

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

C. P. No. D-521 of 2021

Present:

Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Petitioner : M/s. Fauji Fertilizer Company Limited through Salahuddin Ahmed, Advocate.

Respondent No.1 : Syed Jawed Ali Shah.

Respondent No.2. : National Industrial Relations Commission, Sukkur Bench.

Respondent No.3. : The Full Bench of National Industrial Relations Commission, Karachi.

Through Jamshed Ahmed Faiz, Advocate.

Date of hearing : 28.09.2022.

ORDER

YOUSUF ALI SAYEED, J - The captioned Petition had been preferred along with the similar matters listed in Schedule 1 below (collectively the “**Petitions**”), impugning analogous Orders made by the Full Bench of the National Industrial Relations Commission (the “**NIRC**”), dismissing various Appeals filed by the Petitioner against the underlying Orders of a Single Bench in cases where the Petitioner had been directed to reinstate an employee along with back benefits.

2. The Petitions were disposed of on 15.03.2021, with two Miscellaneous Applications since being filed in each case, as specified in the aforementioned Schedule; one by the Petitioner under Section 12(2) CPC, seeking that the Petitions be revived for a decision on merits, and the other by the Respondent No.3, seeking encashment of the Bank Guarantee furnished before the Nazir of this Court as a condition of the interim order made on 08.02.2021.

3. As the matter gravitates around the disposal Order dated 15.03.2021, it would be appropriate to reproduce the same, which reads as follows:

“The concurrent findings of two forums below, petitioner-company being an employer/ex-employer of the private respondents have challenged the findings of learned Sindh Bench / Full Bench of National Industrial Relation Commission, on the strength that there was no such observations as to reinstatement, as relied upon by the two forums below, and hence since there was no observation as to reinstatement there is no question of back benefits. Learned counsel also submits that without practically analyzing the evidence, which is yet to be ascertained through cogent evidence, summarily two forums below reached such conclusion which does not align with the evidence/material available on record. When confronted with the legal position of the case on the premise that lis between the parties have already been set at naught by the decision of the Hon’ble Supreme Court; and, the issue of back benefits has already been taken care of by the learned Single Bench of NIRC, concurred by the Full Bench of NIRC vide order dated 12.01.2021 had no satisfactory reply.

Because of the above legal position of the case, and after detailed deliberations on the subject matter, both learned counsels concluded that the Petition bearing C.P No.D-225/2017, which is pending before learned Division Bench at Sukkur be heard, and till the decision, thereof the amount of back benefits, which was/is not calculated properly under the law may not be disbursed to the private respondent. Learned counsel for the petitioner further submits that the Grievance Petition filed by the beneficiaries through their attorneys was also not maintainable.

Be that as it may, through this petition, we are not probing the aforesaid question at this stage, as the C.P No.D-225/2017 is pending and yet to be decided. However, we make it clear that till the decision of the aforesaid petition respondent No.1 shall not attempt for encashment of bank guarantee deposited by the petitioner-company with the Nazir of this Court vide order dated 08.02.2021 and the same shall remain lying with the Nazir, till the final decision of C.P No.D- 225/2017.

In terms of the above understanding, learned counsel for the petitioners does not press these petitions, which are accordingly dismissed as not pressed, leaving the petitioners to avail their remedy before a proper forum as provided under the law. This order shall apply mutatis mutandis in all connected petitions. The office is directed to place a copy of this order in all connected petitions. These petitions stand disposed in the above terms with no order as to costs.”

