Judgment Sheet

IN THE LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

Writ Petition No.141 of 2017.

Sarwar Masih. Vs. Chairman, Punjab Labour Appellate Tribunal & others.

JUDGMENT

Date of hearing: 30.10.2023.

Petitioner by: Khawaja Muhammad Arif, Advocate.

Respondents by: Malik Amjad Ali, Additional Advocate-General, Punjab.

Shujaat Ali Khan, J: - Briefly put, the facts, as gleaned out from instant petition, are that the petitioner, while serving as Sanitary Worker in City District Government, Rawalpindi, was arrested in a criminal case bearing FIR No.173/2009 registered at Police Station Waris Khan Rawalpindi, on 23.03.2009, in respect of offences under Article 3 & 4 of the Prohibition (Enforcement of Hadd) Order, 1979. During his arrest in the aforesaid criminal case, Show Cause Notices were issued to him containing allegation of absence from duty and upon conclusion of departmental proceeding, major penalty of dismissal from service was imposed against him *vide* order,

dated 27.07.2009, with effect from 01.04.2009, factum whereof was conveyed to him *vide* letter, dated 06.08.2009 issued by the District Officer (Solid Waste Management), City District Government, Rawalpindi. After his release from jail in terms of Section 249 Cr.P.C., the petitioner submitted an application (Exh.R-15) for his reinstatement in service which was dismissed, factum whereof was conveyed to him through communication, bearing No.HRM/EDO (MS)2367, dated 02.07.2010 addressed by the District Officer (HRM), District Coordination Officer, Rawalpindi. Thereafter, the petitioner filed Grievance Petition before the Punjab Labour Court No.VI, Rawalpindi **("the Labour Court")** which was dismissed through judgment, dated 26.07.2016 against which he filed appeal before the Punjab Labour Appellate Court, Lahore (Camp at Rawalpindi) **("PLAT")** but without any success as the same was dismissed through order dated 29.06.2016; hence this petition.

2. Learned counsel for the petitioner submits that both the *fora* below failed to consider that Show Cause Notices, purportedly issued to the petitioner, were never served upon him personally. Adds that since the Show Cause Notices were issued to the petitioner under E&D Rules, 2000, subsequent

proceedings could not be switched over either to the Punjab Employees Efficiency, Discipline and Accountability, Act 2006 ("PEEDA ACT 2006") or to the Industrial and Commercial Employment (Standing Order) Ordinance, 1968 **("the Ordinance, 1968")**, hence, the impugned decisions are not sustainable. Further adds that while dismissing the Grievance Petition, the Labour Court omitted to note that no limitation runs against a void order. Argues that the PLAT instead of deciding the matter independently toed the line of the Labour Court. Relies on *Tanveer Hussain v. Raviryan Limited through Managing Director and others* **(2007 SCMR 737)**, *Azizullah Memon v. Province of Sindh and another* **(2007 SCMR 229)** and *Khurrum Rasheed v. The Secretary to Government of the Punjab and others* **(2017 PLC (C.S) Note 110)**.

3. Learned Law Officer, while opposing the submissions made by learned counsel for the petitioner, states that mere wrong mentioning of provision(s) of law was not fatal especially when the contents of the Show Cause Notices, issued to the petitioner, stood proof qua allegation levelled against him, thus, no exception can be taken against the decisions rendered by the *fora* below. Adds that there is no cavil with the fact that a forum can condone delay in filing of any proceeding

subject to valid reasons but when the petitioner failed to file application under section 5 of the Limitation Act, 1908, he had no cheeks to claim benefit of Section 76 of the Punjab Industrial Relations Act, 2010. Further adds that since the petitioner was habitual absentee, the department was left with no option but to dismiss him from service. Relies on *Khushi Muhammad through L.Rs. and others v. Mst. Fazal Bibi and others* **(PLD 2016 SC 872)** and *Khalid Imran Khan Barki v. Government of Punjab and others* **(2021 PLC (C.S) 426)**.

4. I have heard learned counsel for the parties at considerable length and have also gone through the documents, appended with this petition, as well as the case-law cited at the bar.

5. It is admitted position that at the time of issuance of Show Cause Notices, the petitioner was confined in jail in connection with the afore-noted criminal case. It is not the case of the respondents that either the petitioner was served personally with any Show Cause Notice(s) or he was served through Superintendent of the Jail concerned, meaning thereby that till his dismissal from service, he was not served with the requisite Show Cause Notice(s) which ultimately culminated into his dismissal from service which fact escaped notice of the

fora below while deciding the matter despite the fact that it had an important bearing upon the outcome of the request of the petitioner for his reinstatement in service.

