IN THE HIGH COURT OF SINDH AT KARACHI

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

C.P. No. D-6812 to 6817 of 2015

M/s Karachi Club
Versus
Sindh Labour Appellate Tribunal & another

Date of Hearing:	02.09.2019
Petitioner:	Through Mr. Muhammad Asadullah Shaikh a/w Mr. Fahim Memon Advocates.
Respondent No.1:	Through Mr. Shaharyar Mehar, Addl. A.G.
Respondents No.2 in CP No.D-6813, D-6815, 6816 and 6817 of 2015:	Through Mr. Abdul Zubaid Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These petitions are arising out from orders passed by Labour Appellate Tribunal Sindh on 07.10.2015. The facts and the questions involved in these petitions are common, except that the tenure of service of respondents No.2 in all cases may have varied, and hence are being dealt with by common order.

Brief facts are that respondents No.2 being aggrieved of the terminations filed their respective grievance applications before the Labour Court. Respondent No.2 in all the petitions are admittedly waiters working with petitioner. In CP No.D-6812 of 2015 the employee Ayub son of Saddiqui claims to be captain for the petitioner club. He claims to have been appointed under a contract. The Labour Court while considering the grievance applications held that West Pakistan Industrial & Commercial Employment (Standing Order) Ordinance 1968 (hereinafter called Standing Order 1968) is not applicable to the establishment of the petitioner and hence grievance applications were dismissed. Since the

applications were dismissed on legal ground, consequently the Labour Court did not dilated upon the factual controversy and/or merit involved.

Being aggrieved of the order of Labour Court, respondents No.2, filed their respective appeals before the Labour Appellate Tribunal Sindh who had not only made the Standing Order 1968 applicable but also held that the respondents cannot be treated as contract workers within the meaning of Standing Order 1(a) (6) (g) and that their terminations were hit by provisions of 12(3) Standing Order 1968. The appeal of respondents No.2 was allowed and hence the petitioner Club has filed these petitions.

We have heard the learned counsel and perused the material available on record. Though at the very outset we have not observed any jurisdictional defect, which could enable the petitioner to exhaust the jurisdiction of this Court under Article 199 of the Constitution, however on the legal questions i.e. applicability of Standing Order 1968, we have heard the learned counsel and perused the material available on record.

In all these petitions the respondents No.2/waiters have worked for a minimum period of more than nine months. The appointment of respondents No.2 is through appointment letters, which described all respondents No.2 as waiters. The Labour Appellate Tribunal while dilating upon the applicability of Standing Order 1968 held that the judgment of Lahore High Court in the case of Syed Shahid Abbas v. Chenab Club (Guarantee) Limited reported in 2008 PLC 58, Managing Committee, The Punjab Club v. The Registrar of Trade Unions, Lahore Region reported in 1993 PLC 543 and Rawalpindi Club v. Registrar of Trade Unions reported in 1989 PLC 760 were wrongly applied by Labour Court ignoring the long standing precedents of Hon'ble Supreme Court in the case of Islamabad Club v. Punjab Labour Court No.2 reported in PLD

1980 SC 307 and of this Court in the case of Syed Haider Imam Rizvi v. IV-Sindh Labour Court, Karachi reported in 2010 PLC 20.

While considering the case of Islamabad Club the Hon'ble Supreme Court rejected the objections regarding non-applicability of West Pakistan Industrial & Commercial Employment (Standing Order) Ordinance 1968 to Islamabad Club and confirmed the observations and findings of Lahore High Court that employees of Club were governed by the Ordinance and the Standing Order framed thereunder.

Next we are inclined to decide the second controversy regarding nature of employment as admittedly provisions of Section 12(2) of the Standing Order were applied.

Learned counsel for petitioner has heavily relied upon the provisions of Section 12(2) of Standing Order 1968 however has ignored in an attempt, to apply subsection 3 of Section 12 of the ibid Standing Order 1968. The service tenure of all employees/respondents No.2 is more than at least nine months. The definition 2(g) of the West Pakistan Industrial & Commercial Employment (Standing Order) Ordinance 1968 enabled us to understand the definition of a temporary workman. The classification of workman is sub-divided into six categories i.e. (i) permanent, (ii) probationers, (iii) Badlis, (iv) temporary, (v) apprentice and (vi) contract workers. Temporary workmen is defined in the schedule as a workman who has been engaged for work of temporary nature, which is likely to be finished within a period not exceeding nine months, which is not the case here.

The (respondents No.2) are waiters insofar as their job description is concerned. A club is not supposed to have these waiters for a temporary period and hence it is not a work of a nature which is likely to be finished within a period not exceeding nine months. In case such contracts are being renewed periodically, even that would not take

away the permanent nature of the job description, though the contract may have been awarded periodically such as for a period of nine months etc. Even the witness of the petitioner has admitted the permanent nature of the job of respondents. Thus, we safely conclude that these (respondents No.2) are permanent workmen to whom the provisions of Section 12(3) is made applicable and not Section 12(2) of ibid Ordinance.