4. As it stands, the aforementioned C.P No. D-225/2017 had earlier been filed by the Petitioner before the Sukkur Bench, against certain interim and interlocutory orders dated 20.01.2017 and 22.9.2016 passed by the Full Bench of the NIRC and the Member NIRC respectively. However, during pendency of that Petition, the Full Bench of the NIRC finally decided the Appeal against the Petitioner vide its order dated 12.01.2021, which was then impugned by way of these Petitions at the Principal Seat.
5. Therefore, when the Petitioner sought to press C.P No. D-225/2017 in the given backdrop, the same came to be dismissed vide an Order dated 09.11.2021, with it being observed *inter alia* by the learned Division Bench that:

“6. As to the argument of Petitioner’s Counsel that while dismissing the Petitions, the learned Division Bench at Principal Seat has permitted the Petitioner to seek adjudication of this Petition on merits is concerned, the same is not only misconceived but appears to be an outcome of some false pleadings and statement before the learned Division Bench at the Principal Seat. It is a matter of record that this Petition was dismissed for non-prosecution on 22.10.2020

against which restoration application was though filed; but remained pending for prosecution on the part of the petitioner. It is only on 13.10.2021 that the Petition was restored by recalling the order dated 22.10.2020; however, it may be noted that when the order dated 15.03.2021 was obtained from learned Division Bench at the Principal Seat, such facts were never disclosed to the Court and instead it was argued that this Petition is still pending, whereas, the matter of fact is that no such petition was pending; rather it stood dismissed for non-prosecution; and only a restoration application was pending. This appears to be a conscious attempt on the part of the Petitioner and its Counsel not to disclose correct facts before the learned Division Bench at the Principal Seat. In fact, the bench was misled and was made to believe that instant petition is not only pending, but so also it involved the main issue, whereas, this is an incorrect statement. Rather, even if this petition had been pending and not dismissed in non-prosecution, it had already become infructuous on 12.01.2021 when the final order had been passed by the Full Bench of NIRC. For the petitioner, the proper remedy was by way of impugning the final judgment of the full Bench of NIRC which had been done; but after failing to satisfy the learned Division Bench at the Principal Seat as to the merits of the case, an alternate argument was raised that the present Petition is pending before the Sukkur Bench, therefore, petitioner may be permitted to argue the Petition on merits. Such conduct on the part of the petitioner and its Counsel was unwarranted and if we may say, was an attempt, knowingly and intentionally, to mislead the Court and obtain favorable orders.

7. Para 1 of the aforesaid order dated 15.3.2021 clearly reflects that the learned Division Bench was not convinced with the arguments so raised on behalf of the Petitioner and when he was confronted, he took a plea that instant Petition is pending at Sukkur Bench, therefore, he may be allowed to agitate the controversy in this Petition. In our considered view, such fact was not properly disclosed as firstly this Petition was only in respect of some interim orders; secondly it stood dismissed when the aforesaid order was obtained and lastly even otherwise by way of an application under Order 6 Rule 17 CPC, this Petition could not be entertained as according to the Petitioner's own case the jurisdiction vested in the Principal Seat as the final order was passed at Karachi. Considering all these facts and after hearing the Petitioner's Counsel, we had given him an option to withdraw this Petition to which he has not conceded, therefore, by way of a short order in the earlier part of the day this Petition was dismissed with costs of Rs.50,000.00 (Fifty thousand) to be deposited in the accounts of High Court Clinic, Sukkur, and High Court Bar Library, Sukkur equally, and these are the reasons thereof."

6. Thereafter, the Petitioner assailed the dismissal of C.P No. D-225/2017 before the Honourable Supreme Court through Civil Petitioner No. 6263 of 2021, which also came to be dismissed as not pressed on 26.01.2022, with the Order reading as follows:

“After arguing the matter at some length, the learned counsel for the petitioner does not press this petition and contends that the petitioner is going to file appropriate application for revival of Constitution Petition No. D-521 to 606 of 2021 decided by the High Court of Sindh vide order dated 15.03.2021. The petition is dismissed as not pressed.”