6. It is well established by now that when a person is confined in prison, he can only be served through the Superintendent of the prison concerned. Insofar as the case in hand is concerned, though the learned Law Officer addressed the Court at reasonable length but was unable to give even half a reason for non-issuance of the Show Cause Notices to the petitioner through the Superintendent of the Jail where he was confined. The Hon'ble Supreme Court of Pakistan in the case of *PIRIDNO and another v. Khurshid Begum* **(1989 SCMR 880)** while dealing with the ramifications of service of notice upon a prisoner, without its endorsement by the Incharge of the prison concerned, has *inter-alia* concluded as under:-

> *"6. We find much force in the submission of the learned counsel. In their written statement the appellants had taken the plea categorically denying having received any notice from the respondent or having refused to accept the same. Even in his evidence Muhammad Hussain has denied that he refused the letter during the time he was in confinement. In the circumstances in accordance with the rule laid down by this Court the respondent did not discharge the onus of proof regarding the service of notice. Even apart from this it is rather surprising that the endorsement on the letter addressed to the appellant while he was in Jail custody does not*

> *contain any verification from the Jail authority that the letter was offered to the prisoner and was refused. It is difficult to conceive of the postman to have entered the Jail premises to directly offer the letter to the prisoner. Our attention was invited to rules 457 and 467 of the Bombay Jail Manual which provided that no letter shall be delivered to a convict without written permission of the Jail authority. Learned counsel submitted that under the Pakistan Prisons Rules similar position obtains and no letter can be delivered to a prisoner until it has been examined by the Jail authority. In view of these legal provisions, there appears good reason to hold that the letter in question was not offered to the appellant. The inevitable conclusion, therefore, is that the presumption of due service stands sufficiently displaced. In absence of positive evidence that the notice was refused by the appellant, the finding that he was guilty in spite of service of section 30 notice to pay rent, is unsustainable."*

If the fate of the Show Cause Notices, being relied upon by the respondents, is seen in the light of the afore-quoted judgment of the Hon'ble Supreme Court of Pakistan there leaves no doubt that the Show Cause Notices were not served upon the petitioner prior to passing of penultimate order against him.

7. A cursory glance over the documents, appended with this petition, in particular the Show Cause Notices issued to the petitioner, shows that they were purportedly issued under E&D Rules, 2000 which, in my humble estimate, were not in vogue at the time of issuance of Show Cause Notices to the petitioner. Though, learned Law Officer has tried to cross the said hurdle

by submitting that mere wrong mentioning of provision of law does not render any act of departmental authorities redundant but has not been able to convince the Court as to why the said defect was not cured even at any subsequent stage despite the fact that the petitioner raised such objection on number of occasions. If the rules, referred in the Show Cause Notices, were not alive as to how it can be considered as a case of mere wrong mentioning of provision of law.

8. Considering from another angle, the Presiding Officer, Labour Court, has dealt with the case of the petitioner while considering it as that covered under Section 15(3)(e) of the Ordinance, 1968, despite knowing the fact that procedure to hold proceedings under E&D Laws/Rules, promulgated in different years by the legislature, has distinct parameters as compared to those formulated under the Ordinance, 1968. In this background, it cannot be considered mere wrong mentioning of provision of law rather it was a blunder which prejudiced the case of the petitioner.

9. While addressing the Court, learned Law Officer took specific plea that when Show Cause Notices could not be served upon the petitioner at his residential address, a proclamation was also got published in the daily “Business

Times, Islamabad", thus the petitioner cannot claim that he was condemned unheard. To appreciate the plea of the learned Law Officer, I have gone through Show Cause Notices, issued in the name of the petitioner as well as the referred proclamation, which brings it to limelight that on the Notices, issued to the petitioner, his address has been mentioned as that of "Union Council No.35, City District Government, Rawalpindi". Likewise, no proof regarding service of publication upon the petitioner, has been brought on record by the respondents. Even if it is presumed that Show Cause Notices were sent at residential address the same were inconsequential especially when it was known to the department that the petitioner was arrested in the above-referred criminal case. Moreover, resort to substituted service can only be made when it has been established on record that the person concerned has refused to accept service of summons/notices issued by a forum. Though learned Law Officer has argued at length but has not been able to refer any document to show that upon refusal of the petitioner to accept notice issued to him, the competent authority decided to get him served with Show Cause Notice by way of substituted service in the shape of proclamation in newspaper. The Hon'ble Peshawar High Court in the case

reported as Niaz Muhammad v. Abdul Rehman **(PLD 2015 Peshawar 90)** while dealing with the result of substituted service without establishing that the person concerned refused service of ordinary notices/summons has *inter-alia* held as under:-

