

Judgment Sheet
IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D –7997 of 2019

Regional Manager Askari Guards (Pvt.) Ltd.

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –7998 of 2019

Regional Manager Askari Guards (Pvt.) Ltd.

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –7999 of 2019

Regional Manager Askari Guards (Pvt.) Ltd.

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –8000 of 2019

Regional Manager Askari Guards (Pvt.) Ltd

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –8001 of 2019

Regional Manager

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –8002 of 2019

Regional Manager Askari Guards (Pvt.) Ltd.

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –8003 of 2019

Regional Manager Askari Guards (Pvt.) Ltd.

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –8004 of 2019

Regional Manager Askari Guards (Pvt.) Ltd.

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –8005 of 2019

Regional Manager Askari Guards (Pvt.) Ltd.

Versus

Full Bench of NIRC and 02 others

Constitutional Petition No. D –8006 of 2019

Regional Manager Askari Guards (Pvt.) Ltd.

Versus

Full Bench of NIRC and 02 others

Date of hearing : 09.03.2021
Date of announcement : 18.03.2021
Syed Akhtar Abbas, advocate for the petitioners.
Mr. Abdul Rauf, advocate for respondent No.3.
Mr. Muhammad Nishat Warsi, DAG.

JUDGMENT

Adnan-ul-Karim Memon, J. Through this single judgment, we intend to dispose of all captioned petitions, having the common question of law and facts involved therein.

2. The Petitioners-Regional Manager Askari Guards (Pvt.) Ltd, (Askari Guards) through the instant petitions, have assailed the common order dated 07.10.2019, passed by the learned Full Bench of National Industrial Relations Commission (FB-NIRC) in Appeals No.12A(74)/2018-K to 12A(83)/2018-K, whereby the appeals filed by the private respondents in all petitions were accepted and appeals No.12A(01)/2019-K to 12A(11)/2019-K filed by the Askari Guards were dismissed with the findings that the private respondents were entitled to receive back benefits and the impugned order passed by the Single Member NIRC dated 29.11.2018 was set-aside to the extent of back benefits.

3. Syed Akhtar Abbas, learned counsel for the Askari Guards, has mainly attacked the findings of the learned FB-NIRC to the extent of grant of back benefits to the private respondents on the premise that they were gainfully employed, during the intervening period of termination from services. In support of his contentions, he relied upon his statements dated 26.11.2020 and argued that the learned Single Member of NIRC, categorically observed in the findings of facts that the private respondents could not prove through concrete evidence that they had not been gainfully employed, during the period with effect from termination of their service, therefore, the findings of the learned FB-NIRC, without any record were not sustainable to that extent; that the impugned order is partially sketchy, non-speaking, contrary to the facts and law, hence is liable to be set aside. Learned counsel emphasized that the findings of learned FB-NIRC are contrary to the law laid down by the Hon'ble Supreme Court in the cases reported as Muhammad Bashir and others versus

Chairman Punjab Labour Appellate Tribunal Lahore and others (1991 SCMR 2087), M&B Pakistan Limited versus Punjab Labour Appellate Tribunal and others (1987 PLC 737). Learned counsel referred to the Affidavit-in-evidence of the private respondents and cross-examination conducted by the petitioner about the back benefits and argued that there was/is nothing on record to suggest they were not gainfully employed elsewhere during the period as discussed supra; that dismissal of appeals of the petitioners and acceptance of their appeals for back benefits was totally against the law. He, again and again, asserted that the learned FB-NIRC erred in granting back benefits to the private respondents. He prayed for acceptance of these writ petitions by setting aside the order dated 7.10.2019 passed by the learned FB-NIRC to the extent of back benefits to the private respondents and in the meanwhile anti-status quo order dated 28.11.2018 may be ordered to be restored. In the alternative, he prayed for setting aside both the decisions rendered by the learned Single and Full Bench of NIRC.

4. Mr. Abdul Rauf learned counsel for the private respondents in all the petitions has supported the impugned decision passed by the learned Full Bench of NIRC and contended that the private respondents in all the petitions were permanent workers in the Petitioner's Organization, thus Grievance Applications were maintainable under the law; that the captioned petitions are liable to be dismissed under the law; that there are concurrent findings recorded by the competent forum under the special law and the grounds raised in the instant petitions are untenable. He further argued that that Petitioner's Organization terminated the services of the private-respondents in all the petitions without any notice and inquiry and did not pay their due back benefits as required under the law. He averred that both the aforesaid decisions are passed within the parameters of law that instant petitions are frivolous, misleading as there are concurrent findings by the courts below on facts and law and this Court has limited jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to dilate upon the evidence led by the parties. In support of his contentions, he relied upon the statement dated 09.03.2021 along with copies of memo of the grievance applications, affidavit in evidence of the private respondents; and, cross-examination conducted by the petitioners and argued that the private respondents categorically disclosed that they were not gainfully employed during the intervening period as such they were rightly granted back benefits by the Full Bench of NIRC. He lastly prayed for dismissal of the instant petitions with costs.

