

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1404 of 2019

Plaintiff: Abdul Rashid Shaikh
Through Dr. Shah Nawaz,
Advocate.

Defendants: M/s. National Refinery Ltd. &
another Through Mr. Javed Ashgar Awan,
Advocate.

For hearing of CMA No. 11475/2019.

**Dates of hearing: 29.10.2019, 12.11.2019, 17.12.2019 &
20.12.2019.**

Date of order: 20.12.2019

ORDER

Muhammad Junaid Ghaffar, J. Through this Suit for Declaration, Injunction and Damages, the Plaintiff seeks reinstatement in service with Defendant No.1 by impugning Letter dated 11.06.2019, whereby, the Plaintiff has been retired pre-maturely.

2. Learned Counsel for the Plaintiff submits that the Plaintiff was initially employed vide Appointment Letter dated 01.09.1992 with State Petroleum Refining & Petrochemical Corporation (Pvt.) Ltd. ("**PERAC**") and was thereafter transferred / absorbed in Defendant No.1 vide Letter dated 12.11.1994; that the Plaintiff has worked for 29 years of service, whereas, time and again his services have been appreciated and there is no allegation of any misconduct; that four years of his service were left when he was retired prematurely through impugned letter; that in the terms of appointment as well as the governing rules of service relationship, there is no provision for an early retirement; that neither any notice was ever issued to the Plaintiff nor an opportunity was provided; that the conduct of the Defendants is in violation of the principles of natural justice

including violation of Article 10-A of the Constitution; that the Defendants ought to have exercised discretion within certain parameters, and procedure should have been followed like issuance of a Show Cause Notice and conducting some inquiry; that it is a matter of exploitation employed by the Defendants to the very detriment of the Plaintiff and in view of these submission he has prayed for allowing the listed application. In support he has relied upon the cases reported as **2016 SCMR 2146** (*Muhammad Rafi and another v. Federation of Pakistan and others*), **2005 SCMR 605** (*Muhammad Shoaib Roomi v. Secretary / Additional Secretary, Education Department, Government of Punjab and others*), **2018 PLC (C.S) Note 133** (*Farid Muhammad v. Federation of Pakistan through Secretary and 9 others*) **2013 SCMR 1707** (*Pakistan Defence Officers Housing Authority and others v. Ltd. Col. Syed Jawaid Ahmed*), **2016 PLC 335** (*Said Amin Rahman v. Pakistan International Airlines Corporation through Managing Director and 3 others*).

3. Learned Counsel for the Defendants has at the very outset, argued that insofar as reinstatement into service is concerned, this Court while hearing an injunction application is not competent to pass any such orders; that there are no statutory rules governing the relationship with the employees; that the principle of “Master” and “Servant” would apply; that Defendant No.1, in the year 2005 stands privatized and in support he has referred to various documents placed on record through additional affidavit of Defendant No.1; that the Government has no say in the managerial affairs of Defendant No.1; that even otherwise in terms of the Regulations any employee can even be terminated with one month’s notice or salary in lieu thereof, whereas, as a good gesture, the Plaintiff has only been retired early; however, with all benefits including pension; that the word “termination”, as provided in the Regulations is generic in

nature which also includes, early retirement; ending of service; and to sever the relationship. In support he has relied upon the cases reported as **PLD 1999 Supreme Court 990 (United Bank Limited v Shahmim Ahmed Khan & Others)**, **1998 PLC 221 (Messrs Telephone Industries of Pakistan (Pvt.) Ltd. through Manager, Planning and Installation, Karachi v. Sindh Labor Appellate Tribunal through Chairman, Karachi and 2 others)** and an unreported judgment of this Bench dated 11.10.2018 passed in **Suit No. 1513/2018 (Shariq Nadeem v. K-Electric)**.

4. While exercising his right of Rebuttal, learned Counsel for the Plaintiff has argued that the Plaintiff is being treated as a slave and not even as a servant, whereas, the Government still owns 25% shares in Defendant No.1; that Section 204 of the Companies Act, 2017 has been violated; that in the interest of justice Plaintiff is entitled for the relief(s) prayed for.