> *"4. The report of Process Server reveals that the same was not proper and service of the defendant was not effected personally at any stage of the proceedings. His brother, who resides in separate house was allegedly served, which cannot be termed as legal/personal service of the defendant. The defendant shall be served in person or through his agent empowered to receive/accept the service. In case defendant is not found on the given address, nor there is any authorized agent then service may be made through male member of the defendant's family, who is residing with him in one house. It is pertinent to mention here that it is normal practice especially in this part of the area, that service is usually effected from servants/"Naukars", who are generally kept in house or for that matter in "Hujra" to perform day to day routine matters, but since they are not family members, therefore, the service effected through the servant would be of no value in the eye of law and only male member, who is residing in one house would be considered as valid service. Once service effected upon defendant then the Court gets jurisdiction to dispose of the matter. The basic object of service on defendant is to enable him to resist the claim, if so desires. This is immaterial that defendant had private knowledge of the pendency of proceedings. Only empowered agent can accept the summons. In safe administration of justice the Process Servers played a pivotal role, as the reports/affidavits sworn by them on the back of notices become a source of make or break for the cases. Therefore, they should take the pain and gather the exact information, inquire about the parties and in case of incomplete*

service, they are bound to follow the matter more than once in order to obtain proper service of the parties and should not wait for the fixed date of hearing and shall take the matter earlier much before the date fixed, so that proper and personal service of the parties could be obtained within time. Thereafter, shall note-down all these efforts in their reports with utmost care and professional sincerity. It is also the responsibility of Presiding Officers to look into the service effected by the Process Server and if necessary summon the concerned officials in order to inquire about the authenticity and correctness of effected service and should keep vigilance on the concerned officials and their reports on the back of notices and should not be considered as gospel truth in all eventualities rather should be considered strictly in accordance with law. They should also discourage the trend of "takiya service", the local terminology used for those Process Servers, who never visited the actual spot rather write-down the reports on the back of notices on their own imaginations. The world has become a global village now, due to fast growing technological devices, therefore, every kind of electronic devices be used in order to obtain effective service of the parties .i.e. Telephone, Telegram, Telex, Fax & U.M.S. etc as well as beat of drum and publication in press as envisaged by Order-5 Rule 20 of C.P.C. In the instant case, the report and sketch prepared by the Process Server reveals that one Nisar, brother of the defendant, has been shown to reside in separate house adjacent to the house of defendant, however, not residing with him and, as such, the provisions of Order-5 Rule-15, C.P.C have been violated. Similarly, substituted service has not been done in compliance to the provisions of Order-5 Rule-20 of C.P.C nor, serving official has been examined regarding the refusal to sign the summons on defendant, has not been find mentioned. Even otherwise "substituted service" cannot be termed as "due service". The process of service through newspaper has also made in disregard of law and at an improper stage in isolation to other proceedings and that too after recording of evidence, which is alien to procedure. The mischief of

> *limitation of 30-days has to be attracted where summons served personal or from knowledge as provided under Article 164 of the Limitation Act. As no personal service effected in the instant matter, nor procedure provided for service under the law has been followed, therefore, ex parte proceedings later on culminated into ex parte decree have not been passed in line with law."*

10. According to Rule 54 of the Fundamental Rules, when an employee has been dismissed from service on account of his absence from duty for having been arrested in a criminal case, as and when he is released/acquitted, he is entitled for reinstatement in service and the said principle has elaborately been highlighted by the Apex Court of the country in the case reported as *Muhammad Aslam Instructor, Animal Husbandry Service Training Institute, Daudzai Peshawar District v. Government of NWFP through Secretary Food, Agriculture, Livestock and Cooperative Department, Peshawar* **(1998 PLC (CS) 1430)** wherein the said issue has been clinched in the following manner:-

