JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO.327 OF 2020

Getz Pharma (Pvt.) Limited.
Vs.
Muhammad Nafees, etc.

WRIT PETITION NO. 340 OF 2020

Getz Pharma (Pvt.) Limited.
Vs.
Saeed Akhtar, etc.

WRIT PETITION NO. 342 OF 2020

Getz Pharma (Pvt.) Limited.
Vs.
Umer Farooq Khan, etc.

Petitioners by : **M/S Wasi Ullah Khan and Saad Shoaib Wyne, Advocates.**

Respondents by : **Mr. Muhammad Bashir Khan, Advocate.**
(For Respondent No.1)

Date of hearing : **16.10.2020.**

LUBNA SALEEM PERVEZ, J. Through this single judgment I intend to dispose of all the three titled writ petitions, as similar questions of law and facts are involved.

2. The petitioner through titled petitions has invoked constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan seeking following prayer:-

> *"In view of the above circumstances, it is most respectfully prayed that the instant petition may kindly be accepted and the Impugned Order dated December 26, 2019 may kindly be set aside;*
>
> *The operation of the Impugned order may kindly be suspended till the final decision of this Honourable High Court in this instant Writ Petition;*
>
> *Any other relief which this Honourable Court deems fit and appropriate may also be granted to the Petitioner.*

3. Facts of the case are that the petitioner, a private limited company, appointed Respondent No.1**,** in the respective petitions, on contract basis in the year 2003, 2004 and 2005, respectively as Territory Manager and subsequently promoted them upto Senior Sales Manager-Institutional Business. The Respondent No.1 in W.P. No. 327/2020, resigned from the service on 04.07.2017, whereas, Respondent No.1 in W.Ps. No. 340 & 342 of 2020, were dismissed from service on 30.11.2017, on the common allegations i.e. breaching terms of the contract and violating the policy of conflict of interest by forming another company having similar nature of business as that of petitioner with the name of Sun Health Care (Pvt.) Limited in June, 2016.The petitioner, therefore, withheld the outstanding dues such as gratuity, etc. in terms of Rule 5(h) of Gratuity Funds Rules according to which no gratuity shall be paid to the member who has been dismissed on account of misconduct or dishonesty or has resigned from service. The Respondents No.1 filed claim/petition under Section 15 of the Payment of Wages Act, 1936, *(hereinafter referred to as the **Act, 1936**)* before Assistant Commissioner/Magistrate 1st Class, who, vide order dated 26.12.2019, directed the petitioner to pay the dues and compensation as claimed in the petition. The petitioner company has assailed the said order in the present Writ Petitions.

4. Learned counsel for the petitioner submitted that the Respondents No.1 are not workmen, as defined under the Industrial Relations Act, 2012, and fall within the definition of employer as at the time of their resignation/dismissal all three were serving as Senior Sale Manager. He referred judgment titled as *National Bank of Pakistan v. Anwar Shah (2015 SCMR 434), Aurangzaib v. Media Pak(Pvt.) Ltd. (2018 SCMR 2027)* and *KESC v. NIRC (2015 PLC 1),* whereby the sales man has been held not to be a workman within the meaning of Industrial and Commercial employment (Standing Orders) Ordinance, 1968. **He**

submitted that controversy involved does not fall within the purview of Act, 1936, in view of the fact that head office of the petitioner is in Karachi and it has been specifically mentioned in their contract that any dispute between the parties will be settled in Karachi courts only and further submitted that the jurisdiction of NIRC under Industrial Relations Act, 2012, is appropriate forum for labour disputes of the employees and workers of trans-provincial corporation/institution/establishment by placing reliance on the judgment of Hon'ble Supreme Court titled as *M/s Sui Southern Gas Company Ltd. v. Federation of Pakistan (2018 SCMR 802)*.

5. On the other hand, learned counsel for the respondents/employees in response to the arguments of learned counsel for the petitioner, *inter-alia*, submitted that the petition is not maintainable for the reason that any order passed under section 15 of the Act, 1936, is appealable under section 17; that the amount of gratuity, etc. ordered to be paid by the authority has not been deposited and no certificate thereof has been annexed which is a mandatory requirement and placed reliance on judgment titled as *Tehsil Nazim TMA, Okara versus Abbas Ali and others (2010 SCMR 1437) and Syed Match Company Ltd. through Managing Director versus Authority Under Payment of Wages Act and others (2003 SCMR 1493)*; that the remedy available to the petitioner is under section 57(2) of the IRRA, 2012 as it is a trans provincial commercial establishment; that the petitioner failed to point out jurisdictional defect of the authority necessary to invoke constitutional jurisdiction under Article 199; that the Respondent No.1 was employed with the petitioner who falls within the definition of commercial establishment, Factory and Industrial establishment, vide sections 2(i), 2(ia) and 2(ii), hence, can approach authority under Act, 1936 in terms of provision of section 1(4) of the Act, 1936; In this regard he relied on the judgments titled *Soneri Bank Ltd.*