5. I have heard both the learned Counsel and perused the record. As per record the Plaintiff was initially employed in the year 1992 in PERAC and was thereafter transferred / absorbed in Defendant No.1 on 12.11.1994, and in clause 9 of the said letter it has been provided that the relationship *will be subject to Service, leave and other Rules framed by the Company from time to time*. At the very outset, first it needs to be appreciated and determined as to what is the status of Defendant No.1 as of now. On 12.11.2019, after briefly hearing the Defendant's Counsel, directions were given to file appropriate affidavit of the concerned official as to the status of Defendant No.1 alongwith supporting documents of SECP. Such order was complied with through additional affidavit dated 29.11.2019 and alongwith such Affidavit, Letter dated 01.07.2005 issued by the Privatization Commission has been annexed, which reflects that 51% equity stake of Defendant No.1 (National Refinery Ltd) has been offered and

accepted by Attock Oil Group Consortium, comprising Attock Refinery Limited, Pakistan Oil Fields Limited and Attock Petroleum Limited. Alongwith this affidavit, various other documents have also been annexed and it does not appear to be in dispute that Defendant No.1 was though initially owned by the Government; but now stands privatized. It may be of relevance to observe that there is no serious challenge to these documents by way of a counter affidavit or a rejoinder affidavit. The annual report of 2019 annexed with this affidavit describes the categories of shareholders and it would be advantageous to reproduce the shareholding as of 30.06.2019, which reads as under:-

CATEGORIES OF SHAREHOLDERS

AS AT JUNE 30, 2019

<u>Categories</u>	<u>Percentage</u> %	<u>Number of</u> <u>Shareholders</u>	<u>Number of</u> <u>Shares held</u>
Directors, Chief Executive officer, and their spouse(s) and minor children	0.01	6	10,807
Associated Companies	50.00	2	39,983,280
NIT and ICP	2.84	9	2,274,123
Banks, Development Financial Institutions and Non-Banking Financial Institutions	1.81	31	1,446,146
Insurance Companies	6.27	15	5,011,653
Modarabas and Mutual Funds	0.67	18	534,041
Shareholders holding 10% -Islamic Development Bank, Jeddah	15.00	1	12,000,000
General Public Local	15.61	5,659	12,483,286
Joint Stock Companies	1.26	27	1,008,355
Foreign Investors – other than individual	1.74	12	1,393,441
Others	4.79	111	3,821,428
	100.00	5,891	79,966,560

Perusal of the above Annual Report leaves in no manner of doubt that Defendant No.1 now stands privatized and is not controlled or owned in majority by the Government of Pakistan as was the case prior to 2005. In these circumstances, the Court has to see the relationship of the Plaintiff with Defendant No.1 and as to whether any mandatory

injunction can even otherwise be passed for reinstating the Plaintiff into service who stands retired from 11.6.2019. The law on this is now almost settled that in case of a private company the relationship of an employee is to be governed under the guidance and principle of master and servant and it may be clarified that this does not, in any manner is to be read and understood as *demeaning* an employee as a slave, as contended by the Plaintiff's Counsel. It is in fact a relative term and now, and more appropriately can be called as the relationship of "Employer" and "Employee" so to say.

6. In the case reported as ***Shakeel Ahmed Shaikh v Agha Khan University*** [2017 PLC (C.S.) 1080], this bench had the occasion to deal with this issue (though on dissimilar facts in that the employee was on probation), regarding the nature of employment with a Government and or a Statutory Corporation and a private Company, but came to the following conclusion which is relevant for the present case;

Insofar as the case law relied upon by the learned Counsel for the plaintiff is concerned, it has to be understood that there is a marked difference insofar as employment with a Government and/or a Statutory Corporation (hereinafter referred to as "Corporation") and a private organization. There may be a situation that an employee of a Corporation can be aggrieved of the conduct and the manner in which his employment has been or is being terminated. The element of governance should be there as after all a Corporation working under the control of the Government has an element of public duty to perform and act within the mandate of its rules be it statutory or otherwise. However, an employee of a private concern cannot be imposed upon his employer by taking shelter in the garb of case law (though very little) which has been developed in respect of Corporation(s), whereby, it has been held that management of a Corporation cannot exercise powers at their own discretion in contravention of infringement of fundamental rights envisioned under the Constitution and that there is no concept of unfettered discretion in public law, whereas, all public power is in the nature of trust and is to be exercised reasonably, honestly, fairly and justly. (See *Federation of Pakistan v. Muhammad Aslam-1986 SCMR 916*, *Shahid Mahmood v. Karachi Electric Supply Corporation Ltd-1997 CLC 1936* & *Sadiq Amin Rahman v. Pakistan International Airlines Corporation-2016 PLC (CS) 335*)

Insofar as a Private Corporation or Company is concerned, it is a settled proposition of law that a servant cannot be forced upon his Master. The Master can always refuse to continue with the employment of any of his employee and may come forward to pay compensation for breach of contract of services and can always say that the employee would not be re-engaged in services. Even otherwise in terms of Section 21(b) of the Specific Relief Act, 1877, a contract for personal

services cannot be specifically enforced. Whereas, a breach of contract in these circumstances can give rise to only two relief(s) i.e. Specific Performance and Damages and if Specific Performance is barred in law, then the only relief(s) available are damages. Once the Master allegedly in breach of his contract refuses to employ the services, the only right which survives for the employee is the right to damages and nothing else. No relief or decree as sought can be passed, (in absence of any contract for such relief), against the unwilling Master that plaintiff is still its employee. Any consideration in support of such plea, will demonstrate the impossibility of its grant. Plaintiff's service with defendant No.1 is under a contract and not as a right. He has only one remedy and that is to sue for money.....”

