JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Regular First Appeal No. 18 / 2021

Faryal Saleem and others.

versus

Nayatel (Pvt) Ltd.

Appellants by:	M/s Aalia Zarreen Abbasi and Ambreen Nawaz Ch. Advocates.
Respondent by:	Mr. Babar Mumtaz, Advocate.
Date of Decision:	14.02.2024.

MOHSIN AKHTAR KAYANI, J: Through this regular first appeal the appellants have assailed judgment and decree dated 26.11.2020, whereby, learned Civil Judge, 1st class-West, Islamabad, has decreed suit for recovery of Rs.534,663/- in favor of respondent / plaintiff.

2. Brief facts referred in the instant appeal are that Faryal Saleem / appellant No.1 was ex-employee of the respondent / Nayatel (Pvt.) Ltd., who was hired as Trainee Network Support Engineer in technical assistance center vide agreement dated 05.01.2018 / Ex.P.2. The appellant No.1 executed irrevocable bond dated 05.01.2018 / Exh.P.03, whereby, she agreed to serve respondent company for period of two years from the date of signing of the bond i.e. 05.01.2020. The appellant No.2 / Farzana Saleem is mother of appellant No.1 / Faryal Saleem, who also executed an irrevocable and unconditional surety bond on 05.01.2018 / Exh.P.4. The appellant has been trained through specialized training and the respondent company has incurred substantial expenses on the training of appellant No.1. As per

stance of the respondent / employer it was agreed in the terms of employment that period of employment was 02 years and if appellant No.01 leaves the employment before the said period she has to pay compensation and damages equal to the salary of one year. The appellant No.1 / Faryal Saleem was also promoted w.e.f 31.07.2018, but she left the job in violation of the terms and conditions of the agreement and bond before the expiry of the agreed period without the approval of HR department, resultantly suit has been filed for recovery of damages while calculating the period of twelve months gross salary at the time of leaving of job and additional expenses of Rs.32,000/- incurred by the respondent company. The suit has been contested by the appellant by way of filing of written statement. The issues have been framed on 29.07.2019 and the trial court after recording testimony of PW.01 / Adnan Jamil, from respondent side and two witnesses on behalf of appellants' side, received documentary evidence and decided the primary issue No.1 in favor of the respondent through impugned judgment and decree, hence this appeal.

3. Learned counsels for the appellants contend that impugned judgment and decree is illegal and beyond the prescribed principles settled by the superior courts qua recovery of damages; that the respondent has not imparted eight weeks training as claimed and even no expenses have been highlighted to justify the compensation, even no evidence has been led to substantiate that what loss has been

caused to the respondent company; that the original offer extended to appellant No.1 was only for period of one year.

4. Conversely, learned counsel for respondent contends that the appellants have violated the terms and conditions of the agreement as well as of surety bond, therefore, the formula fixed in the contract of employment as well as in the bond fully applies in this case, whereby, damages have been calculated equal to twelve months salary as well as additional expenses borne by the respondent company upon training of the appellant to equip her with the specialized skill for the job.

5. Arguments heard, record perused.

6. Perusal of record reveals that the primary question before this Court is whether the appellant / employee has to pay compensation / damages to the respondent company due to breach of terms of contract Exh.P.2 coupled with bond under employment agreement Exh.P.03 and surety bond Exh.P.04, as appellant was hired by the respondent company through offer letter Exh.D.02 on 19.07.2017 as Trainee Network Support Engineer. While attending the original offer of employment it reflects that the respondent company has to extend orientation training of around eight weeks and both the parties are well within their powers as per the clause of offer letter which reads that:

> *"Your services can be terminated at any time by NTL or by yourself on one month notice or equivalent salary in lieu thereof subject to fulfilling the conditions of contract."*

Beside the above termination clause the original offer of the employment is only for one year as reflected from Exh.D.1 that "*You will be required to sing a one year contract as well*." On the other hand the offer of employment also contains penalty clause that if the employee leaves the job before period of one year, employer has to submit nine months equivalent salary. Such aspect of offer of employment seems to be contradictory. The appellants have taken specific stance in her testimony that she was not given technical training as agreed rather six hours training was extended in terms of Exh.D.02 and Exh.D.03, which has not been denied by the respondent side, even both the parties have acknowledged the terms of employment agreement Exh.P.2, the surety bond Exh.P.03 and surety bond of the guarantor Exh.P.04, executed by the mother of the appellant No.1 in favor of the respondent company. As per the stance of PW.1 / Adnan Jamil, the representative of the respondent company, the appellant No.1 / Faryal Saleem was absent on 05.01.2019, and thereafter, she was given show cause notice by the respondent company, but during the course of evidence PW.1 / Adnan Jamil acknowledged that:

"یہ درست ہے کہ مدعاعلیہ نے 05.01.2019 کو کمپنی سے استعفیٰ دے دیا تھا۔"

7. He further acknowledged that:

"یہ درست ہیکہ کمپنی نے مورخہ **11.01.2019** اور **15.01.2019** اور **25.01.2019** جو شوکاز نوٹس دیے وہ مدعاعلیہ کے استعفیٰ دینے کے بعد جاری کیئے گئے۔"

Therefore, the element of show cause is meaningless having no effect in this case.

