

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P No.3144 of 2013

Surrya Ashfaq
Versus
NIRC & others

Petitioner By: Khawaja Muhammad Arif, Advocate.
Respondent No.3 Mr. Riaz Hussain Haleem, Advocate.
Date of Hearing: 22.10.2020

Ghulam Azam Qambrani, J: Through this petition, the petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with the following prayer:-

"It is, therefore, respectfully prayed that this writ petition ay kindly be accepted, orders dated 26.02.2013 passed by respondent No.1 and order dated 09.07.2012 passed by respondent No.2 may kindly be set aside and the case be remanded to the respondent No.2 for its decision on merits."

2. Briefly stated facts for filing of instant petition are that the petitioner joined the Muslim Commercial Bank (MCB) on 11.10.1989 and after serving the bank for 20 years, she applied for retirement on medical grounds. Her request was acceded to by the competent authority and she stood retired w.e.f. 23.10.2009. According to the petitioner, she was retired from service in violation of Rule 17 of the MCB Staff Service Rule. The MCB calculated her dues till 31.12.2003 and she was paid Rs.3,06,107/-, while she considers herself to be entitled for payment of Rs.10,38,420/- therefore, petitioner filed an application under Section 15(2) of Payment of Wages Act, 1936 before the respondent No.2/ Authority under the Payment of Wages Act, 1936 for payment of balance amount of Rs.7,32,313/- with bonus for the year 2009 and 20% profit on Provident Fund.

3. That the respondent No. 3/ MCB contested the application by filing written reply. The respondent No. 2/ Assistant Commissioner City/ Authority under payment Wages Act, 1936, ICT, Islamabad, framed issues and recorded the evidence of petitioner. The application was being fixed for recording the evidence of Respondent No. 3, when the respondent No.3/ MCB filed an application under Section 7 Rule 11 CPC for rejection of the application. The petitioner contested the application by filing written reply. Learned respondent No. 2, after hearing the arguments of the parties, dismissed the main application filed under Section 15 (2) of the Payment of Wages Act vide order dated 09.07.2012. Thereafter, the petitioner filed an appeal under Section 17(1) of the Payment of the Wages Act before the learned NIRC. However, the same was withdrawn by the petitioner vide order dated 26.02.2013 as she wanted to avail appropriate remedy. Therefore, the petitioner filed instant petition on 19.06.2013 challenging both the orders 09.07.2012 and 26.02.2013.

4. Learned counsel for the petitioner contended that the application under Section 15(2) of Payment of Wages Act was fixed for recording of evidence of respondent No. 3/ MCB that it was incumbent upon the respondent No. 2 to decide the main application after completion of evidence of respondent No.3. That on the contrary passed the order dated 09.07.2012 in a hasty manner that infact arguments were heard on the application under Order 7 Rule 11 CPC and dismissed the main application arbitrarily. That the order dated 26.02.2013 is not a lawful order, as the respondent No. 1 failed to exercise its jurisdiction properly and the order was passed in a slip shod manner. Further contended that due to illegal and arbitrary exercise of authority by the respondents No. 1 & 2, the petitioner has suffered irreparable loss, therefore, both the impugned orders are not sustainable and lastly, prayed that the case may be remanded to the respondent No. 2 to decide the application under Section 15(2) of the Payment of Wages Act.

5. Conversely, learned counsel for the respondent No. 3 vehemently oppose the contention of the learned counsel for petitioner contending that the petitioner herself applied for retirement on medical ground, which was accepted by the competent authority and she was allowed retirement w.e.f 23.10.2009. She was paid full benefits on retirement according to her entitlement. That the petitioner kept silent for 03 years and then abruptly filed an application under Section 15(2) of the Payment of Wages Act before the respondent No. 2, which was not maintainable, as such, the learned respondent No. 2 rightly dismissed the same vide order dated 09.07.2012; that the petitioner could file an appeal under Section 17(1) of the Payment of Wages Act before the competent Labour Court, but she preferred to file an appeal before the wrong forum; that when this error came into knowledge of the petitioner that filing of such application before the NIRC was not correct, then during hearing before the learned respondent No. 1/NIRC, she withdrew the appeal vide order dated 26.02.2013 and filed instant petition; that neither the application under Section 15(2) of the Payment of Wages Act before the respondent No. 2 nor appeal under Section 17(1) of Payment of Wages Act before the respondent No.1 was maintainable. Lastly, prayed for dismissal of the petition.