7. In the case reported as **PLD 1961 SC 531 (Messrs Malik and Haq and another v. Muhammad Shamsul Islam Chowdhury and two others)**, a larger bench (5 Members) of the Hon'ble Supreme Court has been pleased to hold as under:-

“This appeal should succeed for the simple reason that in the absence of any statutory provision protecting the servant it is not possible in law to grant to 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 service but will not accept the services of the servant. A contract for personal' service as will appear from section 21 (b) of the Specific Relief 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 a servant the Master agreeing to pay the salary and the servant agreeing to render personal service 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 be 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 to damages and a decree for damages is the only decree that can be granted to him.**”

8. Similar view has been expressed by the Hon'ble Supreme Court in the case of **Marghub Siddiqui V. Hamid Ahmad Khan and 2 others (1974 S C M R 519)** while dealing with a more or less similar situation and has been pleased to hold as under:-

“Secondly it appears to us that none of the Courts have noticed that although *ad interim* injunctions are granted under Order XXIX, 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. The 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.”

9. In somewhat similar circumstances the Hon’ble Supreme Court in the case reported as **Raja IVIZ Mehmood & another v Federation of Pakistan (2018 SCMR 162)** had the occasion to deal with the plea of employees of the then Telegraph and Telephone Department (T&T), subsequently named and reorganized as Pakistan Telecommunication Company Limited (“PTCL”). In post privatization PTCL introduced various incentive packages including “Key Talent” package which offered new terms and conditions of service, including enhanced salary and other benefits being commensurate with the market for private companies. The employees who wished to avail this, were required to resign and enter into new contracts. Thereafter on the basis of the new contracts in which termination was provided, they were terminated. Being aggrieved with such termination, they approached Islamabad High Court and their petitions were allowed by a learned Single Judge. Being aggrieved PTCL filed Intra Court Appeal which was allowed and the impugned judgment of the learned Single Judge was set-aside, against which the employees approached the Hon’ble Supreme Court and the Apex Court has been pleased to dismiss the Appeals of the Employees. The discussion at Para 5 to 8 is relevant for the present purposes and reads as under;

5. The petitioners opted for this package, voluntarily tendered their resignations, signed fresh contracts under the "Key Talent" category and were granted employment under the New Terms and Conditions. Admittedly, they received enhanced pecuniary benefits and rendered services in their respective capacities for more than two years. Although the petitioners have attempted to argue that they had been forced to tender their resignation/seek premature retirement, there is no denial of the fact that from the time of acceptance of NTC and till termination of their respective contracts, none of them lodged any protest or raised any objection that they had been forced to tender their resignations or

execute fresh contracts and accept new terms and conditions of contract. They performed their services under the new scheme and accepted enhanced salaries and pecuniary benefits without protest or demur. We are therefore of the view that the stance of the petitioner that they were forced to accept NTC is an afterthought and a device to overcome the hurdle of having tendered their resignations, severed their relationship with the PTCL and entered into a fresh employment contract with the PTCL on the basis of NTC.

6. The petitioners laid great emphasis on the fact that the terms and conditions of their employment were protected through various instruments including section 36 of the Act of 1996 which provides that the terms and conditions of service of a transferred employee shall not be altered by the company except in accordance with the laws of Pakistan or with the consent of the, "transferred employees". It is clear and obvious to us that NTC offered enhanced and much higher pecuniary benefits, which the employees expressly consented to, accepted the same and enjoyed the benefits of the NTC for more than two years without protest or objection. Further, it cannot by any stretch of the language be held that the fresh contracts violated any laws of Pakistan or that the terms and conditions of service of the petitioners were altered or modified to their detriment and without their consent. An additional benefit was also available to the petitioners in the form of pension to which they were entitled up to the date of their resignation/premature retirement. The fact that they had tendered their resignations, which was a precondition of the NTC, were offered fresh contracts and they accepted such fresh contracts, performed duties thereunder for more than two years and received benefits under the same sufficiently and adequately establishes that the petitioners had consciously and with full awareness and application of mind executed fresh contracts of service and accepted all its terms and conditions including severing their earlier relationship with PTCL. *This conscious decision was made in consideration of a much higher salary among other benefits which was admittedly much better than the one they were receiving at that time. In these circumstances, the argument of the petitioners that their resignations were not accepted or that the same were not formally communicated to them is of no consequence. By their acts and deeds both the parties clearly and categorically expressed their understanding and intention that the earlier relationship of employer and employee stood terminated, and that the petitioners were in a new contractual relationship with the Company, receiving a higher salary and other benefits in terms of their fresh employment contract.*