7. As is apparent, the attendant circumstances scarcely create fertile ground for a case of fraud or misrepresentation, and a perusal of the Application under Section 12(2) reveals it to bereft of any assertion that could validly support a plea on either score. As such, when learned counsel for the Petitioner was confronted with a query as to what the basis for the Application was, he sought to argue that the learned Division Bench seized of the Petitions on 15.03.2021 had failed to exercise its jurisdiction to decide the matter on merit, due to which the Petitioner remained condemned unheard, and contended that the Application could be entertained as such failure brought the case within the ambit and purview of Section 12(2) on a jurisdictional plane. He placed reliance on an Additional Note to the judgment of the Honourable Supreme Court of Pakistan in the case reported as Utility Stores Corporation of Pakistan Limited v. Punjab Labour Appellate Tribunal & others PLD 1987 SC 447, where, while considering the earlier decision of the Court in the cases of Muhammad Hussain Munir v. Sikandar PLD 1974 SC 139 and Zulfiqar Khan Awan v. Secretary, Industries etc. 1974 SCMR 530, it was held as under:-

“I cannot agree with the learned Judge in the High Court. The view of the learned Judge that this Court has ruled that even if the order of a Tribunal is wrong in law, the High Court still cannot intervene in exercise of its constitutional jurisdiction is not justified and I feel that the judgments of this Court in the cases of Muhammad Hussain Munir (PLD 1974 S.C. 139) and Zulfiqar Khan Awan (1974 S.C.M.R. 530) have not been read in their proper context. It is not right to say that the Tribunal, which is invested with the jurisdiction to decide a particular matter, has the jurisdiction to decide it “rightly or wrongly” because the condition of the grant of jurisdiction is that it should decide the matter in accordance with the law. When the Tribunal goes wrong in law, it goes outside the jurisdiction conferred on it because the Tribunal has the jurisdiction to decide rightly but not the jurisdiction to decide wrongly. Accordingly, when the tribunal makes an error of law in deciding the matter before it, it goes outside its jurisdiction and, therefore, a determination of the Tribunal which is shown to be erroneous on a point of law can be quashed under the writ jurisdiction on the ground that it is in excess of its jurisdiction.

It needs hardly be said that under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, it is the right of every individual to be dealt with in accordance with law. Where the law has not been correctly or properly observed a case for interference by the High Court in exercise of its Constitutional jurisdiction is made out.”

8. The Application was opposed by the Respondent No.3 as being vexatious, and in that peculiar backdrop, it merits consideration that Section 2(2) CPC provides as follows:

“Where a person challenges the validity of a judgment, decree or order on plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate Suit.”

[underlining added]

9. Needless to say, there is a sharp distinction between a “want of jurisdiction” and a “failure to exercise jurisdiction”, with the latter concept being far removed from the former. Indeed, in the case reported as *Adamjee Insurance Company Ltd v. Pakistan through the Secretary to the Government in the Ministry of Finance, Islamabad and 5 others* 1993 SCMR 1798, it was observed by the Honourable Supreme Court that “Want of jurisdiction in a Tribunal is usually described as unlawful usurpation of power”. In the case of *The Chief Settlement Commissioner, Lahore v Raja Muhammad Fazil Khan and others* PLD 1975 SC 331, it was held that an order is to be treated void only when it is made by a Court, Tribunal or other authority which has no jurisdiction either as regards that subject-matter, the pecuniary value or the territorial limits when a dispute arose. Such an order would amount to usurpation of power unwarranted by law and accordingly it would be a nullity. In another case, reported as *Ch. Muhammad Ismail v. Fazal Zada, Civil Judge, Lahore and 20 others* PLD 1996 Supreme Court 246, the Apex Court deconstructed the different concepts in simple terms, as follows:

“Before proceeding further, we would like to explain what is meant by want of jurisdiction, excess of jurisdiction and wrong exercise of jurisdiction. If a Magistrate having no powers to decide civil suits, proceeds to decide such a suit, it will be a case of want of jurisdiction. If a Civil Judge disposes of a suit the jurisdictional valuation whereof exceeds the limits of his pecuniary jurisdiction, it will be a case of excess of jurisdiction. If a Civil Judge has pecuniary as well as territorial jurisdiction to decide a suit but decides it by mis-interpreting any provision of law or by improperly appraising the evidence on the record, it will be a case of wrong exercise of jurisdiction.”