> *4. Be that as it may, we hold that the appellant was acquitted because there was not an iota of evidence available on record against him. Learned counsel for the respondents relied upon the rule laid down in Government of West Pakistan through the Secretary, P.W.D., Lahore v. Mian Muhammad Hayat (PLD 1976 SC 202), wherein it was held that the acquittal of the accused had to be honourable which would mean that the allegations were false. In our view, the above rule shall not apply to this case for*

the reason that the appellant in this case was tried and for lack of evidence, he was acquitted by the trial Court. In the referred case, the accused, Muhammad Hayat was never tried under any offence by any Criminal Court. It may also be noted that the provisions of F.R. 54(a) have been declared un-Islamic by the Shariat Appellate Bench of this Court vide Government of N.-W.F.P. v. I.A. Sherwani and another (PLD 1994 SC 72). In other words, the F.R. 54(a) under which the appellant has been deprived of his pay and other financial benefits, does not exist on the statute book. It is admitted by the learned counsel for the parties that term "acquittal" has not been defined anywhere in the Criminal Procedure Code or under some other law. In such a situation, ordinary dictionary meaning of "acquittal" shall be pressed into service. According to "Dictionary Macmillan, William D. Halsey/Editorial Director, Macmillan Publishing Co., Inc. New York, Collier Macmillan Publishers London" the words "acquit" and acquittal mean:--

"'acquit"--quitted, -quitting. v.t. 1. to free or clear from an accusation or charge of crime; declare not guilty; exonerate: The jury acquitted him after a short trial. 2. To relieve or release, as from a duty or obligation: to acquit him of responsibility. 3. To conduct (oneself); behave: The team acquitted itself well in its firs) game. (Old French acquitter to set free, save, going back to Latin ad to + quietare to quiet)"

' acquittal' ' n.1. a setting free from a criminal charge by a verdict or other legal process. 2. Act of acquitting; being acquitted'."

The appellant was acquitted by the trial Judge as already pointed out above. It shall therefore, be presumed that the allegations levelled against him are baseless. In consequence, he has not been declared guilty. In presence of above meaning of "acquittal" the appellant is head to have committed no offence because the competent Criminal Court has freed/cleared him from an accusation or charge of crime. The appellant is, therefore, entitled to the grant

> *of arrears of his pay and allowances in respect of the period he remained under suspension on the basis of registration of murder case against him. This appeal succeeds and is allowed with no order as to costs.*

If the fate of the impugned orders is seen while putting in juxtaposition to the afore-referred judgment of the Hon'ble Supreme Court of Pakistan, there leaves no ambiguity that both the forums below misdirected themselves while deciding the controversy between the parties.

11. A cursory glance over the judgment, passed by the Labour Court, shows that instead of deciding the controversy between the parties on the basis of the material available on record, it proceeded on the basis of suppositions, which approach cannot be approved of rather deserves to be deprecated with full vigor.

12. The observation of the learned Labour Court that since the petitioner used to come to a court of law in afore-referred criminal case, he could conveniently inform the department about his arrest in the said case through his near and dear ones, present in the said court, being alien to the established principle of law that without service of Show Cause Notice, no penultimate order can be passed, carries little weight. Moreover, according to Article 4 of the Constitution of Islamic

Republic of Pakistan, 1973 a citizen has inalienable right to be proceeded in accordance with law and if any deviation is noted on the part of the competent authority, the same cannot be allowed to be let unnoticed by the judicial forums.

13. During arguments, learned Law Officer put much emphasis on the fact that as the petitioner was not acquitted rather he was released from jail, under Section 249 Cr.P.C., the said release cannot be equated with acquittal, thus he was not entitled for his reinstatement in service. In this regard, I do not see eye-to-eye with the learned Law Officer for the reason that even a person released on bail, prior to his conviction in a criminal case, can approach his department seeking reinstatement in service. Reliance is placed on *Ghazi Khan Vehicle Driver Cereal Crops Research Institute Pirsabak Nowshera v. Director General Agriculture Research Office and 3 others* **(2019 PLC (CS) Note-39)**.

14. This Court is cognizant of the fact that departmental and criminal proceedings have no overlapping effect on each other rather the same carry their independent status, however, since no inquiry was conducted against the petitioner prior to imposition of major penalty of dismissal from service, the

departmental proceedings conducted at his back cannot be considered as sacrosanct.

15. As a necessary corollary to the above discussion, I have no hesitation to hold that both the forums below failed to appreciate the facts of the case in its true perspective and to apply the law on the subject, judiciously, thus instead of commenting upon merits of the case lest it may prejudice the case of either party, I deem it appropriate to remit the matter back to the Labour Court for decision afresh. Consequently, this petition is **accepted** and the impugned decisions, rendered by the fora below are **set aside**. As a result, the Grievance Petition filed by the petitioner would be deemed to be pending before the Labour Court, which shall decide the same **afresh** after attending to all the limbs of the matter. No order as to costs.

Judge

APPROVED FOR REPORTING

Judge

*M. Tahir**