JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 1008 of 2022

Shakeel Ahmed

Versus.

M/o Water & Power, etc.

Date of Hearing	:	27.05.2022.
Petitioner by	:	Sher Afzal Khan Marwat, Salah ud Din & Osama Tariq, Advocate:
Respondent by	:	Hafiz Arafat Ahmed Ch., Kashifa Niaz Awan, Tariq Zaman Ch. & Auf Rehman Khan, Advocates. Syed Nazar Hussain Shah, AAG.

ARBAB MUHAMMAD TAHIR, J. Through the instant writ petition, the petitioner has impugned orders dated 07.02.2022 and 26.02.2022 passed by the learned Civil Judge 1st Class and the learned Additional District Judge, West Islamabad respectively, whereby application under Order XXXIX Rule 1 & 2 CPC (‘**application’**) was dismissed while appeal against the said orders also met the same fate.

2. Relevant facts are that the petitioner filed a suit for declaration, mandatory and permanent injunction assailing termination letter dated 11.01.2022. Along with the suit, an application for stay has also been filed. The respondent-department contested the suit as well as application. The learned Trial Court after hearing the parties, dismissed the application vide order dated 07.02.2022. The petitioner assailed the said order in appeal but the same was also dismissed vide order dated 26.02.2022, hence instant writ petition.

3. The learned counsel argued that re-advertisement of the posts is not only violative of service rules of the respondent-department but also contravenes vested right of the petitioner; that about fifty-four employees are being targeted for no fault on their part and that too without assigning any reason; that the petitioner has been serving the respondent for quite long and after completion of probation period, along with others was regularized, therefore, after regularization, there was no justification to throw-out the petitioner in arbitrary manner and that the power of appointment or removal exclusively vests with the Board but has been exercised by the Vice President/Head of Coordination, therefore, impugned orders are liable to be set-aside. The learned counsel fortified his submissions by referring Order of the Hon'ble Lahore High Court passed in W.P. No. 5801/2022.

4. On the other hand, learned counsel for the respondent-department while contravening what has been stated above by the learned counsel for the petitioner argued that the instant writ petition is not maintainable; that the relief sought cannot be granted as the petitioner was appointed on contract basis; that the assertion that services of the petitioner were regularized after serving the respondent-department for considerable time, does not hold ground as the relationship of the petitioner and the respondent-department is that of master and service, as declared by this Court and had also attained finality.

5. The learned counsel further stated that grant of relief in the instant writ petition would amount to decree the suit as the prayer made through the instant petition is akin to prayer of the main suit. It has been further stated that petition is of the nature of *certiorari* but the petitioner has not been able to point out any deficiency in the impugned order. The learned counsel further stated that the necessary provisions to be looked into are contained in Order XXXIX CPC. According to the learned counsel,

the case of the petitioner does not fall under sub clause (1) rather, at the most, attracts sub clause (2) of the Order XXXIX CPC.

6. The learned counsel has drawn the attention towards Section 21 of the Specific Relief Act 1877 (**'Act of 1877'**), which deals with the contracts, not specifically enforceable. Sub clause (a) of Section 21 of the Act of 1877 deals with situation where non-performance of a contract can be compensated in monitory terms and Sub-clause (b) of Section 21 deals with a situation where a contract runs into such minute details or which is dependent on the personal qualification or volition of the parties or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms. While relying on the provisions ibid of Act of 1877 and CPC, the learned counsel argued that since the contract which is running into such a minute detail where an adequate and alternate remedy is compensation therefore interim relief of injunction cannot be granted. The learned counsel further argued that the Court cannot create a new situation by granting an interlocutory order which will amount to allowing the main case without trial. The learned counsel for the respondent placed reliance upon case law reported as **1997 SCMR 1508**, wherein it was held that *"as regards the merits of the case, it may be pointed out that it is a well-settled proposition of law that the object of passing of an interlocutory order or status quo is to maintain the situation obtaining on the date when the party concerned approaches the Court and not to create a new situation. Another will-settled principle of legal jurisprudence is that generally a Court cannot grant an interlocutory relief of the nature which will amount to allowing the main case without trial/hearing of the same. In this regard, reference may be made to the judgment of this Court in the case of Qazi Inam-ul-Haq v. Heavy Foundry and forge Engineering (Pvt.) and another 1989 SCMR 1855, in which the petitioner had been prematurely retired form service."*