10. As such, a failure to exercise jurisdiction is a concept far removed from that of a want of jurisdiction, which this Court clearly does not suffer from. Nor does it lie in the mouth of the Petitioner to raise such a plea, when it has itself come forward to invoke such jurisdiction and even now purports to be seeking a decision on merits.
11. Furthermore, under the given circumstances, it cannot even otherwise be said that this Court failed to exercise jurisdiction, as the matter was heard and it was during the course of hearing, when a certain view was tentatively expressed as to the merits of the case, that counsel appearing on behalf of the Petitioner saw fit to stage what may at best be called a strategic retreat, by withdrawing the Petition so as to fall back on the matter then pending before the Sukkur Bench as a device to forestall encashment of the guarantees. The caselaw cited by learned counsel for the Petitioner proceeds on an altogether different basis and is thus of no avail. That being so, the Application under Section 12(2) is found to be completely devoid of merit and is in fact greatly misconceived.
12. Turning then to the Application under Section 151 CPC, it was argued on behalf of the Respondent No.3 that in view of the dismissal of C.P No.D-225/2017, there was no impediment to the encashment of the bank guarantee that had been furnished and it was prayed that appropriate directions for such a step as well as distribution of the proceeds be issued to the Nazir. No serious opposition was raised to that plea by learned counsel for the Petitioner during the course of arguments independent of the submissions advanced in support of the Application under Section 12(2). Indeed in their Counter Affidavit to the Application, the Petitioner had raised only a technical plea regarding the capacity of the deponent of the affidavit in support of that application and had contended

that separate applications ought to be filed in all the Petitions, rather a consolidated application in CP D-521 of 2021. However, the substance thereof was not contested on merits beyond the contention that the Order dated 15.3.2000 had been impugned through the Petitioner's own Application under Section 12(2). Those technical objections also appear to be misplaced as the deponent of the affidavit is apparently the attorney of the respective respondents and applications are available across the Petitions, as mentioned in the Schedule.

13. Under the given circumstances, the Application of the Petitioner under Section 12(2) CPC stands dismissed with costs of Rs.5,000/- (five thousand) to be deposited towards the Prime Ministers Flood Relief Fund within 7 days of the date of announcement of this Order and the receipt submitted before the office, while the Application of the Respondent No.3 under Section 151 CPC stands allowed, with the Nazir being directed to encash the bank guarantee and pay over the amount realised to said Respondent upon proper identification.
14. This Order applies *mutatis mutandis* across the Petitions, with the pending applications specified in the Schedule standing allowed or dismissed in each case in the foregoing terms, including costs. For any further part of the claim as may remain unsatisfied, the Respondent may approach the appropriate forum.

JUDGE

CHIEF JUSTICE

CP No.D-521 of 2021 (MAIN LEADING CASE)

