

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Adnan-ul-Karim Memon

CPNo.D-2608 of 2021

Abdullah Soomro

Petitioner: Through Mr. Abdul Sattar Mughal, advocate

Respondents No.1 to 3: Through Mr. Faisal Mahmood Ghani,
advocate

Respondents No. 4 & 5: Nemo

Date of hearing
& Decision: 18.01.2023.

ORDER

ADNAN-UL-KARIM MEMON, J. Through this petition, the petitioner is praying for setting aside the order dated 16.03.2021 passed by the Full Bench of National Industrial Relations Commission Islamabad (NIRC-FB) in Appeal No.12A(30)/2021-K CMA No.7B(12)/2021-K, whereby order dated 28.12.2020 passed by the learned Single Bench of National Industrial Commission, at Karachi (NIRC-SB) was maintained, inter-alia on the ground that the impugned orders dated 16.03.2021, 06.08.2020 and 28.12.2020 are liable to be set aside and his Grievance Petition is liable to be restored to its original position which was dismissed for non-prosecution vide order dated 6.8.2020, which is extracted as under:

“Case called. Junior Counsel for the Respondent is present. Petitioner and his Counsel called absent. Perusal of record shows that previously matter was dismissed for non-prosecution, thereafter, an application was filed which is fixed for hearing. Absence of the Petitioner and his Counsel shows that they are no more interested to pursue the matter, therefore, matter stands dismissed in default for non-prosecution. File be consigned to record room after completion of all codal formalities.

2. The case of the Petitioner is that his right to cross-examination to the witness of respondent-Bank was closed vide order dated 01.08.2018, without any justifiable cause. Petitioner moved an application for restoration of his closed side, however, his main grievance application was dismissed vide order dated 6.8.2020 passed by the NIRC, his application for restoration under Order IX Rule 9 along with limitation application was strongly objected to by the respondent

bank, though petitioner's counsel assigned the reason for his absence on the very day to the effect that due to lockdown in COVID Pandemic his father suffered heart ailment where after he was undergone Angiography. His contention was supported by the discharge summary issued by the Indus Hospital. However, the aforesaid stance was discarded and finally, the learned NIRC vide order dated 28.12.2020 dismissed the Grievance Application of the petitioner on account of non-prosecution. An excerpt whereof is reproduced as under:

"I have heard learned Counsel for the parties and perused record. Learned Counsel for the Petitioner contended that on 22.06.2020 Member was on leave and matter was fixed for hearing and reader of the court adjourned the matter and Reader was not authorized or empowered to fix the case, hence, order subsequently passed is illegal. While, learned Counsel for the Respondent has contended that whole record shows that Petitioner has remained not vigilant and his petition was rightly dismissed in default and subsequently, restoration application was also dismissed. He further contended that present application is also time barred as the order was passed on 06.08.2020 but present application is moved on 16.09.2020.

4. In this connection I have perused the record which supports the contentions of learned Counsel for the Respondent. As regards the date given by the reader is concerned I rely on PLD 1986 (SC) 129. In another Case reported in 1983 SCMR 619 whereby, observed as under:

"This order obviously is made under Order XVII, rule 3 of the C.P.C. This Rule applies where a party who is granted time to perform some act, not only fails to do so but is also absent on the date to which the hearing is adjourned. It is immaterial whether the adjournment was granted at the instance of the party or for other reasons. Where a defendant does not appear at an adjourned hearing, this rule applies irrespective of whether he appeared at the first hearing or not and the Court has to exercise its discretion; its hands are not tied by the previous ex-parte order. For these reasons we do not consider this petition has any merit and is, therefore, dismissed"

5. Under these circumstances I have found no reason to allow the application, hence, the same stands dismissed."

3. Petitioner being aggrieved by and dissatisfied with the aforesaid decision filed the appeal which was also dismissed by the NIRC-FB in Appeal No.12A (30)/2021-K vide order dated 16.03.2021. For convenience's sake, an excerpt whereof is reproduced as under:

"5. We have heard the arguments of both the learned counsels for both the parties and have perused the record carefully and we have come to the conclusion that the appellant had failed to cross examine the RW and their side was closed on 08.01.2018 and subsequently, their grievance petition was also dismissed due to non prosecution on 06.08.2020 which shows the attitude and conduct of appellant to pursue his case. Appellant filed the application on 16.09.2020 for recalling the order dated 06.08.2020 which is time barred by 11 days and no application for condonation of delay has been filed. Therefore, we find no rational to interfere in the order dated 28.12.2020 passed by the learned Single Member as the same is lawful and legal. We upheld the order dated 28.12.2020 and dismiss the instant appeal with no order as to the cost. File be consigned to record room after due completion."

4. Petitioner has submitted that the matter could have been decided on merits, even his side to cross-examination was closed and the Grievance application of the petitioner ought to have been decided on merits rather than dismissal on technical grounds.

