this

responsibility of "services M9". Mr. Saad Usmani earlier was also providing services as head of HR M9 under Chief Executive Officer and he was saddled with this additional responsibility of services whereas under him Raheel Ahmed was redefined as Administration Manager M8. Similarly chart that relates to Muhammad Bilal as head of HR, Services & IR also shows that Nizamuddin was saddled with this responsibility of service manager.

31. We have noticed that the requirement of Manager Admin or Support Service was never dispensed. In fact additional charge of administration and support service was provided as additional post to other employees, as disclosed above. It is thus their (appellant's) own internal changes for the reasons best known to them to redesign such designation by handing over additional charge to others, although the job description of such service was never dispensed. Even otherwise as stated above these structural changes in the service hierarchy were never established through any boards resolution.

32. Without prejudice to above relocation of services to other heads by providing them additional charges, this redesign of the service structure itself would not make a case whereby Section 73 of Contract Act, 1872 could be excluded. Section 73 for convenience is reproduced as under:-

> *"**73. Compensation for loss or damage caused by breach of contract.** When a contract has been broken, the party who suffers by such breach is entitled for receive, from the party who has broken the contract compensation for any loss or damage caused to him there by, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.*
>
> *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."*

33. Thus, a party is not precluded from claiming compensation in the shape of left over salary of the unexpired period on account of breach of contract. In general these termination clauses may have been provided in the contract but that is only to the extent of terminating the services as company or management is no longer wishes to continue with the employee. However if the terms of termination is a “breach of contract” then the cause to claim such compensation would trigger for the employee or by the employer, as the case may be.

34. Learned Single Judge however in his wisdom has considered the unreasonableness of 30 days period and reached to the conclusion that 120 days appear to be more appropriate and reasonable. For the purpose of termination or terminating the services if the parties have agreed to a period of 30 days then we are afraid that the wisdom and/or understanding of the employer and employee to the extent of ending the relationship cannot be challenged. In the instant appeal of employee this subject is not under challenge however we are discussing it for academic purpose. In the present appeal the subject of claim is entire leftover salary. However, insofar as the claim of compensation on account of alleged breach is concerned, that will take its own course having independent footings and it will depend upon each case as to whether breach is of such nature that either party is entitled for compensation in lieu thereof. This kind of damages i.e. unpaid salary could have been conveniently measured as it naturally flows from a contract i.e. quantum of monthly salary but it is dependent, as there are some prerequisites.

35. We have been able to lay our hands on one of the identical case of National Bank of Pakistan v. Ghulam Muhammad Sagarwala reported in PLD 1988 Karachi 489 of the Division Bench of this Court. For the

purpose of controversy involved in this appeal following principle is deducible:-

1. Contract being of three years and with a private company, appellant cannot seek reinstatement;
2. To terminate the relationship of employer and employee, the Master and Servant can agree to any reasonable time and this wisdom cannot be challenged;
3. That compensation/damages either general, ancillary or naturally flown such as salary can be **claimed** independently, irrespective of any notice period as mentioned in the contract subject to breach of a contract by employer or vice versa, as the case may be;
4. The aforesaid claim of naturally flown damages does not ripe on successfully proving breach of contract as it further depends upon establishing the fact that all endeavors were made by employee to minimize the damages and efforts were made to obtain alternate employment, to shift the burden to employer.

36. In the instant case we have noticed that nothing has been said as to whether any effort was made by the employee to obtain an employment elsewhere and that he has monetarily suffered on account of such termination despite his efforts.

37. Although this was agreed between parties that contract can be terminated by giving 30 days' notice and prima facie action on this is no breach of terms but the spirit of Section 73 is that if contract is broken i.e. party has not provided justified reasons then the cause is available to mobilize Section 73 of Contract Act. However, the availability of a cause in terms of Section 73, ibid, does not automatically resolve that losses or damages are also proved as it is dependent on establishing such

losses. Thus, availability of 30 days' period is only for terminating the relationship and does not mean that damages or compensation cannot be claimed as it is not a breach of term.

38. Since appellant/employer chose to file separate/independent appeal, principle of reopening entire set of issues, for a party who did not prefer an appeal, in an appeal of aggrieved party, against those issues, reasoning of which have gone against it, does not arise.

39. Since evidence to establish the losses/damages is lacking in the case we are unable to measure damages allegedly sustained by the employee. Since it is employee's appeal which is heard on merit and only part of order whereby entire unexpired period of salary was claimed, we are unable to modify it to extent of entire period of salary.

40. In view of the above, both High Court Appeal No.15 of 2016 (as being not maintainable) and High Court Appeal No.103 of 2016 are dismissed along with pending applications.

Dated: 23.09.2019 **Judge**

Judge