# IN THE HIGH COURT OF SINDH Bench AT SUKKUR

Constitutional Petition No. D-288 of 2024
(Engro Fertilizer Limited v Ful Bench of NIRC & others )
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| Date | Order with signature of Judge(s) |
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Mr. Justice Adnan-ul-Karim Memon
Mr. Justice Muhammad Abdur Rahman

**Date of hearing:- 23.05.2024**
**Date of judgment: ___.02.2025**

Mr. Faisal Mahmood Ghani advocate for the petitioners.
Mr. Jaffar Ali Shah advocate for respondents No. 2 to 4 in C.P. No. 289 of 2024.
Mr. Jamshed Ahmed Faiz advocate for respondents No. 3 and 4.
Mr. Abdul Hafeez Irfan advocate for respondent No. 3 in C.P. No. D-289 of 2024.

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## J UD G M E N T

**Adnan-ul_Karim Memon, J;** All captioned petitions, sharing common legal and factual issues, need to be disposed of through this single judgment.

2. The case of the petitioner company is that the petitioner company, a fertilizer manufacturer with operations across Sindh and Punjab, conducted a review to improve efficiency and resource allocation. This led to organizational restructuring to enhance career growth and adapt to upgraded production processes, this involved abolishing Group "F" (60 employees) and promoting Group "G" (56 employees). Four employees from Group "G" accepted voluntary separation schemes. As per the company, the private respondents cannot object to these agreed-upon changes under the guise of unfair labor practices as such three grievance Petitions were filed before a Single Bench of the National Industrial Relations Commission, (NIRC), including by Respondents 3 & 4 in C.P. No. D-288 of 2024, challenging a completed promotion. Despite this challenge, Respondents 3 & 4 were already serving in the promoted roles and receiving corresponding salaries. Notice was issued on the main grievance petition and stay application. The petitioner company filed preliminary legal objections, with a reply statement and counter affidavit, along with an application for a hearing. Evidence was led by both parties. Respondents 3 and 4 also testified. Qurban Ali, Deputy Manager of Industrial Relations, authorized by the Board of Directors of the petitioner company was examined. The parties presented their evidence and arguments were heard. The learned Single Bench of NIRC allowed the grievance petitions vide impugned order dated 20-09-2023. The Petitioner company filed Appeals No. 12A(08)/2023S, 12A(09)/2023S, and 12A(10)/2021-S, before the Full Bench of NIRC challenging orders dated 20-09-2023 issued by the learned

Single Member of NIRC in grievance cases No. 4B(28)/21-S and 4B(29)/21-S. However, these appeals were dismissed by the Full Bench of NIRC via an impugned order dated 25-01-2024, and as per the petitioner company, which misread and misapplied the evidence and ignored settled law, thus are liable to be set aside.

3. learned counsel for the petitioner-company argued that no grievance notices, which is condition precedent under section 33(1) ibid have been served by respondents No 3 & 4 upon the petitioner company; he emphasized that respondents 3 & 4 admitted during cross-examination that they failed to serve a grievance notice upon the petitioner, which was outside the scope of Section 33 of Industrial Relations Act (IRA 2012). This renders the grievance petitions non-maintainable. Per learned counsel, the grievance petitions were/are not maintainable under Section 33 of the IRA 2012 as this section allows grievance petitions only for enforcing rights guaranteed under 'law,' 'award,' or 'settlement.' Per learned counsel, the grievance petition is only valid if it relates to a right guaranteed by law, settlement, or award. He added that even if the private respondents are considered workmen, their grievance does not fall under any legally guaranteed right. Learned counsel argued that respondents 3 & 4 accepted their promoted salaries and positions, implying acquiescence. This conduct renders the grievance petition inadmissible due to acquiescence and the law of estoppel. He emphasized that respondents 3 & 4 admitted during cross-examination that Engro Fertilizers management reclassified them from Grade F to management grade P-6. Per learned counsel, the NIRC erred in stating that the petitioner failed to produce job descriptions, though job descriptions were filed as an employee cannot insist on remaining in their current role and refuse a promotion. Learned counsel next argued that the petitioner company reviewed operations to optimize costs and ensure a sustainable manufacturing process for the company, this involved analyzing resource allocation, deployment, and utilization, along with process efficiency and effectiveness. Per learned counsel, to shape career growth and drive efficiency, the petitioner company restructured its organization, this aimed to create an agile and skilled workforce equipped to manage upgraded production processes. Learned further added that respondents 3 & 4 were performing supervisory and managerial duties as their primary function. This included responsibilities like hiring, promotion, demotion, transfers, discipline, and determining employee requirements. He pointed out that manual work, if any, was ancillary, after promotion, respondents 3 & 4 received benefits in the management cadre, as such they cannot file grievance petitions before the NIRC as these included increased salary, 12 air tickets per year, access to the management Club and School, enhanced end-of-service benefits (including provident fund), and improved medical coverage. Per learned counsel, their last

pay slips show gross salaries of Rs.407,169/- and Rs.634,575/- respectively, this includes benefits in the management cadre and an inflation increment. He argued that the Single Bench of NIRC erred in Para 7 by failing to determine, how the promoted posts became vacant (freshly created, retirement, promotion, etc.). Per learned counsel, the parties previously agreed to a Memorandum of Understanding (MoU) for the period January 1, 2021, to December 31, 2022, which became part of the Memorandum of Settlement. This MoU contains Section 3 outlining the agreed-upon terms. He submitted that promotion is an agreed right, covered by the settlement agreement. Per learned counsel, the respondents cannot object to agreed provisions, especially under the guise of unfair labor practices based on promotion posts. He further argued that the settlements between the employer and CBA are binding on dissenting workers. Learned counsel submitted that respondents No. 3 & 4 during their cross-examination admitted that the MoU dated 05.10.2021 attached with Affidavit in Evidence signed between management and union from 01.01.2021 to 31.12.2022; He referred to clause I of the MoU contains rights of CBU (CBA) union and management. He argued that the NIRC's finding that workers can forego promotions and that the settlement lacks provisions for promotion beyond Grade F strongly suggests that Grade F is the terminal point in the workers' grade structure. He added that promotion is not an unfair labor practice, as such, the grievances petitions lack specific instances of unfair labor practice and were/are, therefore, not maintainable; that the Single Bench of NIRC erred in finding that the promotion was malicious and intended to suppress union activities. Learned counsel argued that there is no legal requirement for consent or consultation for promotion as promotion from Grade C to F is permissible under the CBA. Per learned counsel promotion to P-6 (Management Cadre) is valid as promotion is not based on malice or dissatisfaction. Besides transfer is a normal part of employment. Since Engro Fertilizers Ltd. is the proper legal entity such a Grievance Petition filed without following proper procedure was/is not maintainable. A petition filed by a provincially registered union for a trans-provincial establishment is not maintainable. On the question of concurrent findings of facts and law by the NIRC, he argued that concurrent findings can be overturned if based on the application of incorrect law. Petitioner's affidavit in evidence was not challenged, creating a presumption of its acceptance. He argued that since there is no specific law regarding promotion in the Standing Orders, and promotion is not a guaranteed right, the grievance petition ought to have been dismissed in terms of the ratio of the judgments rendered in the cases of *Liaquat Ali v. Managing Director Sui Northern Gas Pipelines Ltd*, 2009 PLC 79 is irrelevant to the current grievance petition. In support of his contention he relied upon the cases of *Karachi Pipe Mills employees Union Karachi v Karachi Pipe Mills Ltd Karachi* **1992 SCMR 36**, *Liaquat Ali v M/s Sindh Labour Appellate*