8. I have gone through the terms of employment provided in Exh.P.02, agreed between appellant No.1 / Faryal Saleem and Nayatel Pvt. Ltd, whereby, clause Nos. 2.1 and 6.7, only refer the period of employment as of 02 years commencing from 05th day of 2018. Similarly clause No.7.1 deals with the termination of employment by the employer without assigning any reason whatsoever on 30 days written notice or payment of salary in lieu thereof, even employer can terminate employment forthwith upon gross misconduct. The clause No.7.4 highlights the rights of employee who furnished bond for continued employment in which employer may terminate his / her employment by giving 30 days written notice subject to fulfilling the conditions of the bond, even it was written in the said clause that if a notice has not been given to the employer the employer shall have the discretion to withhold any salary due to the employee till the date of termination.

9. Now dealing with the basic question as to whether any compensation or damages are payable by the employee to the employer in case of early resignation or termination. The relevant clause No.7.5 is reproduced as under:

> *"7.5: In case the employee is required to furnish the Bond, he/she shall not terminate his/her employment and shall continue to serve the Employer for as long as the Bond remains in effect and, in case of breach of this provision, shall pay all damages, compensation and indemnity as may be specified in the Bond. The employee further acknowledges and*

affirms that the Employer has or shall incur substantial expense in training the Employee and for imparting specialized skills to perform his duties and that on account of such skills being specialized and not readily available in the market for instant substitution the Employer will suffer loss not readily measureable in damages apart from and in addition to severe interruption in the business operations of the Employer. Accordingly, the employer shall have the right to seek and obtain an order for specific performance together with a mandatory injunction against the Employee in addition to bringing a claim in damages in case of threatened discontinuation of his employment by the Employee contrary to the terms of the Bond."

Upon plain reading of the said clause it appears that employee hereby acknowledges and affirms that all the expenses borne by the employer including the expenses of training of employee for imparting substantial skills to perform his / her duties are key factors. The bond Exh.P.3 also highlights "*the period of two years and states that in case of breach of conditions 6.6, 6.8, 7.5, 8.1, 8.2 and 9.2 of the employment agreement dated 05.01.2018, the employee shall pay compensation (hereby agreed as reasonable, quantifiable and agreed sum and not a penalty) to the employer a sum equal to twelve months gross salary at the rate of employee's current salary at the time of leaving employment*".

10. Now question arises as to whether the employee has any choice to resign from his/her position. Such aspect has duly been acknowledged in the terms of employment as reflected from plain reading of clause No.7.1 read with clause No.7.4 as well as in terms of Exh.D.01, but surprisingly the employment agreement and the

service bond have been managed in writing in order to protect rights of employer and no clear option has been given to the employee to resign from his / her position by giving 30 days' notice, which itself is against the international labor standards.

11. Dealing with the issue of damages it is necessary to define them first. The etymology of the word "*damages*" reveals that the word damages stems from the words "*dommage*" in French and "*damnum*" in Latin, signifying that a thing is being taken away or that a thing is being lost which a party is entitled to have restored to him so that they may be made whole again. Damages have also been defined by the UK's House of Lords in the case of ***Livingstone v. Rawyards Coal Co.*** **((1880) 5 App. Cas. 25)** wherein damages have been defined as:-

> *"that sum of money which will put the party who has been injured or who has suffered in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation"*

12. Now dealing with the primary issue of damages, there are two separate lines of action to calculate compensation / damages written in the terms of employment as well as in the bond Exh.P.2 and Exh.P.3, but surprisingly, PW.1 / Adnan Jamil, the representative of the company has not explained in his affirmative evidence that what loss has been caused to the company in case of resignation of the appellant No.1 / Faryal Saleem. There is no bifurcation for claim of Rs.534,663/-, even not a single document has been rendered which confirms the cost of training, though it

has been claimed that trial court has awarded 32,000/- as cost of training. The employer in terms of Article 117 of Qanun-e-Shahadat Order, 1984, is under legal obligation to discharge the burden qua the quantification of loss and compensation. The respondent side has been confronted to this effect, whereby, learned counsel for the respondent company has drawn attention of this Court towards section 74 of the Contract Act, 1872, which deals with the compensation for breach of contract where penalty has been stipulated and the plain reading of the said provision reveals that:

> *"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for"*

In comparison to section 74 of the Contract Act, 1872, section 73 also deals with compensation for losses or damage caused by breach of contract, but it qualifies with condition that:

> *"The party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."*

However, there is mark difference between these two provisions. In case of section 73 the concept of damage assessment

is mandatory. In ordinary prudence if the contract of service expressly provides that it is terminable upon, one month's notice, the damages will ordinarily be a month's wage. In case of contract of employment for a fixed period, whereby, breach has occurred normal measure of damages is salary quantification concept. The onus is on the employer to show that employee ought reasonably to have taken certain mitigating steps before submission of his / her resignation. In case of breach of service contract the damages are to be calculated in terms of the actual emoluments of the person irrespective of the fact if some of the emoluments drawn by him were not mentioned or covered in the service agreement, where employer has terminated the service of the employee through wrongful dismissal. No doubt appellant No.1 has received specialized training, though it is case of PW.1 / employee that the agreed training was not imparted, however, such aspect was not proved through any cogent evidence except calculation of training hours which is apparently admitted on record. As stipulated in **2016 C L D 1833** ***(Atlas Cables (Pvt.) Limited Vs Islamabad Electric Supply Company Limited)*** damages have to be first pleaded and thereafter proved by leading reliable trustworthy and cogent evidence. Damages require evidence regarding details of losses actually suffered. Liquidated damages, as a rule, require the positive evidence to show that actual loss was suffered by the party claiming the damages. Even a fixed amount stipulated in a contract as liquidated damages cannot be recovered if the quantum

of actual loss suffered is not proved through sufficient evidence. The plain reading of section 74 of Contract Act, 1872, only envisage the minimum standard in which compensation could not be existed provided limit and it is ordinarily not necessary to prove actual damages or loss. Similar observations were recorded by **Lord Atkin** in the case of **(AIR 1929 Privy Council 179)** ***Bhai Panna Singh and others v. Bhai Arjun Singh and others***, that the effect of Section 74 is to disentitle the plaintiff to recover simpliciter the penal sum named in the agreement as due and payable on a breach of contract, whether as penalty or liquidated damages, unless he proves the damages he has suffered. Reliance can be made upon **2006 CLD 394 (*Messrs United Bank Limited v. Messrs M. Esmail and Company (Pvt.) Limited*), 2001 MLD 1955 (*Allied Bank of Pakistan Limited, Faisalabad v. Messrs Asisha Garments*),** and **PLD 1997 Quetta 87 (*Messrs HITEC Metal Plast (Pvt.) Ltd. v. Habib Bank Limited.***

13. Learned counsel for the respondent has heavily relied upon the judgments reported as **1991 SCMR 1436 (*M/s Khanzada Muhammad Abdul Haq Khan Khattar & Co. Vs. WAPDA through Chairma and another)*** and **1989 CLC 636 (*M/s Ghulam Muhammad Dossal Engineering Ltd. Vs. Zafar Iqbal and another)***, though this Court is in agreement with the principles settled in these case laws, however, primary question is relating to the expenses incurred on the training of the employee and due to resignation and termination of the employee the employer has to

hire new person, who further requires training, where it was held that actual expenses incurred by employer on employee and money spent on his replacement were awarded by the court. This Court has also been guided on the principles settled in the judgment reported as **2019 CLC 950 (*Muhammad Ashfaq and another Vs. Muhammad Haroon)***, where it was held that in absence of establishing loss actually suffered by the indemnity holder claimed of plaintiff legally could not be accepted for decreeing merely for the reasons that there have been a document of indemnity bond. Failure of plaintiff in establishing actual loss suffered by him, suit could not be decreed in favor of the plaintiff.