5. The Petitioner-Askari Guards, in principle, have confined their arguments to the extent of grant of back benefits to the private respondents by the order of learned FB-NIRC vide order dated 07.10.2019. We have heard the learned counsel for the parties on the issue of back benefits and perused the material available on record and case-law cited at the bar.

6. We have gone through the order dated 07.10.2019 passed by the learned FB-NIRC, which explicitly shows that while terminating the services of private respondents no regular inquiry was conducted. The main assertion of the petitioner-Askari Guards before the trial court was that the private respondents created law and order situations and caused damage to their properties, thus punitive action was taken against them; and, prima-facie did not justify dispensing with a regular inquiry before taking such drastic action against the private respondents. However, the findings of FB-NIRC are as under:

“Learned Single Member of NIRC has rightly reinstated the employees/appellants. As far back benefits are concerned these can be refused only when it is proved that the employees were engaged in some job for remuneration and if reinstated employees took the position that they were not gainfully engaged during the period they were out of job, then onus of proof is shifted upon the employer to prove that the employees were somewhere engaged in job, for reward or remuneration. It is an established position now that where the order of dismissal removal has been set aside and found to be illegal the back benefits have to be paid. Once the dismissal is declared illegal the person becomes entitled to back benefits, because his deprivation from such wages was purely a result of such illegal dismissal (1997 PLC 162 (Sindh). Denial of back benefits must be for genuine and not for arbitrary reasons, because ordinarily, a reinstatement means reinstatement with full back benefits (1985 PLC 744 (Lahore). In this regard, the apex Court also upheld that:-

“S.O 12(3)...permanent employees—dismissed without assigning reasons--back benefits, entitlement to appellants were terminated without assigning any reasons whatsoever which termination was found illegal by the Labour Court as well as by the Labour Appellate Tribunal in terms of Standing Orders 112(3) of the schedule to the Industrial & Commercial Employment (Standing Orders) Ordinance, 1968 the services of the permanent employees can be terminated only by giving explicit reasons...Supreme Court order payment of back benefits to the appellant for the intervening period between his date of termination and date of his reinstatement in service.

7. In view of the above facts and law position the appeals at serial No.11 to 21 are dismissed and appeals at Sr. No.1 to 10 are hereby accepted. The employees are entitled to receive back benefits and the impugned order passed by the learned Single Member NIRC dated 29.11.2018 is hereby set aside to the extent of back benefits. No order as to cost. File be consigned to P.R.”

7. The only question that arises out of the controversy is about back benefits. It is vehemently argued by petitioner-Askari Guards that the private

respondents were gainfully employed during the period under termination and they (respondents) have to discharge this burden successfully, which they have failed.

8. To the aforesaid question of back benefits, we have noticed that there are two basic principles on the subject; (a) that back benefits do not automatically follow the order of reinstatement where the order of dismissal or removal has been set aside; and (b) as regards the matter of onus of proof in cases where a workman is entitled to receive the back benefits it lies on the employer to show that the workman was not gainfully employed during the period of the workman was deprived 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 was (not) gainfully employed elsewhere. On his mere statement to this effect, the onus falls on the employer to show that he was so gainfully employed. The reason is that back benefits are to be paid to the workman, not as a punishment to the employer for illegally removing him but to compensate him for his remaining jobless on account of being illegally removing him but to compensate him for his remaining jobless account of being illegally removed from service.

9. We have perused the record including but not limited to affidavit-in-evidence filed by some of the employees/respondents as well as cross-examination. In para 4 of affidavit-in-evidence of the respondent, Ghulam Muhammad has pleaded that he may be reinstated in service with all back benefits, his statement was on oath.

10. We have been informed that the learned NIRC Single Bench vide order dated 27.02.2017 recorded consent of the parties to the extent that they intended to adopt cross-examination of the witness in all matters, which prima-facie shows implied consent of the parties so far as cross-examination is concerned.