Section 12 of the ibid Ordinance provides that for terminating employment of a permanent workman for any reason other than misconduct, one month notice shall be given either by employer or workman. Section 12(3) ibid provides that service of a workman shall not be terminated nor shall a workman be removed, retrenched, discharged or dismissed from service except by an order in writing which shall state the reasons for the action taken.

Perusal of termination letters provide (since they are common in terms of their language) that since they were considered as employees against a job of temporary nature, their contracts were terminated. Thus, the services were terminated considering them to be employee of temporary nature, which is not the case here. On this count alone the termination letters are liable to be set aside.

Thus, we do not see any reason to interfere in the order nor is there any question of remanding the case back to the Labour Court, as argued by learned counsel for petitioner on the ground that the Labour Court has not pass the judgment on merits. He could not have done so as the Labour Court has out rightly rejected the grievance petitions of the employees on the score that Standing Order was not applicable. The Tribunal discussed the applicability of Ordinance and went on to observe that the employees could not have been non-suited by treating them as temporary employees. Thus the Tribunal rightly maintained that the reasons ought to have been assigned while terminating them/

respondents No.2. It is not petitioner's case that respondents have been terminated on account of misconduct.

The last question that arises out from the controversy is of back benefits. It is vehemently argued by petitioner that respondents No.2 were gainfully employed during the period under termination and they (respondents) have to discharge this burden successfully, which they have failed.

We have perused the record including but not limited to affidavit-in-evidence filed by the employees/respondents No.2 as well as cross-examination. In para 11 of affidavit-in-evidence of Irshad, Muhammad Ayaz, Sajeed Ali, Obaid-ur-Rehman and in Para 16 of Athar Mursaleen and last para of Ayub (last two affidavits being in Urdu), the respondents have pleaded that they were jobless. The statements were on oath yet the petitioner's counsel himself suggested a question in the cross-examination, which suggestion was denied. He also asked as to who is bearing the expenses which were categorically replied (in the case arising out of CP No.D-6812 of 2015) that his mother was bearing the expenses. Since the burden was not satisfactorily discharged by the petitioner that he (respondent No.2) was gainfully employed, we, therefore, do not see any reason to interfere in the observations/ findings of the Tribunal that respondents were entitled for back benefits while they remained terminated.

Learned counsel for petitioner has relied upon judgment of House Building Finance Corporation v. Syed Muhammad Ali Gohar Zaidi reported in 2007 PLC 981 wherein after post remand proceedings the inquiry was not conducted by the Inquiry Tribunal concerning questions whether respondent remained without any job and not doing any lawful business during the intervening period. In the instant case Petitioner himself has contributed to overcome this exercise/point as he himself

asked the respondent No.2 and/or his witnesses who suggested that they were not gainfully employed during the intervening period. Furthermore, had he been employed elsewhere it is for petitioner to discharge this burden on this positive assertion by producing evidence either oral or documentary in that regard. It was an impossible task to give evidence of negative assertion for the employee that he was not employed anywhere else to earn his livelihood.

In the case of Muhammad Bashir v. Chairman Punjab Labour Appellate Tribunal reported in 1991 SCMR 2087 the question of back benefits was discussed and it was observed by the Bench that the back benefits do not automatically follow order of reinstatement where an order of dismissal or removal had been set aside. It was further held that burden of proof to establish that workman was engaged in some gainful employment during the period he remained out of service was at employer.

The Bench further held that with regard to matters of onus of proof in case where a workman is entitled to receive the back benefits, lies on the employer to show that the workman was not gainfully employed during the period the workman was deprive of service till the date of his reinstatement thereto, subject to the proviso that the workman has asserted at least orally in the first instance that he has not gainfully employed elsewhere.

Insofar as negative assertion and/or fact is concerned, in the same case i.e. Muhammad Bashir (Supra) the Bench has relied upon an earlier case of Dilkusha Enterprises Ltd. v. Abdul Rashid reported in 1985 SCMR 1882 in which it has been held as under:-

> *"We are unable to agree with the broad proposition of law that the initial burden to prove lies upon the worker to establish that he was not gainfully employed elsewhere during the relevant period in order to succeed to the grant of back benefits, for, this being a* ***negative fact*** *the*

> *worker can hardly establish it with anything substantial evidence except his oral assertion that he was not gainfully employed elsewhere and then it would be for the employer to prove affirmatively that he was so employed."*

Thus, we are of the view that since the employees herein i.e. respondents have very specifically asserted orally that they did not have any gainful employment during the intervening period, the burden was then shifted to the employer i.e. petitioner to prove otherwise, which it has failed, as discussed above.

Insofar as the case of Administrator Zila Council Sahiwal v. Arif Hussain reported in 2011 SCMR 1082 is concerned, in the grievance petitions the employees/respondents No.2 have categorically claimed the back benefits with effect from the date of their unlawful termination.

In view of the above instant petitions are dismissed along with pending applications.

Above are reasons of our short order dated: 02.09.2019.

Dated: **Judge**

Judge