*Tribunal Karachi & others* **1993 PLC 109**, *Munnawar Hussain v MCB Ltd.* **PLJ 2006 Lahore 1130**, *Zar Khan v Senior Vice President, Muslim Commercial Bank Ltd. & others* **1984 PLC 89**, *The Area Manager MERCK Sharp and Dhome of Pakistan Ltd and others v The Chairman First Labour Court East Pakistan & others* **1971 PLC 406**, *Syed Muhammad Hussain v Pakistan Tobacco Co Ltd and others* **PLD 1980 SC 80**, *Allied Bank of Pakistan Workers Union v Allied Bank Ltd, Employees Union & others* **2006 PLC 308**, *PESCO WAPDA House v Ishfaq Khan & others* **2021 PLC 148**, *PIA Corporation v Syed Suleman Alam Rizvi & others* **2015 SCMR 1545**, *Mukhtar Ali v Pakistan Railways and others* **2005 PLC 166**, *I.E Saleh v Messers International Laboratories Ltd* **PLD 1975 Karachi 279**, *unreported order passed in Civil Appeals No. 481 of 2017 & 913 and 914 of 2020* passed by **Supreme Court** of Pakistan and another unreported order in *Civil Petition No. 34 of 2022* passed on 30.01.2024, *Muslim Commercial Bank Limited v Rizwan Ali Khan and others* **2024 SCMR 360**, *United Bank Limited v Jamil Ahmed and others* **2024 PLC 50**, *Muhammad Shafi @ Kuddoo v The State* **2019 SCMR 1045**, *Utility Store Corporation of Pakistan Limited v Punjab Labour Appellate Tribunal & others* **PLD 1987 SC 447**, *Muhammad Nawaz v Member Judicial Board and others* **2014 SCMR 914,** *Muslim Commercial Bank Ltd v Muhammad Riaz Jutt* **NLR 2010 109** and *Muhammad Akhtar v Manna* **2000 SCMR 974**. He lastly prayed for allowing the instant petitions by dismissing the grievance petitions filed by the private respondents.

4. Mr. Jamshed Ahmed Faiz, advocate for respondents No. 3 and 4 in C.P. No. 289 of 2024, referred to the objections filed by the respondents and argued that on September 20, 2023, the NIRC set aside an order dated October 5, 2021, that forcibly converted the private respondents from their technical Grade-F positions to lower-ranked management positions (P-6). He further submitted that the respondents were improperly treated by the petitioner company just to knock them out of service so that they may not be able to file a grievance petition against the highhandedness of the management of the petitioner company. As per counsel, this treatment violates a 2021 Memorandum of Settlement that does not allow for such conversions from workmen to management cadre positions. He further argued that their Grade-F positions are the highest in their technical field within the petitioner company, however, the petitioner company acted arbitrarily and against labor laws by reducing their salaries and forcibly converting them just to knock them out of the category of the workman to create a ground to remove them from services, therefore they were compelled to approach NIRC to have October 5, 2021, the order passed by the management set aside with the declaration that their forced conversion was/is unlawful and illegal and an injunction order preventing the petitioner company from further implementing the order dated October 5, 2021. He further argued that the settlement agreement

dated 01-01-2021, being statutory, only includes payscale A and F, for workmen and the Memorandum of Settlement dated 01-01-2021 does not include any provision for converting technical employees into non-technical roles. He emphasized that on October 5, 2021, the respondents were forcibly converted to Grade P-6 (Senior Plant Operator) from Grade F. This contradicts the Memorandum of Settlement, which classifies Senior Operator as Grade E. The petitioner company's classification also deems the management grade (P-6) inferior to the respondent's previous position in Grade F. Moreover, the Memorandum of Settlement lacks any procedure for converting Grade-F employees into the management cadre. The intention of the petitioner company, through the impugned promotion/conversion order, was/is to remove them from service with malafide intentions. He further contended that the present petitions are not maintainable, as NIRC (National Industrial Relations Commission) has rendered concurrent findings of fact, which cannot be challenged through writ jurisdiction. On the point of service of grievance notices, upon the petitioner company, he argued that earlier one of the respondents filed grievance petitions under Section 54(e) of the IRA, 2012, seeking an injunction against the petitioner company from altering their employment status. The Single Member NIRC Sukkur dismissed the grievance petitions, ruling that section 54(e) did not apply to individual grievances. The Single Member directed the respondents to invoke Section 33 of the IRA, 2012, for individual grievances after exhausting internal grievance procedures by serving the petitioner company. They supported the impugned orders passed by the learned NIRCs. He concluded by praying for the dismissal of the captioned petitions.

5. Mr. Jaffar Ali Shah represents respondents 2 to 4 in C.P. No. 289/2024 and Mr. Abdul Hafeez Irfan represents respondent 3 in C.P. No. D-289/2024 has adopted the arguments of counsel for respondents 3 and 4 in C.P No. 288 of 2024.