6. Arguments heard, record perused.

7. Perusal of the record reveals that the petitioner has agitated her grievance under the Payment of Wages Act, 1936, therefore, it will be appropriate to reproduce definition of term "Wages" as described in Section 2 (VI) of the Act , which is as under:-

"Wages means all remuneration, capable of being expressed in terms of money, which would if the terms of the contract of employment, express or implied, were fulfilled, be payable, whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise, to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional remuneration of the nature aforesaid, which would be so payable and any sum payable to such person by reason of the termination of his employment, but does not include---

- a. -----
- b. *Any contribution paid by the employer to any pension fund or provident fund,*
- c. -----
- d. -----
- e. *Any gratuity payable on discharge.*

8. Perusal of application under Section 15(2) of Payment of Wages Act, filed by the petitioner reflects that she had prayed for the following three reliefs:-

- i. *MCB calculated her dues till 31.12.2003 and was paid Rs.03,06,107/- while she claims to be entitled to Rs.10,38,420/- and prayed for balance amount of Rs.07,32,313/-*
- ii. *Bonus for the year 2009*
- iii. *20% per-cent profit on provident fund*

9. Above definition of the term 'Wages' reflects that it includes bonus as well. Learned respondent No.2 vide impugned order dated 09.07.2012 rightly accepted the claim of the petitioner to the extent of bonus and directed the respondent No.3 MCB to pay an amount of Rs.37,089/- to the petitioner with a 30 days.

10. That with regard to claim of dues to the tune of Rs.7,32,313/- it falls either within the ambit of gratuity or provident fund which according to the proviso (b) and (e) of the above definition does not fall within the terms "Wages". Hence, the application under Section 15 (2) of the Payment of Wages Act to this extent was rightly dismissed by the learned respondent No.2 as false litigation must be buried at the very inception.

11. That if the petitioner felt aggrieved of the order dated 09.07.2012, proper course available with the petitioner was to file an appeal under Section 17(1) of the Payment of Wages Act before the learned Labour Court. To the contrary, petitioner preferred appeal before respondent No. 1. Realizing her error, she withdrew the appeal unconditionally from the respondent No.1 vide order dated 26.02.2013. Hence after withdrawal of the appeal she cannot agitate

any grievance against the order which was passed on her own request. That the petitioner is estopped to challenge the order dated 26.02.2013. Now, the petitioner has invoking the constitutional jurisdiction of this Court, which is extraordinary and discretionary in nature. It is settled principle of law that when law requires an act to be done in a particular manner it must be done in that particular manner. The petitioner has not availed the remedy as was available to her under the law and she is not authorized by law to seek the same remedy by invoking constitutional jurisdiction of this Court. Further writ jurisdiction cannot be invoked to seek a remedy, which has become barred by law. Guidance in this regard has been solicited from the judgment of the Hon'ble Supreme Court of Pakistan titled as "Muhammad Azhar Khan and another Versus Assistant Commissioner/ Collector Toba Tak Singh and others" (2006 SCMR 778), wherein it has been held as under:-

"It is to be noted that once the appeal was not filed in time before the Appellate Authority how the writ or review petition was competent because before approaching the High Court for redressal of the grievance by invoking it Constitutional Jurisdiction under Article 199 of the Constitution, it was incumbent upon the respondents to have availed alternative remedies according to law."

12. For the foregoing discussion, I do not see any illegality or infirmity in both the impugned orders therefore, this petition is **dismissed**

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on this 31st day of December, 2020.

JUDGE

"Kamran Shahzad"