5. Mr. Abdul Sattar Mughal, learned counsel for the petitioner, contended that the impugned orders dated 16-03-2021, 06-08-2020 as well as 28-12-2020 passed by the learned NIRC are illegal, unlawful and without lawful authority and the same is liable to be set aside; that the Grievance Application has been dismissed for non- persecution, though the matter was at evidence stage and side of the petitioner to cross-examine the witnesses had already been closed, thus the matter ought to have been decided on merit based on the available oral as well as documentary evidence. Learned counsel emphasized that the learned NIRC was not justified in dismissing the Grievance Application for non-prosecution as for doing so in the first place the court was required to have applied its conscious mind to the facts and circumstances of the case and not just to pass a mechanical order based on conjunctures; that Grievance Application was dismissed for non-prosecution when none of the parties appeared before the Court on 06.08.2020 and intimation notice ought to have been issued keeping in view the COVID-19 pandemic as the Courts a usually were taking up the urgent matters in terms of Circular issued by this Court. He added that there was no intimation by the Court fixing the case for hearing and requiring the petitioner to appear before it along with its evidence, therefore, such an order of the NIRC is altogether without jurisdiction and void ab initio. Learned counsel also referred to his affidavit as well as an affidavit of his son intimating the Court about his heart ailment and hospitalization along with restoration application, however, that was not considered by the learned NIRC vide order dated 28.12.2020. Learned counsel argued that for applying for restoration, the residuary Article 181 of the Limitation Act will be applicable, providing three years. Thus, the applicability of Article 163 of the Limitation Act is misconceived as portrayed by the learned counsel for the respondent Bank. Per learned counsel, the application filed by the petitioner for restoration of the main case was within time even otherwise the matter ought to have been decided on merit rather than dismissal on technical grounds. He prayed for setting aside the impugned orders and restoring the Grievance Application wherefrom it was dismissed and directed the

NIRC to expedite its hearing and dispose of the same preferably within one month. In support of his contentions, learned counsel relied upon the cases of Nowheri Khan v. Said Ahmad Shah, **1983 PSC 1218**, Haji Muhammad Ramzan Saifi v. Mian Abdul Majid and others, **PLD 1986 SC 129**, Anwar Muhammad v. General Manager, Pakistan Railways Lahore and another, **1995 SCMR 950**, Executive Engineer, Peshawar v. Messrs Tour Muhammad and sons and 4 others, **1983 SCMR 619**, Faiz Bakhsh v. District Judge, Multan and others, **1983 CLC 2437**, Messrs Zeenit Textile Mills Ltd. v. the Government of Punjab through the Secretary, Department of Labour, **1987 SCMR 770**, Shaukat Hussain and others v. Mst. Qaisarah Begum and others, **1988 SCMR 263**, Ghulam Mustafa Shah v. Haji through Legal Hiers and others, **1993 SCMR 256**, Ali Muhammad v. Mst. Murad Bibi, **1995 SCMR 773**, Messrs Inam & Company (Pvt.) Ltd Gujrat v. Punjab Cooperative Board for Liquidation Lahore, **1999 SCMR 2824**, Messrs Transglobe Shipping Service v. WAPDA and another, **2016 SCMR 2023**, Convell Laboratories Ltd, Saida Sharif SWAT Pakistan v. m.v Alexanders Faith A Vessel of Greek Flag presently Berthed at Berth No.4, Eastwharf KPT, **1998 CLC 1383** and Allahwala Foundation v. Province of Sindh and others, **2002 SCMR 798**.

6. Mr. Faisal Mahmood Ghani, learned counsel for the respondent Bank, argued that these proceedings are summary in nature and 7 days period has been provided which shows the intent of the legislature, but the delay has been on the part of Petitioner; that the courts are not expected to keep accommodating a party more so the Petitioner when he is not interested in pursuing the matter vigilantly culminating into the closure of his side to cross-examine and thereafter dismissal of his Grievance Application on account of non-prosecution; that the plea of shortage of staff at NIRC during COVID-19 is misconceived as portrayed by the petitioner; that Restoration/Recalling Application has to be filed within 30 days as held in labor matters by the Hon'ble Supreme Court in CP No. 2491/19 titled Administrative Committee vs. Punjab Labour Appellate Tribunal No. II Multan and others, 2002 PLC 158. The limitation in terms of Article 163 of the First Schedule is Thirty (30) days and not three years which is misconceived approach on the part of the petitioner; the plea of the Petitioner that date was given by the Reader, hence could not be termed as a valid reason not to pursue the case which contention is an afterthought and misconceived; that neither this ground/plea was

taken in the Application for Setting aside the ex-parte order dated 06.08.2020 nor the Petitioner's Counsel was present on 22-06-2020 as per Diary and the matter was adjourned to 06.08.2020 hearing on recalling the order; that litigant is also under a duty to see that his matter is prosecuted properly and diligently; that no additional Grounds can be allowed to be raised beyond pleadings, resultantly the two Impugned Orders are well reasoned, and therefore the Petition merits to be dismissed. In support of his contentions, he relied upon the cases of the Hon'ble Supreme Court of Pakistan in Messrs SKB-KNK Joint Venture Contractors through Regional Director v. Water and Power Development Authority and others, **2022 SCMR 1616**, Haji Muhammad Ramzan Saifi versus Mian Abdul Majid and others, **PLD 1986 SC 129**; **1982 SCMR 1229**, **1974 SCMR 162**, and **PLD 2001 SC 49**.