6. At this stage counsel for the petitioner company by exercising the right of rebuttal submitted that the respondents’ claims were previously dismissed by NIRC, and they cannot re-litigate the same issue (estoppel and res judicata). He added that the company restructured to improve efficiency and reduce costs, including offering VSS (which the respondents declined). He argued that there is no legal right to promotion under the relevant labor law (Industrial and Commercial Employment (Standing Orders) Ordinance, 1968). As the respondents are now in management positions, they are no longer covered by the Standing Orders; that the petitioner company has the right to promote employees under the existing Memorandum of Settlement. He lastly submitted that the respondents accepted the promotion and are currently working and receiving a salary in the promoted position.

7. We have heard the learned counsel for the parties and perused the record with their assistance and case law cited at the bar.

8. Petitioner Engro Fertilizers Limited company calls the orders dated 25.01.2024 passed in Appeal No.12A (09)/2023-S by Full Bench of NIRC'/Respondent No.1 and on 20.09.2023 in Case No.4B(30)/2021-S by /Single bench of NIRC. The reasoning of the learned full bench of the NIRC is that the petitioner company retains all management rights, including the right to direct and control its workforce. This includes hiring, promoting, demoting, transferring, disciplining, discharging employees, and determining staffing needs. In the petitioner company position classifications exist from Grade A to Grade F, which outline pay rights with grades ranging from A to F. Upon reaching the maximum salary within a grade, a salary revision may be considered. However, the Memorandum of Settlement lacks provisions for promotions beyond Grade F, suggesting that Grade F likely marks the highest attainable grade for workers, with potential advancement into officer positions thereafter. It was further observed that the petitioner's counsel failed to provide information on the company's profile when questioned by the NIRC Bench. Additionally, he could not provide evidence regarding the abolishment of Grade F, including any settlement agreement with the CBA, relevant orders, or notifications. This demonstrated a lack of preparedness on his part. The petitioner company claimed that all employees in Grade F either accepted a promotion or filed grievances, effectively ending the grade. That factum lacked documentation for the grade's abolishment. While he showed a salary increase with the promotion to P-6, he couldn't provide salary data for other employee classes to compare inflation-related raises. The petitioner company had the right to decline promotion, and no worker can be compelled to accept it. It was further observed that the petitioner's counsel failed to demonstrate any misinterpretation of evidence by the Single Member of NIRC to justify the Full Bench's intervention. Consequently, all three appeals filed by the petitioner company were dismissed as meritless.

9. The questions involved in the present proceeding, for determination, are whether the petitioner company can convert the status of the respondents/workman to officer category by promoting them to P-6 groups and whether a grievance petition can be filed under section 33 of the Industrial Relations Act 2012, based on unfair labour practice.

10. There is no dispute that petitioner company vide order dated 05.10.2021 promoted the private respondents from Grade F to P-6 management cadre, however, that promotion has been objected by the respondents leading to filling of grivence petitions before NIRC, on the premise that this arrangement was/is against their desire and consent.

11. This issue has been addressed by the learned single bench of NIRC on the premise that the respondents' conversion/promotion order dated 05.10.2020 was invalid due to salary reduction and no overtime as these are significant detriments in the converted position. Besides petitioner company failed to provide clarity on the new role as the origin of the vacancies remains unexplained. Additionally, the "P-6" position was/is not recognized in the Management Cadre. Lastly, the conversion was/is a punitive measure against trade union activities. Thus the grievance petition was allowed, and the order dated 05.10.2020 was set aside. An excerpt whereof reads as under:-

> *" I have heard the arguments of the learned counsel for both parties and perused the record. It is very strange that petitioners' salaries are decreased in a conversion/promotion position, it is also worth mentioning that overtime is also not allowed in the above-said conversion) position, moreover, the respondents failed to produce job description of the converted/promoted position. The respondents were unable to explain how the converted/promotion post became vacant, or whether these posts were freshly created or they became vacant due to the retirement or promotion of incumbents. According to the Memorandum of Settlement, the last top position or grade is F-Grade and there is no mention of the P-6 position in the Management Cadre. Moreover, the petitioners never wanted this position and they are not availing the perks and privileges of the P-6 is a self-created position to punish the employees, and they should not take part in trade unionism. The employees that they should not take part in trade unionism. The employees, that they should not take part in trade unionism. The conversion/promotion of the petitioners was based on malafide intention of the respondents to deprive the petitioners of the status of workmen, in fact, they wanted to curtail/restrain their trade union activities. Therefore, the instant petition is allowed and the order dated 05.10.202 is set aside, with no order as cost. File be consigned to record room.*

12. The full bench of NIRC endorsed the findings of the single bench of NIRC vide order dated 25.01.2024 on the following premise:-

> *"5. The learned counsel for the appellant while arguing his case submitted and reiterated in his arguments all the facts which he reiterated at the time of submission of written reply. On the other hand, learned counsel for the respondents supported the impugned order and requested that all three appeals be dismissed. While going through the Memorandum of Settlement in Section 3 the respondent as well as the Employee Union agree on the following: "The company retains all rights of management resulting from ownership of the Company and pertaining to the operation of business. These rights shall include (a) the right to direct and control the workforce i.e. Among others the right to hire, promote, demote, transfer, discipline, discharge, to create to discontinue, or reclassify jobs, to determine the number of employees needed" and the Memorandum of Settlement is also attached with position classification and starting from Grade-A, Grade B, Grade-C, Grae-D, Grade-E, and Grade-F. The rights of pay as per Section 6 is also mentioned in the attached ATTACHMENT 'A'. The pay group starts from Grade A and ends at Grade F and if a worker reaches on sealing of his grade basic salary the sealing may be considered for revision. Nowhere in the Memorandum of Settlement, it is permitted that the worker class to reach Grade how will be promoted it means that the gradation of the workers class comes to an end at Grade F and*