| <u>Sr.</u> | <u>Case No.</u> | <u>CMA Nos.</u> (Appl U/s 151) | <u>CMA Nos.</u> (Appl U/s 12 (2)) |
|-------------------|------------------------|--|---|
| <u>01</u> | <u>521/2021</u> | <u>39392/2021</u> | <u>4141/2022</u> |
| <u>02</u> | <u>522/2021</u> | <u>836/2022</u> | <u>26260/2022</u> |
| <u>03</u> | <u>523/2021</u> | <u>835/2022</u> | <u>26261/2022</u> |
| <u>04</u> | <u>524/2021</u> | <u>834/2022</u> | <u>26262/2022</u> |
| <u>05</u> | <u>526/2021</u> | <u>841/2022</u> | <u>26264/2022</u> |
| <u>06</u> | <u>527/2021</u> | <u>837/2022</u> | <u>26265/2022</u> |
| <u>07</u> | <u>528/2021</u> | <u>840/2022</u> | <u>26266/2022</u> |
| <u>08</u> | <u>529/2021</u> | <u>842/2022</u> | <u>26267/2022</u> |
| <u>09</u> | <u>530/2021</u> | <u>843/2022</u> | <u>26268/2022</u> |
| <u>10</u> | <u>531/2021</u> | <u>844/2022</u> | <u>26269/2022</u> |
| <u>11</u> | <u>532/2021</u> | <u>847/2022</u> | <u>26270/2022</u> |
| <u>12</u> | <u>533/2021</u> | <u>848/2022</u> | <u>26271/2022</u> |
| <u>13</u> | <u>534/2021</u> | <u>849/2022</u> | <u>26215/2022</u> |
| <u>14</u> | <u>535/2021</u> | <u>976/2022</u> | <u>26216/2022</u> |
| <u>15</u> | <u>536/2021</u> | <u>975/2022</u> | <u>26218/2022</u> |
| <u>16</u> | <u>537/2021</u> | <u>850/2022</u> | <u>26221/2022</u> |
| <u>17</u> | <u>538/2021</u> | <u>977/2022</u> | <u>26240/2022</u> |
| <u>18</u> | <u>539/2021</u> | <u>978/2022</u> | <u>26241/2022</u> |
| <u>19</u> | <u>540/2021</u> | <u>854/2022</u> | <u>26242/2022</u> |
| <u>20</u> | <u>541/2021</u> | <u>867/2022</u> | <u>26243/2022</u> |
| <u>21</u> | <u>542/2021</u> | <u>868/2022</u> | <u>26244/2022</u> |

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| <u>22</u> | <u>543/2021</u> | <u>869/2022</u> | <u>26245/2022</u> |
| <u>23</u> | <u>544/2021</u> | <u>873/2022</u> | <u>26246/2022</u> |
| <u>24</u> | <u>545/2021</u> | <u>880/2022</u> | <u>26247/2022</u> |
| <u>25</u> | <u>546/2021</u> | <u>883/2022</u> | <u>26248/2022</u> |
| <u>26</u> | <u>547/2021</u> | <u>973/2022</u> | <u>26249/2022</u> |
| <u>27</u> | <u>548/2021</u> | <u>874/2022</u> | <u>26250/2022</u> |
| <u>28</u> | <u>549/2021</u> | <u>877/2022</u> | <u>26251/2022</u> |
| <u>29</u> | <u>550/2021</u> | <u>878/2022</u> | <u>26252/2022</u> |
| <u>30</u> | <u>551/2021</u> | <u>884/2022</u> | <u>26253/2022</u> |
| <u>31</u> | <u>552/2021</u> | - | <u>26254/2022</u> |
| <u>32</u> | <u>553/2021</u> | <u>852/2022</u> | <u>26255/2022</u> |
| <u>33</u> | <u>554/2021</u> | <u>851/2022</u> | <u>26256/2022</u> |
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| <u>35</u> | <u>556/2021</u> | <u>885/2022</u> | <u>26258/2022</u> |
| <u>36</u> | <u>557/2021</u> | <u>971/2022</u> | <u>26259/2022</u> |
| <u>37</u> | <u>558/2021</u> | <u>972/2022</u> | <u>26217/2022</u> |
| <u>38</u> | <u>559/2021</u> | <u>888/2022</u> | <u>26219/2022</u> |
| <u>39</u> | <u>560/2021</u> | <u>887/2022</u> | <u>26222/2022</u> |
| <u>40</u> | <u>561/2021</u> | <u>979/2022</u> | <u>26223/2022</u> |
| <u>41</u> | <u>562/2021</u> | <u>980/2022</u> | <u>26272/2022</u> |
| <u>42</u> | <u>563/2021</u> | <u>969/2022</u> | <u>26273/2022</u> |
| <u>43</u> | <u>564/2021</u> | <u>981/2022</u> | <u>26274/2022</u> |
| <u>44</u> | <u>565/2021</u> | <u>982/2022</u> | <u>26275/2022</u> |