14. Learned counsel for the appellant contends that Unconscionability is a doctrine under which courts may deny enforcement of unfair or oppressive contracts because of procedural abuses arising out of the contract formation, or because of substantive abuses relating to terms of the contract, such as terms which violate reasonable expectations of parties or which involve gross disparities in price; either abuse can be the basis for a finding of Unconscionability. **[Remco Enterprises, Inc. Vs. Houston, 9 Kan. Alpp.2d 296, 677 P.2d 567, 572).** Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties, to a contract together with contract terms which are unreasonably favorable to the other party. **[Gordon Vs. Crown Central Petroleum Corp., D.C. Ga, 423 F. Slupp. 58, 61].** Typically, the cases in which

Unconscionability is found involve gross overall one-sidedness or gross one sidedness of a term disclaiming a warranty, limiting damages, or granting procedural advantages. In these cases, one sidedness is often coupled with the fact that the imbalance is buried in small print and often couched in language intelligible to even a person of moderate education. Often the seller deals with a particularly susceptible clientele**. [Kugler Vs. Romain, 58 N.J. 522, 279 A.2d 640).** Applying the Unconscionability doctrine to the present case, there was clearly inequality of bargaining power between the company and the employee. The employee was powerless to negotiate any of its terms. His contractual option was to accept or reject it. There is a significant gulf in sophistication between the employee and a large multinational as held in 2020 SCMR 1279 *(Uber Technologies INC. Vs. David Hailler).* An undertaking to pay a sum of money or to forfeit a sum of money fixed in terrorem without reference to any estimated damages on breach of the contract is in the nature of the penalty and that the party claiming the compensation must prove the loss suffered by him as held in **AIR 1970 SC 1955 *(Maula Bux Vs. Union of India)*.**

15. Keeping in view the above discussion, if the terms of employment contract read in conjunction with section 124 of Contract Act, 1872, it reveals that a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called “contract of indemnity”. To indemnify means to make good,

to compensate, to make reimbursement of a loss. In the present case, the respondent company has neither incurred any loss nor provided any proof of such loss before the trial court, therefore, under the provisions of section 74 of the Contract Act, 1872, the claimant under any bond is entitled to reasonable compensation and not specific amount asserted in the said bond. It is, by now, well-settled proposition of law that claiming of fine, liquidated damages or penalty solely based upon the terms of finance agreement between the parties itself will not be sufficient to grant the fine, liquidated damages or the penalty amount inasmuch as the party claiming such fine, liquidated damages or penalty has to in the first place plead such fact in its plaint or petition and thereafter to prove the same through cogent and reliable evidence and that too, the Court, if satisfied with the evidence, will not necessarily grant the specific amount of fine liquidated damages or penalty as stipulated in the finance agreement but only a reasonable compensation to be ascertained from the evidence adduced by the parties as held in **2010 CLD 591 (*Industrial Development Bank of Pakistan v. Messrs Baloch Engineering Industry (Pvt.) Ltd).*** The court's discretion to determine the reasonableness of the amount is never taken away by the determination of parties under a compulsive bond. It is admitted fact on record that appellant No.1 / Faryal Saleem has resigned on 05.01.2019, after completion of one year, from respondent company and show cause notices were issued pursuant to the resignation

which have no legal effect, therefore, the party relying on the forfeiture clause had suffered loss or not is one of the ways to see whether the forfeiture was unconscionable or highly penal in nature. The ultimate analysis remains one of the Unconscionability and the extent of the penalty. What is unconcscionable and what is reasonable compensation, that is a question of fact that the court determines in the peculiar facts and circumstances of each case, and compensation should be reasonable.

16. However, Justice **Khilji Arif Hussain** in ***Abdul Majeed Khan Vs Tawseen Abdul Haleem*** **2012 C L D 6 (Equivalent Citation 2012 PLD 80 Supreme-Court)** has observed that:

> *"… Besides the broad classifications of General and Special Damages, damages may also be of the following kinds:*
>
> *(i) Contemptuous damages;*
>
> *(ii) Nominal damages;*
>
> *(iii) Punitive or exemplary;*
>
> *(iv) Compensatory; and*
>
> *(v) Prospective damages*
>
> *…**Nominal damages**.---Nominal damages are trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant's duty, or in cases where, although there has been a real injury, the plaintiffs evidence entirely fails to show its amount.*"

The best statement as to the meaning and incidence of nominal damages is given in Halsbury's Laws of England (Hailsham), Second Edition para 101, whereby, it has been observed:

> *"Nominal Damages' is a technical phase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed." See* ***1991 C L C 32 (Trading Corporation Of Pakistan Ltd. Vs International Trading And Sales Inc.)***

17. No doubt the company has incurred expenses on the training of the appellant No.1 / Faryal Saleem, therefore, company is entitled for recovery of those amount as well as at least salary of one month which is otherwise in accordance with public policy principle, resultantly this appeal is **PARTLY-ALLOWED**, the impugned judgment and decree is modified to the effect that respondent No.1 is entitled for recovery of amount of Rs.32,000/- as training cost and one month of salary amounting to Rs.43,000/-, rest of the claim of respondent is not made out. Office is directed to draw the decree sheet accordingly.

MOHSIN AKHTAR KAYANI
JUDGE

A.Waheed.

Approved for reporting.