7. The learned counsel further argued that Section 56 (d) of the Act of 1877 prohibits grant of permanent injunction which may

result in interference in performance of duties of any department of Central Government or any Provincial Government or with the sovereign acts of Foreign Government, whereas clause (F) of section 56 of the Act of 1877 imposes an embargo on the grant of permanent injunction to prevent the breach of contract, the performance of which would not be specifically enforced. Learned counsel also placed reliance upon case law reported as **PLD 1997 SC 835** and **1974 SCMR 519.**

8. Heard, record perused.

9. There is no denial of the fact that relationship of the petitioner with respondent department was that of master and service while it is also an admitted fact that legal status of service rules of the respondent-department has already been finally decided to be of 'non statutory character'. It was for this reason that earlier writ petition and Intra Appeal filed by the petitioner before this Court remained unsuccessful. Subsequently, the petitioner opted to file the subject suit together with the application, subject matter of the instant writ petition.

10. Record further reveals that second appointment letter contains a specific clause i.e. Clause 11 wherein it was specifically mentioned that **the termination shall be subject to three months' written notice or payment of salaries for the said period, without assigning reason.** The contention of the learned counsel that petitioner had been thrown out without assigning any reason can be replied well on the basis of Clause 11 of the appointment letter where under reasons for termination are not mandatory and services of an employee can be terminated without assigning any reason.

11. Furthermore, it is by now well settled that any employee of a company having non-statutory rules can at the most sue its employer in case of termination for recovery of damages and not reinstatement.

12. The Hon'ble Apex Court in a case reported as **1974 SCMR 519,** has graciously held that:-

> "Secondly it appears to us that none of the Courts have noticed that although ad-interim injunctions are granted under Order XXXIX, rule 1 of the Code of Civil Procedure, **the principles, which govern the grant of injunctions, contained in the Specific Relief Act have also to be kept in view**. **Under Section 56 clause (f), one of the principles is that an injunction cannot be granted to prevent the breach of a contract the performance of which cannot specifically be enforced.** Now it is well settled that contracts for personal service are not contracts which can be specifically enforced. **Granting of an injunction, therefore, in a service matter, like the present one, is opposed to the principles governing the grant of such injunctions for, by such an injunction the Courts really foist an employee upon an unwilling employer**. Such an order for injunction made in disregard of these not only sound judicial principles but even statutory prohibitions cannot, in our view, be regarded as having been made in the proper exercise of the discretion of the Court."

13. To allow the relief for would amount to create a new situation i.e. to re-induct an employee and create a new situation. The Hon'ble Apex Court in a case reported as **PLD 1997 SC 835** has laid down that:-

> *"As regard the relief of permanent injunction, it may be stated that above-quoted clause (d) of section 56 of the Act prohibits grant of permanent injunction which may interfere with the public duties of any department of the Central government of any provincial Government or with the sovereign acts of Foreign Government. Whereas clauses (f) of section 56 imposes and embargo on the grant of permanent injunction to prevent the breach of a contract, the performance of which would not be specifically enforced. Both the above clauses are attracted to the case in hand, as to impose on the Department two persons as the employees on the basis of above agreement, would constitute interference with the working of the Department. Furthermore, as pointed out hereinabove, by virtue of above clauses of section 21 of the Act, the agreement in question cannot be specifically enforced and thus no permanent injunction can be granted in respect thereof under clause (f) of section 56 of the Act."*

14. This aspect of the matter further highlighted by the Hon'ble Apex Court in its reported judgment in PLD 1970 SC 139, wherein it has been graciously held that:-

> *"Clause (d) of section 56 of the Specific Relief Act which prohibits the grant of an injunction which interferes with the public duties of any Department of the Central Government or the Provincial Government. A further consideration that very rightly weighed with the Additional District Judge was that the respondent had been reverted by an order dated the 18th of November, 1965, two day thereafter. Under Order XXXIX, rule I of the Civil Procedure Code, status quo can be maintained between the parties in accordance with the situation as it obtains at the time of the institution of the suit and not to point of time prior thereto."*

15. The aspect as to whether the Courts can force an unwilling master to hold services of a servant has been dealt with in the case law reported as **2002 CLC 857** in terms that:-