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| <u>45</u> | <u>566/2021</u> | <u>983/2022</u> | <u>26276/2022</u> |
| <u>46</u> | <u>567/2021</u> | <u>984/2022</u> | <u>26277/2022</u> |
| <u>47</u> | <u>568/2021</u> | <u>985/2022</u> | <u>26278/2022</u> |
| <u>48</u> | <u>569/2021</u> | <u>986/2022</u> | <u>26279/2022</u> |
| <u>49</u> | <u>570/2021</u> | <u>987/2022</u> | <u>26280/2022</u> |
| <u>50</u> | <u>571/2021</u> | <u>853/2022</u> | <u>26281/2022</u> |
| <u>51</u> | <u>572/2021</u> | <u>974/2022</u> | <u>26282/2022</u> |
| <u>52</u> | <u>573/2021</u> | <u>988/2022</u> | <u>26283/2022</u> |
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| <u>54</u> | <u>575/2021</u> | <u>1022/2022</u> | <u>26285/2022</u> |
| <u>55</u> | <u>576/2021</u> | <u>1020/2022</u> | <u>26286/2022</u> |
| <u>56</u> | <u>577/2021</u> | <u>1019/2022</u> | <u>26287/2022</u> |
| <u>57</u> | <u>578/2021</u> | <u>1018/2022</u> | <u>26288/2022</u> |
| <u>58</u> | <u>579/2021</u> | <u>1017/2022</u> | <u>26289/2022</u> |
| <u>59</u> | <u>580/2021</u> | <u>1016/2022</u> | <u>26296/2022</u> |
| <u>60</u> | <u>581/2021</u> | <u>1015/2022</u> | <u>26291/2022</u> |
| <u>61</u> | <u>582/2021</u> | <u>1014/2022</u> | <u>26292/2022</u> |
| <u>62</u> | <u>583/2021</u> | <u>1013/2022</u> | <u>26293/2022</u> |
| <u>63</u> | <u>584/2021</u> | <u>1012/2022</u> | <u>26294/2022</u> |
| <u>64</u> | <u>585/2021</u> | <u>1011/2022</u> | <u>26295/2022</u> |
| <u>65</u> | <u>586/2021</u> | <u>1010/2022</u> | <u>26296/2022</u> |
| <u>66</u> | <u>587/2021</u> | <u>1008/2022</u> | <u>26297/2022</u> |
| <u>67</u> | <u>588/2021</u> | <u>1009/2022</u> | <u>26298/2022</u> |

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| <u>68</u> | <u>589/2021</u> | <u>989/2022</u> | <u>26299/2022</u> |
| <u>69</u> | <u>590/2021</u> | <u>1007/2022</u> | <u>26220/2022</u> |
| <u>70</u> | <u>591/2021</u> | <u>1006/2022</u> | <u>26224/2022</u> |
| <u>71</u> | <u>592/2021</u> | <u>1005/2022</u> | <u>26225/2022</u> |
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| <u>73</u> | <u>594/2021</u> | <u>1003/2022</u> | <u>26227/2022</u> |
| <u>74</u> | <u>595/2021</u> | <u>1002/2022</u> | <u>26228/2022</u> |
| <u>75</u> | <u>596/2021</u> | <u>1001/2022</u> | <u>26229/2022</u> |
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| <u>77</u> | <u>598/2021</u> | <u>999/2022</u> | <u>26231/2022</u> |
| <u>78</u> | <u>599/2021</u> | <u>998/2022</u> | <u>26232/2022</u> |
| <u>79</u> | <u>600/2021</u> | <u>997/2022</u> | <u>26233/2022</u> |
| <u>80</u> | <u>601/2021</u> | <u>996/2022</u> | <u>26234/2022</u> |
| <u>81</u> | <u>602/2021</u> | <u>995/2022</u> | <u>26235/2022</u> |
| <u>82</u> | <u>603/2021</u> | <u>994/2022</u> | <u>26236/2022</u> |
| <u>83</u> | <u>604/2021</u> | <u>993/2022</u> | <u>26237/2022</u> |
| <u>84</u> | <u>605/2021</u> | <u>-</u> | <u>26238/2022</u> |
| <u>85</u> | <u>606/2021</u> | <u>992/2022</u> | <u>26239/2022</u> |