> *probably onward in officer class. However, when during the arguments we posed a question to the learned counsel for the appellant to appraise about the agrogram of the company he could not satisfy the Bench in this respect. Moreover, when he was asked whether Grade F is abolished whether there is any agreement of Settlement reached between the CB And the company in this respect, and whether any order/notification has been made in respect of abolishing Grade F he was unable to bring any letter show his ignorance in this respect. Though he pleaded that the total strength in Grade F is 60, 04 out of 60 opted for VSS 48 accepted promotion and the remaining 8 filed grievance petitions, and thus the whole group came to an end. He is unable to show any document about the abolishment of Grade F, he also provided the breakdown in this respect of the salary the petitioner used to receive in Grade F and will receive in P-6 and pleaded that their salary is not reduced but rather enhanced. However, when he was asked that the raise in the salary due the inflation would also be received by the workers class of the company as well as the officer class, he was unable to show us the salary of both classes.*
>
> *6. Admittedly the petitioners had the right to forgo their promotion and no worker can be forced for promotion. Moreover, the learned counsel for the appellant failed to point out any misreading and non-reading of documentary evidence by the learned Single Member to warrant the interference of this Bench, therefore, all the above-mentioned three appeals around meritless stand were dismissed. No order as to cost. The file be consigned to the record room after due completion."*

13. Keeping in view the above factual as well as legal findings, in such circumstances, the High Court has the power only to issue a writ of certiorari to review NIRC decisions based on a misreading of evidence or jurisdiction error; as the scope of judicial review of the decisions as discussed supra is limited. This court generally does not interfere with concurrent findings of fact unless there's evidence of Jurisdictional errors, errors of law, manifest injustice, and violation of principles of natural justice which factum is missing in the present case.

14. On the issue of concurrent findings, if both a single bench and a full bench of the NIRC have reached the same conclusion on a matter of fact, it carries significant weight then the High Court will be hesitant to overturn these findings unless there's a strong case for one of the exceptions mentioned above as the high court is not the appellate court in the matter in dispute against concurrent findings.

15. Coming to the proposition so forward by the petitioner company that the issue of promotion in a company cannot potentially be agitated in the National Industrial Relations Commission (NIRC) based on unfair labor practice. The concept of unfair labor practice refers to actions by employers or employees that interfere with, restrain, or coerce employees in the exercise of their rights. These rights may include the right to organize, bargain collectively, or engage in other concerted activities for mutual aid or protection. Promotion may be considered a right if it is explicitly stated in a collective bargaining agreement or company policy. If the employer denies promotion based on discriminatory or retaliatory motives, it could be considered an unfair labor practice. For unfair labor practices based on promotion denial, the parties need to present evidence that the decision of the company was based on discriminatory factors such as race,

gender, religion, union membership, or protected activities. Retaliation for engaging in union activities or filing grievances could also be considered an unfair labor practice. In such circumstances, the NIRC will investigate the complaint and conduct a hearing to determine the merits of the case. If the NIRC finds that the employer engaged in unfair labor practices, it may order remedies such as reinstatement, back pay, or other appropriate relief.

16. Touching on the second issue of non-service of grievance notice. Under Section 33 of the Industrial Relations Act, 2012 (IRA 2012), if a grievance notice is not served, the grievance petition can be dismissed. This is because service of the grievance notice is a mandatory requirement and a precondition for filing a grievance petition. The law requires that a grievance notice be served on the employer before filing a grievance petition. This allows the employer to respond to the grievance and attempt to resolve it amicably. If the employer fails to respond or resolve the grievance, the employee can then file a grievance petition with the National Industrial Relations Commission (NIRC) if the organization is transprovincial. If the employee fails to serve a grievance notice, the NIRC may dismiss the grievance petition. This is because the employer has not had an opportunity to respond to the grievance and attempt to resolve it. In some cases, the NIRC may allow the employee to amend the grievance petition to include the grievance notice. However, this is usually only done if the employee can show that they had a good reason for not serving the grievance notice. In the present case, the parties were allowed to lead evidence and the petitioner company responded to the allegations as such they were well aware of the allegations and led the evidence as such this point is of no use to be looked into in constitutional jurisdiction at this stage.

17. 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 /single Benches of NIRC warranting interference of this Court. Hence, the instant Petitions are found to be meritless and are accordingly dismissed along with the pending application (s) with costs.

JUDGE

**MOHAMMAD ABDUR RAHMAN. J** I have had the honour of reading the order passed by my learned brother Adnan Karim ul Memon, J and respectfully, for the reasons that follow, have come to a different conclusion regarding my decision in each of these Petitions.

2. The facts in these three Petitions are not in dispute. Each of the Private Respondents in these Petitions are employed by the Petitioner and were admittedly "workers" or a "workman" within the meaning of the definition of that expression as contained in Sub-Section (xxxiii) of Section 2 of the Industrial Relations Act, 2012 (hereinafter referred to as the "Act, 2012"). The entire class in which the Private Respondents were employed by the Petitioner i.e., Class F was "reorganised" by the entire class being cancelled and each of the members of the class indiscriminately being promoted into a management class i.e. Class P-6.

3. The Private Respondents were each issued letters on 5 October 2021 informing them of the reclassification by the termination of Class F and their absorption by promotion into the management Class P-6. The manner in which the communication of the reclassification was made to the Private Respondents is contested. It is contended by the Petitioner that when the letter was issued, the Private Respondents refused to accept the notice and despite not having taken on their new position, they accepted their pay cheques and received their pay slips, and which actions the Petitioner contend amounts to acquiescing to their employment being "reorgnaised" however these factual disputes are, as will be seen, inconsequential to the decision in these petitions

4. The Private Respondents initially maintained an application under Section 54 of the Act, 2012 before the National Industrial Relations Commission (NIRC) but which were apparently dismissed for want of jurisdiction and whereafter the Private Respondents each issued notices as prescribed under Sub-Section (1) of Section 33 of the Act, 2012 and on receiving a reply from the Petitioner maintained Grievance Petitions bearing Case No. 4B(28)/21-S, Case No. 4B(29)/21-S and Case No. No. 4B(30)/21-S before a Single Member of the NIRC.