7. We find that once the petitioners opted to tender their resignations their existing status as transferred employees and the protection and safeguards available to such employees (except the safeguard of pension) came to an end. Their new contract represented a fresh arrangement based upon the principle of 'Master and Servant' and their service was governed by the terms and conditions of their fresh contract. The protection under section 36(2) as well as the agreement between M/S Etisalat and the Government of Pakistan cannot therefore be extended to the petitioners at this stage because now their relationship with their employer is governed by the principle of 'Master and Servant' on the basis of the terms and conditions of their new contract. Even otherwise, having voluntarily accepted an offer made by the employer and the same having been acted upon by both the sides, the petitioners are estopped from resiling from the same. The intent behind section 36 was to ensure that the terms and conditions of employment of the Transferred Employees were protected from unilateral actions, without their consent and to their detriment. We have already held that NTC was accepted by the petitioners of their own free will consciously exercised and was ex facie not to their disadvantage. As such the petitioners cannot be allowed to blow hot and cold in the same breath and resile from their position and opt out of the contract and

claim protection and safeguards which they had given up in bargain for higher salaries and benefits.

8. As far as termination of their services is concerned, one of the conditions of the contract of employment deals with the subject of termination. For ease of reference, the same is reproduced below:-

"TERMINATION OF APPOINTMENT. Your services can be terminated by giving one (01) month notice period or gross salary equal to one (01) month in lieu thereof by either side. However the appointment shall be terminated if any document or information provided by you proves fake or false."

9. It is clear and obvious from perusal of the termination clause that there was an option to terminate the services of employee by giving one month notice or payment of one month salary in lieu thereof by either side. The employer also had the power to terminate the services of the employee if any document or information provided by him was found to be fake or false. The petitioners have attempted to argue that they were neither given one month notice nor paid salary in lieu thereof. If that is the case, the remedy of the petitioners lies in recovering amounts claimed by them through the competent fora. However, non-service of notice or non-payment of notice fee cannot furnish basis for reinstatement. (Emphasis supplied)

10. All these cases as above, were also relied upon by this bench in the Judgment dated 11.10.2018 passed in Suit No. 1513 of 2018 ***Shariq Nadeem v. K-Electric*** relied upon by the learned Counsel for Defendants, wherein, in more or less similar circumstances, the issue of K-Electric's pre and post privatization was in consideration and the Plaintiff's case was that K-Electric is still not a Private Company and the earlier Employment Rules would apply. However, such contention was repelled and it was held that the Plaintiff's contention is incorrect and the injunctions applications were dismissed.

11. Even otherwise, the rules governing the relationship of the Plaintiff with Defendant No.1 placed through counter affidavit (and not disputed) also reflects that in terms of Rule 20, *the Company may, at any time, **discharge an employee from service** or terminate his service by giving one month prior written notice of such termination or discharge by payment of salary for a period of notice in lieu of such notice and such notice shall began to count from the day next after the date of the notice.* Though the Plaintiff has not been issued a specific termination

notice (which is worded as “Early Retirement”); however, the contents of the impugned Notice dated 11.06.2019 in essence are more or less akin to the notice of discharge / termination as it is provided in the said notice that you shall stand relieved from today and in addition to the legal dues, *you shall be paid one month’s salary in lieu of period of notice*. It further appears that it is not in dispute that Plaintiff has been paid retirement dues including monthly payment of pension as per his entitlement; therefore, in all fairness, at this injunctive stage, it would not be proper and appropriate to order any mandatory injunction in favour of the Plaintiff by reinstating him into service as a considerable period has already lapsed since his retirement, whereas, the Plaintiff is always entitled to claim damages, if he can be successful in proving that his *discharge, termination or retirement* was unlawful and in violation of the terms and conditions of service. He can even claim salary of the period, for which he was not allowed to work in the service of Defendant No.1 until he would have ordinarily attained the age of superannuation. But for the present purposes, this, unfortunately, cannot be granted by this Court while deciding the injunction application, whereas, on the same touchstone, in the given facts of this case, even re-instatement is also not permissible.

12. In view of hereinabove facts and circumstances, the injunction application cannot be granted as the Plaintiff has failed to make out a prima facie case and other ingredients for grant of such an injunction are also lacking, and therefore, by means of a short order in the earlier part of the day, the injunction application was dismissed, and these are the reasons thereof.

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