11. In view of the preceding paragraphs; and, since the burden was not satisfactorily discharged by the petitioner-Askari Guards on the aforesaid point that the respondents were gainfully employed. At this juncture, they cannot take resort by merely relying upon the copies of the letters dated 20.12.2019 and 25.11.2020, which are primarily not part of the record thus could not be taken into consideration at this stage to discard the version of the private respondents to the extent of grant of back benefits.

12. We, under the peculiar facts and circumstances of the case do not see any reason to interfere in the observations/ findings of the learned Full Bench of NIRC that respondents were entitled to back benefits while they remained terminated. On the aforesaid proposition, we are fortified by the decisions of the Hon'ble Supreme Court in the cases of Sohail Ahmed Usmani versus Director General Pakistan Civil Aviation Authority and another (2014 SCMR 1843. In the cited judgment the Honorable Supreme Court has allowed back benefits on the ground that the employee was not gainfully

employed during the period of his dismissal up to his reinstatement. However, the employee being gainfully employed or not while remaining out of service has not always been a reason for granting or non-granting of back benefits rather it has been held by the Honorable Supreme Court in several cases that where the Court concerned reinstates the employee in service, it is not bound to grant back benefits automatically rather it is within the discretion of that Court to grant back benefits or not and exercise of such discretion could not be interfered with by this Court in the exercise of writ jurisdiction unless it is shown that such discretion has been exercised without lawful authority and is of no legal effect. Such discretion has not been interfered with by the superior forum. In this regard, reference is made to the cases of Abdul Majid v. Chairman, WAPDA and 2 others [1990 SCMR 1458], Muhammad Tufail v. Divisional Forest Officer, Forest Division, Lahore and 3 others [1990 SCMR 1708], Humayun Badshah v. Habib Bank Limited and 3 others [1996 SCMR 1606] and Syed Kamaluddin Ahmed v. Federal Service Tribunal and others [1992 SCMR 1348]. On the aforesaid proposition, the further principle is that where the Court or the Tribunal has jurisdiction and it determines the specific question of fact or even of law unless the patent legal defect or material irregularity is pointed out, such determination could not be ordinarily interfered with by this Court, while exercising jurisdiction under Article 199 of the Constitution. The very facts of the case amply demonstrate that the private respondents remained out of their job after their removal from service by the petitioner-Askari Guards, after serving a couple of years with the petitioner-Askari Guards. Primarily the Full Bench of NIRC having exercised discretion in granting back benefits to the private respondents, such exercise of discretion could not be found to be without lawful authority and of no legal effect. Reference is made to the latest pronouncement of the Honorable Supreme Court in the case of CHIEF EXECUTIVE MEPCO and others. Vs. MUHAMMAD FAZIL and others (2019 SCMR 919).

13. Thus, we are of the considered view that since the employees herein i.e. respondents have very specifically asserted some of them in the pleadings / affidavit-in-evidence, appeals; and, the prayer clauses that they remained out of job during the intervening period, deserved to be reinstated in service with all back benefits. Prima-facie, the burden was then shifted to the employer i.e. petitioners to prove otherwise, which it has failed to discharge, as discussed above.

14. We are unable to agree with the proposition put forward by the petitioners that the initial burden to prove lies upon the private respondents to establish that they were not gainfully employed elsewhere during the relevant period to succeed to the grant of back benefits, for the simple reason that the private respondents pleaded their case before the trial Court that they were not gainfully employed elsewhere during the intervening period and it was for the employer to prove affirmatively by producing cogent evidence that they were so employed.

15. Concurrent findings arrived by the courts below cannot be lightly interfered with unless some question of law or erroneous appreciation of evidence is made out. We are of the view that the learned Full Bench of NIRC has dilated upon the subject issue of back benefits in an elaborative manner and gave its findings by appreciating the evidence of the parties, therefore no ground existed for re-evaluation of the evidences, thus, we maintain the common order dated 07.10.2019, passed by the leaned Full Bench of National Industrial Relations Commission. We are fortified by the decisions rendered by the Hon'ble Supreme Court of Pakistan in the case of Dilshad Khan Lodhi v. Allied Bank of Pakistan and other (2008 SCMR 1530) and General Manager National Radio Telecommunication Corporation Haripur 10 District Abotabad v. Muhammad Aslam and others (1992 SCMR 2169).

16. In the light of the above facts and circumstances of the case, we are of the view that this Court in its Constitutional jurisdiction cannot interfere in the concurrent findings recorded by the two competent fora below and we also do not see any illegality, infirmity or material irregularity in the common order passed by the learned Full Bench of NIRC warranting interference of this Court. Hence, the instant Petitions are found to be meritless and are accordingly dismissed along with listed application (s) with costs.

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