versus Federation of Pakistan through Secretary, Law and others (2016 SCMR 2168), M/s Lone China (Pvt) Ltd. Gujranwala through Chief Executive versus Presiding Officer, Punjab Labour Court No.7 Gujranwala and others (2011 PLCS 37), Factory Manager, Nauroz Associate (Pvt) Ltd. Multan versus Muhammad Ali and 2 others (2013 PLC 229), Ghulam Mustafa and another versus Pakistan Industrial Gases Ltd. and others (2002 PLC 52) and Tariq Jameel Butt and another versus Pakistan Engineering Company Ltd. (2010 PLC 204); He also relied on judgment of Hon'ble Supreme Court in Aurangzeb versus Medipak (Pvt.) Ltd. and others (2018 SCMR 2027). Learned counsel prayed for dismissal of the petition on the ground of maintainability.

6. Arguments heard. Record perused.

7. The learned counsel for the respondents has raised a preliminary objection regarding maintainability of the petition on the ground that orders passed under section 15 of the Act, 1936 are appealable under section 17, therefore, the petitioner was required to avail alternate remedies under the Act, 1936 instead of invoking writ jurisdiction under Article 199 of the Constitution. The argument of the learned counsel has been considered and the Act, 1936 has also been perused which provides an inbuilt forum of appeal vide section 17 of the Act, 1936, where an aggrieved party within period of 30 days can assail the order passed u/s 15 before the Labour Court, however, it is also a fact that no labour Court is functional in Islamabad, as such no alternate remedy is available to the petitioner and the present writ filed by the petitioner is maintainable as writ of certiorari, under Article 199(1)(a)(ii) of the Constitution of Pakistan, 1973.

8. The petitioner has assailed order dated 26.12.2019, passed by the Assistant Commissioner/Magistrate 1st Class, Islamabad, wherein the learned Court after considering all the facts, circumstances and arguments of the parties, has observed that the claim of the respondents against Petitioner Company is genuine and the petitioner company is directed to pay the outstanding dues and gratuity, etc to the Respondents No.1.

9. The Respondents No.1 upon refusal of the petitioner for payment of gratuity and other dues, filed petition under section 15 of the Act, 1936. Learned counsel for Petitioner mainly argued on the jurisdiction of Assistant Commissioner for entertaining the claim of the Respondents No.1 under section 15 of the Act, 1936, and contended that they do not fall within the definition of the term "Workman". According to preamble of Act, 1936, the primary object of its promulgation is to regulate the payment of wages to certain classes of persons employed in the factory, industrial or commercial establishment, with the purpose to protect the wages of the persons who served and performed duties in industrial and commercial establishment/factories and such other work places. Therefore, the legislature in its wisdom and intention has not defined the term "worker" or "workman" in the Act and the words "persons employed" has been referred instead, which has broaden the scope, evidently in view of the object of the Act, 1936. The Hon'ble Supreme Court, vide judgment titled as ***Aurangzeb versus Medipak (Pvt.) Ltd. and others (2019 PLC 51)*** with reference to the amendment, vide the Labour Laws (Amendment) Act, 2001, has interpreted the provisions of sub-section (4), (5) & (6) of section 1 and held that substantial changes has made through Ordinance, 2001, to expand the scope of Act, 1936. The relevant passage of the judgment is also reproduced below:-

> *"9. The Labour Laws (Amendment) Ordinance 2001 ("2001 Ordinance") made substantial changes to the 1936 Act. Subsections (5)*

and (6) of section 1 were omitted altogether. A new definition of "commercial establishment" was added to section 2, and subsection (4) of section 1 amended so that it now read as follows:

> *"It applies to the payment of wages to persons employed in any factory, industrial establishment or commercial establishment and to persons employed (otherwise than in a factory, industrial establishment or commercial establishment) upon any railway by a railway administration or, either directly or through a subcontractor, by a person fulfilling a contract with a railway administration."*

Subsection (4) has retained the foregoing shape since 2001, and therefore, applied on all dates relevant for present purposes. It will be seen that the limiting words "in the first instance" have been omitted, which was of course consistent with the omission of subsection (5). Thus, the Act has now become applicable to persons employed in any factory, industrial or commercial establishment. The omission of subsection (6) means that the other limiting feature, namely that the Act only applied to wages up to a certain limit and not beyond, has also been removed. Thus, since 2001 only two things need be shown by a person who seeks to bring his claim within its scope: firstly, that he was a "person employed", and secondly that he was employed in either a "factory" or an "industrial establishment" or a "commercial establishment" (as defined). It is clear that the 2001 Ordinance has expanded the scope of the 1936 Act manifold. In one go, an extraordinarily large number of persons, employed in a great many different situations, have been brought within its fold, and have become entitled to bring a claim in terms thereof. One thing, of immediate relevance, may be emphasized. There never was, and certainly after the 2001 Ordinance no longer is, any requirement that the claimant establish himself to be a "workman", whether as defined under any labor legislation (including the 1968 Ordinance) or otherwise.".