5. I have perused each of the Grievance Petitions maintained by each of the Private Respondents and the grounds in which read as hereinunder:

**(i)** **Case No. 4B(29)/21-S and Case No. No. 4B(30)/21-S**

(5) یہ کہ 60 ورکرز جو F-Group میں تسلی بخش طور پر کام کر رہے تھے میں سے 50 ورکرز کو Respondent نے F-Group نکال کر مینیجمنٹ کیڈر میں تبدیل کرنے فیصلہ کیا جب کہ کسی کی بھی مرضی شامل نہیں تھی یہ کے Respondent نے مینیجمنٹ کیڈر میں تبدیل کرنے سے قبل کسی بھی ورکر اور نہ ہی درخواست دہندگان سے رضا مندی حاصل کی اور نہ ہی اس کے مینیجمنٹ کیڈرمیں تبدیل کرنےکے لیے کوئ مشورہ کیا مینیجمنٹ کیڈر Respondent نے تبدیلی کر کے Respondent کو یہ اختیار حاصل ہوگا کہ اینگرو فرٹیلائز کمپنی ڈھرکی سے پاکستان کے کسی مقام پر بھی ٹرانسفر کر سکتا ہےاور یہ اٰعمل بد نیتی پر مبنی ہے ہو کیا ہوتی ہے Respondent کے اس عمل سے درخواست دہندگان کا پورا خاندانی نظام تباہ ہو جائیگا اور شدید مشکلات سے دوچار ہو جا ئیں گے۔ اس لئے درخواست دہندگان مینیجمنٹ کیڈر میں تبدیل کرنے کے فیصلے سے اتفاق نہیں کرتے ہیں اور نہ منیجمنٹ کیڈر میں شامل ہونے کے لئے رضا مندی کا اظہار کیا کیونکہ درخواست دہندگان کجھتے ہیں کہ Respondent کا عمل بدنیتی پر مبنی ہے۔

(6) یہ کہ درخواست دہندگان کو مورخہ 05-10-2021 کو علم میں آیا کہ Respondentنے بدنیتی کی بنیاد پر درخواست دہندگان کو F-Group سے مینیجمنٹ کیڈر میں تبدیل کر رہا ہے جس سے درخواست و ہندگان کوشدید مشکلات کا سامنا کرنا پڑیگا یہ کہ منجمنٹ درخواست دہندگان کو یہ خدشہ بھی ہے کہ اسطرح سے درخواست دہندگان کو Respondent ملازمت سے ٹرانسفر کر کے مشکلات پیدا کر سکتا ہے اور کسی وقت بھی ملازمت سے ریٹائر اور برطرف ، اس اور فارغ بھی کر سکتا ہے اسطرح سے درخواست دہندگان کی ملازمت کا تحفظ بھی ختم ہو جائیگا۔"

**(ii)** **Case No. 4B(28)/21-S**

*" ...* *3. That the memorandum of the settlement dated. 01.01.2021 executed by the company with the petitioner does not provide any provision that a Technical employee shall be converted into a non-technical cadre* ***and such act on the part of the company is not only illegal, unlawful but it is against the labour laws of the country****. A person who has served for a long time of 32 years in the company as a technical employee, his conversion and promotion into non-technical cadre is an act of highhandedness and* ***there are certain ulterior and hidden designs on the part of the factory administration, either to transfer the petitioner to somewhere else in the country or terminate his services****.*

*4.* ***That petitioner is working as Head Operator in grade F which is the last highest grade in classified grades of the company in technical section. The Petitioner through order dated 05.10.2021 has been forcibly converted/shown to be promoted from grade F to P-6, whereby his position is shown as Senior Plant Operator, which is as per the classification attached along with the memorandum of the settlement shown grade 5 as senior operator, as per the classification of the company the position mentioned in the management group is inferior in the rank and position to that of the petitioner which he was already wielding in grade F. The senior operator is mentioned in the category of E whereas head operator is mentioned in grade F which is the current position of petitioner****.*

*5.* ***That memorandum of settlement is silent about the procedure and manner that how a person who is in grade F shall be converted into management cadre****.* ***The order dated 05.10.2021 has been passed in arbitrary and forcible manner. The attached lists bearing attachment A and B are very much clear about pay group and classification of grades A to F****...*

> *16. That there is jobs security in technical grade but there is no any jobs security in management cadre, as such the respondents have passed order dated 05.10.2021, which is arbitrary in nature."*

The grounds maintained in the grievance petition can be summarised as hereinunder:

(i) it was against the law to reclassify the Private Respondents from a class exclusive to workers into a management class;

(ii) the reclassification of Private Respondents from a workers class into the management class was contrary to the terms of the Memorandum of Settlement;

(iii) the entire act of reclassification was mala fide and the real intention on the part of the Petitioner was to directly or indirectly terminate the employment of the Petitioner;

(iv) the promotion is actually a demotion;

(v) there being no process identified for the reclassification of pay groups as between workers and management in the Memorandum of Settlement rendered the entire process as arbitrary; and

(vi) the lack of job security in the management class rendered the entire act of reclassification as arbitrary.

6. The Petitioner conversely contends that they have every right to manage the Company and which right has not been limited by the terms of the Memorandum of Settlement as entered into between the Petitioner and the Collective Bargaining Agent as the Private Respondents and which as per Section 3 of the Memorandum of Settlement is clarified in the following terms:

> *" ... **The COMPANY retains all rights of the Management resulting from ownership of the COMPANY and pertaining to the operation of the business**. These rights shall include but not be limited to (a) **the right to direct and control the workforce i.e. amongst others the right to hire, promote, demote, transfer, discipline, discharge, to create discontinue or reclassify jobs, requirements and job contents**;(b) to establish plant and office rules and regulations; (c) **to make optimum utilization of its workforce, tolls equipment and other resources;** (d)to maintain employees discipline and production efficiency; and (e) to determine the means, methods, processes, materials, procedures and schedules of production. **The COMPANY'S exercise of its right to manage shall not violate any of the expressed provisions of this Settlement or applicable laws**..."*

On the basis of this provision, it was contended that as the Petitioner had the right to "promote" and "reclassify" jobs, as well as the right to reorganise its class structure and which it had done without discriminating as between any member of the class. Regarding Pay Scales determined by the Petitioner, reference can be made to Section 6 of the Memorandum of Settlement which reads as hereinunder:

> " ... *Section 6 - Compensation*
>
> *The Company has classified jobs into 6 Pay Groups within minimum and maximum rates of pay for each group as shown in Attachment A.*
>
> *The corresponding Job Titles that fall with each respective Pay Group are listed in Attachment "B". The Job Titles listings in Attachment B are designed for the purpose of determining the rate of salary for persons assigned to these positions and shall not be deemed to constitute any restrictions upon the Company's right to create discontinue or modify, job positions. ..."*

7. The Single Bench of the NIRC, on 20 September 2023, allowed Case No. 4B(28)/21-S, Case No. 4B(29)/21-S and Case No. No. 4B(30)/21-S in the following terms:

> " … *" I have heard the arguments of the learned counsel for both parties and perused the record. It is very strange that petitioners' salaries are decreased in a conversion/promotion position, it is also worth mentioning that overtime is also not allowed in the above-said conversion) position, moreover, the respondents failed to produce job description of the converted/promoted position.* ***The respondents were unable to explain how the converted/promotion post became vacant, or whether these posts were freshly created or they became vacant due to the retirement or promotion of incumbents. According to the Memorandum of Settlement, the last top position or grade is F-Grade and there is no mention of the P-6 position in the Management Cadre.*** *Moreover, the petitioners never wanted this position and they are not availing the perks and privileges of the P-6 is a self-created position to punish the employees, and they should not take part in trade unionism. The employees that they should not take part in trade unionism. The employees, that they should not take part in trade unionism. The conversion/promotion of the petitioners was based on malafide intention of the respondents to deprive the petitioners of the status of workmen, in fact, they wanted to curtail/restrain their trade union activities. Therefore, the instant petition is allowed and the order dated 05.10.202 is set aside, with no order as cost. File be consigned to record room."*

The Petitioner being aggrieved maintained three appeals as against each of the orders passed in the Grievance Petitions bearing Appeal No. 12A (08)/2023 Q, Appeal No. 12A (09)/2023 Q and Appeal No. 12A (10)/2023 Q and each of which were, on 25 January 2024, dismissed by the Full Bench of the NIRC in the following terms:

> " … *"5. The learned counsel for the appellant while arguing his case submitted and reiterated in his arguments all the facts which he reiterated at the time of submission of written reply. On the other hand, learned counsel for the respondents supported the impugned order and requested that all three appeals be dismissed. While going through the Memorandum of Settlement in Section 3 the respondent as well as the Employee Union agree on the following: "The company retains all rights of management resulting from ownership of the Company and pertaining to the operation of business. These rights shall include (a) the right to direct and control the workforce i.e. Among others the right to hire, promote, demote, transfer, discipline, discharge, to create to discontinue, or reclassify jobs, to determine the number of employees needed" and the Memorandum of Settlement is also attached with position classification and starting from Grade-A, Grade B, Grade-C, Grae-D, Grade-E, and Grade-F. The rights of pay as per Section 6 is also mentioned in the attached ATTACHMENT 'A'. The pay group starts from Grade A and ends at Grade F and if a worker reaches on*

> *sealing of his grade basic salary the sealing may be considered for revision.* ***Nowhere in the Memorandum of Settlement, it is permitted that the worker class to reach Grade how will be promoted it means that the gradation of the workers class comes to an end at Grade F and probably onward in officer class****. However, when during the arguments we posed a question to the learned counsel for the appellant to appraise about the agrogram of the company he could not satisfy the Bench in this respect. Moreover, when he was asked whether Grade F is abolished whether there is any agreement of Settlement reached between the CB And the company in this respect, and whether any order/notification has been made in respect of abolishing Grade F he was unable to bring any letter show his ignorance in this respect. Though he pleaded that the total strength in Grade F is 60, 04 out of 60 opted for VSS 48 accepted promotion and the remaining 8 filed grievance petitions, and thus the whole group came to an end. He is unable to show any document about the abolishment of Grade F, he also provided the breakdown in this respect of the salary the petitioner used to receive in Grade F and will receive in P-6 and pleaded that their salary is not reduced but rather enhanced. However, when he was asked that the raise in the salary due the inflation would also be received by the workers class of the company as well as the officer class, he was unable to show us the salary of both classes.*
>
> *6.* ***Admittedly the petitioners had the right to forgo their promotion and no worker can be forced for promotion****. Moreover, the learned counsel for the appellant failed to point out any misreading and non-reading of documentary evidence by the learned Single Member to warrant the interference of this Bench, therefore, all the above-mentioned three appeals around meritless stand were dismissed. No order as to cost. The file be consigned to the record room after due completion."*

8. The Petitioner is aggrieved with each of these orders and maintains these Petitions on the following grounds:

(i) that on the facts and in law the cause maintained by the Private Respondents did not fall within the purview of a Grievance Petition under Section 33 of the Act, 2012 as the Petitioner had the right to "reclassify" jobs in terms of the Memorandum of Settlement and hence the Petition was not maintainable;

(ii) that the Private Respondents, having not issued a notice, as required under Sub-Section (1) of Section 33 of the Act, 2012, prior to presenting their Grievance Petition were prohibited in law from maintaining their Grievance Petitions;

(iii) that by accepting their salary, the Private Respondents have acquiesced to the reorganisation and are estopped from maintaining the grievance petition;

(iv) that as the promotion of a person was not an unfair labour practice, the decision of the Full Bench of the NIRC, that the Petitioners had a right to choose to forgo their promotion, was illogical;

(v) that if the Full Bench of the NIRC had come to the conclusion that the manner in which the Private Respondents were being promoted amounted to an unfair labour practice, then such a claim was not justiciable in a Grievance Petition under Section 33 of the Industrial Relations Act 2012 and rather was maintainable in a Petition under Section 67 read with Section 31 of the Act, 2012;

(vi) that there had been a misreading of evidence inasmuch as on the basis of the evidence adduced the remuneration of the Private Respondents had not been reduced;

The Petitioner relied on caselaw that has been detailed by my learned brother Adnan-ul-Karim Memon, J in his order.

9. The Private Respondents while supporting the abovementioned orders had contended that:

(i) concurrent findings cannot be upset in proceedings under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973;

(ii) there had been a breach of the Memorandum of Settlement as entered into between the Petitioner and the Collective Bargaining Agent which was justiciable in a Grievance Petition under Section 33 of the Act,2012; and

(iii) in the event that the Private Respondents are "promoted" they, not having the requisite security of retaining their employment, will inevitably be dismissed as an act of retribution for forwarding the cause of their union.

The Private Respondents relied on caselaw that has been detailed by my learned brother Adnan-ul-Karim Memon, J in his order.