> *"The specific performance of contract in case of an employee, the criteria for termination and grant of injunction in the absence of any statutory provision protecting the servant, has been examined by the superior Courts and it is already settled that it is not possible in law to grant him a decree against an unwilling master that he is still his servant. A servant cannot be forced upon his master. The master is always entitled to say that he is prepared to pay damages for breach of contract of personal service but will not accept the services of the servant. A contract for Act cannot be specifically enforced. But it is not even necessary to invoke section 21 (b) for such a contract is unenforceable on account of section 21 (a) wherein it is provided that a contract for the non-performance of which compensation in money is adequate relief cannot be specifically enforced. In a case where there is a contract between a master and servant the master agreeing to pay the salary and the servant agreeing to render personal services it is obvious that money compensation is full relief; for all that the servant was entitled to under the contract was his salary. A breach of contract can give rise to only two reliefs; damage or specific performance. If specific performance is barred the only relief available is damages. When a master, in breach of his contract, refused to employ the servant the only right that survives to the servant is the right of damages and a decree for damages is the only decree that can be granted to him. It has further been held that if a plaintiff is entitled to money from the defendant he cannot claim a declaration as to his being so entitled. He must sue for money. In any case, the*

only right that survived on account of breach of contract was the right to sue for damages. For purpose of termination it has been observed that it is quite sufficient that the master when he filed the written statement or appears in Court takes up the position that the servant is no longer his Servant and that his services have been terminated by him. Assuming that before suit that there was no valid termination of services, there is a breach of contract when the master appears and makes a statement to this effect the relationship of master and servant necessarily ends. The master is a defendant to the suit. He is contesting the suit. He contends that respondent No. 1 is not his servant. No decree for declaration that the servant holds a post can be passed against the master as held by the Hon'ble Supreme Court in Messrs Malik and Haq's case (Supra)

16. Reliance is also placed upon case law reported as **2003 PLC (CS) 11,** wherein it has been held that:-

"It is also settled law that while granting interlocutory relief the court maintain the situation as prevailing at the time of institution of proceedings and does not create a new situation. Allowing the present application would amount to creating a new situation by grant of interlocutory relief as held by this Court in the case of Shah Nawaz limited (supra)."

17. The petitioner has impugned the orders of the learned Civil as well as Appellate Court by way of filing a writ of certiorari. The powers that are conferred on this Court while deciding the writ of certiorari are discussed by the Hon'ble Apex Court in the case of ***Chairman NAB v. Muhammad Usman & others*** **(PLD 2018 SC 28).** In Para 18 of the Judgment it was held that:-

"As held time and again that the powers of the judicial review vested in High Court under Article 199 of the Constitution is no doubt a great weapon in the Judge's hand however, the same shall not be exercised in case where discretion is exercised by the subordinate court/Tribunal in fair and just manner without violating or disregarding statutory provision of law, likely to occasion the failure of justice. Ordinarily such extraordinary jurisdiction shall not be exercised at random and in routine manner. The following case law is reproduced for the guidance of the learned judges of the High Court for future course of action:-

i. *Brig. (Rtd.) Imtiaz Ahmed v. Government of Pakistan, through Secretary, Interior Division, Islamabad (1994 SCMR 2142)*
ii. *Shahnaz Begum v. The Hon'ble Judges of the High Court of Sindh and Balochistan (PLD 1971 SC 677)*
iii. *Malik Shaukat Ali Dogar v. Ghulam Qasim Khan Khakwani (PLD 1994 SC 281)`*

18. This view was adopted by the this Court in case law reported as **2022 CLC 269** wherein it has been held that:-

> *"It is well settled that certiorari is only available to quash a decision for an error of law. It will also be issued for correcting errors of jurisdiction when an inferior court or a tribunal acts without jurisdiction or in excess of its jurisdiction, or fails to exercise jurisdiction or where the court or a tribunal acts illegally in exercise of its undoubted jurisdiction and it decides a matter in violation of the principal of natural justice. The High Court while issuing a writ of certiorari acts in exercise of supervisory and not appellate jurisdiction.*

19. In view of above factual as well as legal position, the impugned orders are well reasoned and do not call for any interference. Consequently, instant writ petition fails and accordingly **dismissed**.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in the open Court on 01.07.2022.

JUDGE

//Kamran//