10. Perusal of Section 2(iv) of Act, 1936, which defined the term "Wages" reveals that payment of gratuity has been excluded from wages, which oust the jurisdiction of authority to hear the claim regarding gratuity but the amendment made vide Act, No. XVII of 1973. The words *"or non-payment of dues relating to provident fund or gratuity payable under any law"* were inserted in sub-section (1) & (2) of Section and in effect thereof the authority u/s 15 of Act, 1936 have been accorded jurisdiction to entertain claims/issues regarding gratuity and provident fund. The payment of gratuity in the case in hand has not been denied by the petitioner, but has refused payment on the grounds of misconduct and resignation of the Respondents No.1 for alleged violation of conflict of interest and breach of contract. Thus in view of the judgment of Hon'ble Supreme Court in *Aruangzeb's* case supra, and the amendment made in

section 15(1) & (2) vide Act, 1977, the authority was well within its jurisdiction to adjudicate upon the claim of the Respondents No.1 filed under section 15 of the Act, 1936.

11. Learned counsel for the petitioner agitated that the Respondent No.1 since, breached the terms of contract, therefore, they are guilty of misconduct and, as such, not liable for gratuity in terms of Rule 5(h) of Gratuity Funds Rules, of the petitioner's Company and that the authority has not considered material facts in this regard while passing the impugned order. Perusal of the order dated 26.12.2019, passed by the authority reveals that it has considered all the arguments raised before him and after appreciating all the relevant documents produced by the parties, has passed the order impugned through this petition. Moreover in writ of certiorari, the scope of interference by the High Court is very limited to the extent of supervisory jurisdiction and, therefore, the High Court has no jurisdiction to probe into the factual disputes or reappraise or reconsider the documents and evidences empowered as in appellate jurisdiction. It has been settled by now that party seeking writ of certiorari is required to establish error of law, jurisdictional defect or violation of principles of natural justice which must be seen on the face of order and establish that the order is without lawful authority and of no legal effect. Guidance has been taken from the following judgments of the High Court:-

Bashir Ahmad Khan Versus Additional Sessions Judge (2020 M L D 42)

> *The person invoking the Constitutional jurisdiction under the above Article seeking issuance of writ of certiorari, by way of setting aside the order, has to show that the order, under challenge, violates the condition mentioned in the above provisions of the Constitution, that the authority/court/tribunal was denuded of jurisdiction whatsoever to pass the order or that the order impugned is unsustainable on account of being result of extremely, improper exercise of jurisdiction or has clearly been passed in violation of any provisions of law or is product of excess or failure of jurisdiction, by the tribunal or that some principle of law laid down by the superior courts, which under Article 189 of the Constitution is binding on the subordinate courts has been violated.*

Muhammad FarooqVersus Full Bench, NIRC Islamabad (2020 PLC 175)

In the petition at hand, the petitioners are seeking the issuance of a writ of certiorari. Certiorari is not a writ of right but one of discretion. Its object is to curb excess of jurisdiction, and to keep inferior Courts and Tribunals within their bounds. The High Court, while judicially reviewing the proceedings and judgments of the inferior Courts and Tribunals, cannot substitute its own decision with that of such inferior Courts or Tribunals. The grounds on which certiorari may be invoked is where there is an error of law apparent on the face of the record, and not every error either of law or fact which can be corrected by the appellate authority. It lies where the inferior Court or Tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of law which they were meant to administer. It is also issued when the inferior Court or Tribunal acts illegally in exercise of its jurisdiction. For instance, when it decides without giving any opportunity to the parties to be heard or violates the principles of natural justice. The High Court while issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. The High Court will not judicially review findings of fact reached by an inferior Court or a Tribunal unless there is manifest error apparent on the face of the proceedings, or where such findings are based on disregard of the provisions of law. The Superior Courts have also interfered with the findings of the inferior Courts and Tribunals where such findings have been found to be perverse or patently erroneous, i.e. contrary to the evidence on the record. The essential prerequisites for issuing a writ of certiorari do not appear to be satisfied in this case.

12. In view of the above, the petitioner in the present case has failed to point out any jurisdictional error, illegality and irregularity in the impugned order, passed by the authority, thus no case has been made out for interference in the impugned order dated 26.12.2019, hence, all the three titled petitions are **dismissed with all listed applications,** accordingly.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on _____.

JUDGE

APPROVED FOR REPORTING.
Blue Slip added

M. JUNAIDUSMAN