10. I have considered the contentions of the Petitioner and the Private Respondents and have also perused the record.

11. The Supreme Court of Pakistan in the decision reported as ***United Bank Limited (UBL) vs. Jamil Ahmed***[1] has clarified the jurisdiction of this Court to interfere against orders passed by two fora concurrently and has held that:

> *" ... 9. It is a well settled exposition of law that a right of appeal is a right of entering into a superior court and invoking its aid and interposition to redress the error of the forum below. It is essentially a continuation of the original proceedings as a vested right of the litigant to avail the remedy of an appeal provided for appraisal and testing the soundness of the decisions and proceedings of the courts below. It is always explicated and elucidated that the right of appeal is not a mere matter of procedure but is a substantive right. While considering matters in appeal, the appellate courts may affirm, modify, reverse or vacate the decision of lower courts. Fundamentally, the remedy of appeal is elected on the grounds of attack that the court below committed a serious error in the verdict on law and facts, including the plea of misreading or non-reading of evidence led by the parties in support of their contention. It is the duty of the Court and Tribunal to adhere to the applicable law in letter and spirit. It is the foremost duty of the appellate court to determine whether the oral and documentary evidence produced by the parties for and against during the trial fortifies and adds force to the weight of decision or not. No doubt the Trial Court possesses the distinctive position to adjudge the trustworthiness of witnesses and cumulative effect of evidence led in the lis and, in turn, the appellate court accords deference to the findings and such findings are not overturned unless found erroneous or defective. It is not the domain or function of appellate court and/or High Court to re-weigh or interpret the evidence, but they can examine whether the impugned judgment or order attains the benchmark of an unflawed judgment; and whether it is in consonance with the law and evidence and free from unjust and unfair errors apparent on the face of record**. However, if the concurrent findings recorded by the lower fora are found to be in violation of law or based on flagrant and obvious defect floating on the surface of record, then it cannot be treated as being so sacrosanct or sanctified that it cannot be reversed by the High Court in the Constitutional jurisdiction vested in it by Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as a corrective measure in order to satisfy and reassure whether the impugned decision is within the law or not and if it suffers any jurisdictional defect, in such set of circumstances, the High Court without being impressed or influenced by the fact that the matter reached the High Court under Constitutional jurisdiction in pursuit of the concurrent findings recorded below, can cure and rectify the defect**." [1]

As is apparent the Supreme Court of Pakistan has impressed that this Court exercising its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, where it finds defects floating on the surface of record in terms of an incorrect exercise of jurisdiction, can interfere in concurrent orders.

12. The provisions of Sub-Section (1) of Section 33 of the Act, 2012, have recently been interpreted by the Supreme Court of Pakistan in the decision reported as ***M/S Pak Telecom Mobile Limited vs. Muhammad Atif Bilal and others***[2] wherein the scope of Section 33 of the Act, 2012 has been clarified as hereinunder:

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[1] 2024 PLC 50
[2] 2024 SMCR 719

" ... *14.5. Moving on to the third distinguishing feature introduced in IRA of 2012, we note the re-emergence of NIRC,[2] but this time having varied functions,[3] including one of an arbiter for resolving the individual grievances of the 'worker' against the 'employer' of a trans-provincial establishments. This is provided under Section 33 of IRA of 2012, which reads as under: -*

> ***Section 33. Redressal of individual grievances*** *(1) A worker may bring his grievance in respect of any right guaranteed or secured to him by or the notice of his employer in writing, under any law or any award or settlement for the time being in force to the notice of his employer in writing, either himself or through his shop steward or collective bargaining agent within ninety days of the day on which the cause of such grievance arises.*
>
> *(2) Where a worker himself brings his grievance to the notice of the employer, the employer shall, within fifteen days of the grievance, being brought to his notice, communicate his decision in writing to the worker.*
>
> *(3) Where a worker brings his grievance to the notice of his employer through his shop steward or collective bargaining agent, the employer shall, within seven days of the grievance being brought to his notice, communicate his decision in writing to the shop steward or as the case may be the collective bargaining agent.*
>
> *(4) If the employer fails to communicate a decision within the period specified in sub-section(2) or, as the case may be sub-section (3), or if the worker is dissatisfied with such decision, the worker or the shop steward may take the matter to his collective bargaining agent or to the Commission or, as the case may be, the collective bargaining agent may take the matter to the Commission, and where the matter is taken to the Commission, it shall give a decision within seven days from the date of the matter being brought before it as if such matter were an industrial dispute.*
>
> *Provided that a worker who desires to so take the matter to the Commission shall do so within a period of sixty days from the date of the communication of the employer or, as the case may be, from the expiry of the period mentioned in sub-section (2), or sub-section (3), as the case may be.*
>
> *(5) In adjudicating and determining a grievance under sub-section (4), the Commission shall go into all the facts of the case and pass such orders as may be just and proper in the circumstances of the case.*
>
> *(6) If a decision under sub-section (4) or an order under sub-section (5) given by the Commission or a decision in an appeal against such a decision or order is not given effect to or complied with within seven days or within the period specified in such order or decision, the defaulter shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to seventy-five thousand rupees, or with both.*
>
> *(7) No person shall be prosecuted under sub-section (6) except on a complaint in writing-*
>
> *(a) by the workman if the order or decision in his favour is not implemented within the period specified therein; or*
>
> *(b) by the Commission if an order or decision thereof is not complied with.*
>
> *(8) For the purposes of this section, workers having common grievance arising out of a common cause of action may make a joint application to the Commission.*