7. We have heard the learned counsel appearing for the parties and have also gone through the record with their assistance.

8. The question involved in the present proceedings is whether Grievance application No.237 of 2006 of the petitioner could be dismissed for non-prosecution by the NIRC vide order dated 06.08.2020 when the side of the petitioner to cross-examination to the witness of the respondent-bank was closed on 01.08.2018 and the matter ought to have been decided on merits based on available record.

9. To appreciate the aforesaid proposition, it is expedient to have a look at the factual aspect of the case first, it appears from the record that the petitioner joined the respondent Bank in the year 1977 and was promoted to the rank of OG-III and remained posted at different branches of the respondent Bank. Per the petitioner, he had been working manually and doing work by hand in all respects of making documents/instruments since his appointment in the bank and the petitioner falls under the definition of workman as defined in the IRA 2002, Standing Orders Ordinance 1968, and different Labor laws enforced from time to time. According to the petitioner, he proceeded under the UBL Staff Service Rules and was issued with the charge sheet dated 15.04.1999, following the suspension from the service order. Inquiry letter was initiated on 13.05.1999 and 07.06.1999 and petitioner was directed to appear before the inquiry committee on 31.07.1999; that the petitioner on account of constant harassment on the part of

respondent bank, fell ill and made the application on 21.07.1999 for his appearance before enquiry committee, but appellant's application was un-replied and no intimation was received by the appellant as to what happened thereafter, however, in absence of the petitioner his service was dispensed with vide office order dated 16.09.1999 without proper inquiry, show cause and without affording any opportunity of personal hearing and defence; that the petitioner filed an appeal before the Service Tribunal which was abated in the light of Honorable Supreme Court Judgment dated 27.06.2006 and the appellant thereafter, filed an application No.247/2006 before the learned Labour Court # VI at Karachi under section 46 of the IRA, 2002 which was transferred to the NIRC by the Labour Court, after enactment of IRA, 2012, and during proceedings, his side for cross examination the witness was closed on 1.8.2018, application for restoration of his side was moved on 8.8.2018, finally, his main grievance application No.237 of 2006 was dismissed for non-prosecution on 6.8.2020, application for restoration was moved on 16.9.2020 along with limitation application which was objected by the respondent bank, however the learned NIRC vide order dated 28.12.2020 dismissed the restoration application, application for recalling the order dated 28.12.2020 and his further application on the subject issue not entertained. The petitioner being aggrieved by and dissatisfied with the aforesaid order, preferred appeal which was too dismissed by the NIRC-FB in Appeal No.12A (30)/2021-K vide order dated 16.03.2021.

10. Though the conduct of the petitioner and his counsel is not up to the mark so far as this case is concerned in terms of Diary Sheets of the learned NIRC which reflects that the petitioner and his counsel remained unwilling to cross-examine the witness, however, when the side of the petitioner to cross-examine the respondent witness was closed, it was incumbent upon the learned NIRC to have decided the matter on merits based on available record rather than dismissal of the *lis* for non-prosecution.

11. Primarily, the right to cross-examine is a valuable right of the party to discover the truth, for which the party should not be lightly deprived. The opportunity to cross-examine a witness is contemplated by the law and must be real, fair, and reasonable for the reasons that rules of procedure are meant to advance justice and to preserve the right of litigants, and these are not meant to entrap them into the blind corner to frustrate the purpose of law and justice.

Primarily, the right to close the evidence under Order XVII, Rule 3, C.P.C. shall not be exercised unless various opportunities have been granted to the parties who have failed to produce evidence. However, in the present case, the Petitioner was awarded ample opportunities to cross-examine the witnesses of the respondent bank, but in our view, the trial Court ought to have decided the matter on merits based on available record, therefore, in the interest of justice and to decide the case on merits, one more opportunity is granted to the Petitioner to cross-examine the respondent-bank and his witnesses and if he fails to do so, in one week, the learned NIRC shall decide the matter on merit based on available record, however, that arrangement is subject to payment of the cost to be paid to the petitioner to the respondent-bank.

12. In view of the above, without touching the merits of the case, this petition is allowed and impugned orders are set aside subject to payment of costs of Rs.5000/- to be paid to the respondent bank by the petitioner and learned trial court is directed to provide one (1) opportunity to the Petitioner to cross-examine the witnesses of the respondents in the terms mentioned above.

JUDGE

JUDGE

Nadir*