> *(9) Any collective bargaining agent or any employer may apply to the Commission for the enforcement of any right guaranteed or secured to it or him by or under any law or any award or settlement.*
>
> *(10) There shall be a Tripartite Council for review of grievances of workers in the Islamabad Capital Territory comprising not less than three members each of the workers, employers and the Government: Provided that the representatives of the workers and the employers shall be nominated by the Government after consultation with registered trade unions and employers' organizations to be notified in the Official Gazette.*
>
> *A careful reading of the above provision of IRA of 2012 makes it evident that the 'worker' under the new legal dispensation had been provided under the said provision, two options to seek redressal of his individual grievances regarding enforcement of his rights guaranteed or secured to him by or under any law or any award or settlement. Firstly, he can directly approach the employer in writing within 90 days of the day on which the cause of such grievance arises, and the employer on receipt of such notice by the aggrieved 'worker' has to communicate within 15 days, the decision on the said notice. Secondly, a 'worker' may also bring his grievance to the notice of the employer through his shop steward or collective bargaining agent. In such case, the employer shall, within seven days of receipt of the grievance notice, communicate its decision in writing to the shop steward or, as the case may be, the collective bargaining agent. In both cases, where the employer fails to communicate its decision in the prescribed stipulated time or if the worker is dissatisfied with such decision, the 'worker' or the shop steward or the collective bargaining agent, as applicable, may approach NIRC for the redressal of his grievance. …*
>
> ***Issue No. 1***
>
> *which is the competent forum for redressal of individual grievance of a worker, who has been terminated, removed, retrenched, discharged, or dismissed from employment in a trans-provincial establishment, and which law would apply in such cases;*
>
> *15. In view of the above discussion, to address the first issue, it is clear that the appropriate forum of redressal for a workman* ***who is terminated, removed, retrenched, discharged, or dismissed from service in a trans- provincial establishment is NIRC, as provided under Section 33 of the IRA of 2012****. The said provision states that a 'worker' may bring his grievance in respect of any right guaranteed or secured to him by or under any law. In the case at hand, the relevant law for the purpose of right of reinstatement is Standing Orders of 1968, specifically Order 12(3). Therefore, the contention of the learned counsel for the petitioner- company, as to the maintainability of grievance petition of the respondent No.1 does not hold legal ground, as the remedy of reinstatement being sought by respondent No.1 can be brought before NIRC, as an individual grievance under Section 33 of IRA of 2012. This is further established by Section 54(h) of IRA of 2012 which includes one of the functions of NIRC to "deal with cases of individual grievance in the manners prescribed in Section 33".*
>
> *16. Thus, it would be safe to state that the competent forum for the redressal of personal grievance of a 'worker/workman' of a tans-provincial establishment is NIRC, and the mode and manner of enforcing any right guaranteed or secured to him by or under any law has been provided under section 33 of the IRA of 2012, as has been explained hereinabove."*

The scope of a grievance petition that can be maintained by a "worker" or "workman" has been identified by the Supreme Court to be in respect of termination, removal, retrenchment or being discharged or dismissed and in respect of any right guaranteed or secured to him by or under any law and to

which I would add, as per the language of that Section, to "any award or settlement."

13. A bare perusal of each of the Grievance Petitions maintained by each of the Private Pespondents indicates that no reference has been made therein as to what rights guaranteed by ***any law*** to the Private Respondent have been violated by the Petitioner. While it has been clarified by the Supreme Court of Pakistan in the decision reported as ***PESCO, WAPDA House through Chief Executive vs, Ishfaq Khan and others***[3] that the expression "any law" used in the context of Section 31 of the Act, 2012 is a reference to legislation, it is apparent that not only the Private Respondents, but the Single Member of the NIRC and the Full Bench of the NIRC have also failed to identify as to even one law which prohibits the Petitioner from either, cancelling a class of workers or from promoting the Private Respondents from the "workers" or "workmen" class to management or from reclassifying a class of "workers" or "workmen" as management or from rescinding a class all together or for that matter from refusing to accept a promotion. There being not statutory restriction and no award in play, the Private Respondents would therefore have to rely on the terms of the Memorandum of Settlement and in which again I am unable to find any restriction on the Petitioner to carry out any of the above referred activities. There being no right guaranteed or secured by any of the Petitioners under the terms of the Memorandum of Settlement there would seem to be no basis for the NIRC to assume jurisdiction over the *lis* under Sub-Section (1) of Section 33 of the Act, 2012. The basis on which the Single Member of the NIRC and the Full Bench of the NIRC have attempted to asume jurisdiction of the grievance Petition i.e., that the Petitioner can only act in such a manner when it is permitted under the Memorandum of Settlement and which right did not exist is, to my mind, clearly incorrect. Such a right is transparently found in Section 3 of the Memorandum of the Settlement which permits the Petitioner "*the right to hire, **promote**, demote, transfer, discipline, discharge, to **create discontinue or reclassify jobs**, requirements **and job contents**"* and which rights having not been exercised by the Petitioner in violation of "***of the expressed provisions of this Settlement or applicable laws"*** are clearly available to the Petitioner. While the Single Member of the NIRC and the Full Bench of the NIRC placed reliance on Attachment A as referenced in Section 6 of the Memorandum of Settlement, to state that those were the only classes that could exist in the workforce of the Petitioner, it is to be noted that the language used in Section 6 of the Memorandum of Settlement does not prevent the Petitioner from discontinuing any of those classes or from promoting the Private Respondents and there therefore being no conflict as

[3] 2021 PLC 148

between Section 6 and Section 3 of the Memorandum of Settlement, I am clear when read together such a right to discontinue a class has been conferred on the Petitioner and which it can exercise along with the right to reclassify a job of a person employed by the Petitioner; being rights retained by the Petitioner "***of the Management resulting from ownership of the COMPANY and pertaining to the operation of the business***" The attribution of *mens rea* by the Single Member of the NIRC to the Petitioner also seems misplaced as that is clearly not the basis for the NIRC to assume jurisdiction of a Grievance Petition under Sub-Section (1) of Section 31 of the Act, 2012 and which must be premised in respect of an employee's termination, removal, retrenchment or being discharged or dismissed and in respect of any right guaranteed or secured to him by or under any law, any award or settlement and which cannot be assumed singularly on the basis of any intention attributed to the Petitioner. Additionally, the finding by the Full Bench of the NIRC that the Private Respondents have a right to refuse promotion is also not premised on any statutory provision nor on any term of the Memorandum of Settlement and hence the interpretation that has been cast by the Single Member of the NIRC and the Full Bench of the NIRC to assume jurisdiction is therefore incorrect. The Petitions are therefore liable to be allowed and each of the Grievance Petitions maintained by the Private Respondents liable to be dismissed for want of jurisdiction.

14. For the foregoing reasons I am of the opinion that the orders dated 20 September 2023 passed by the Single Member of the NIRC in Case No. 4B(28)/21-S, Case No. 4B(29)/21-S and Case No. No. 4B(30)/21 and the orders dated 25 January 2023 passed by the Full Bench of the NIRC in Appeal No. 12A (08)/2023 Q, Appeal No. 12A (09)/2023 Q and Appeal No. 12A (10)/2023 Q cannot be sustained as the NIRC lacked jurisdiction under Sub-Section (1) of Section 33 of the Act, 2012 to entertain each of the Grievance Petitions bearing Case No. 4B(28)/21-S, Case No. 4B(29)/21-S and Case No. No. 4B(30)/21 and each of which are dismissed with no order as to costs.

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