

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE QAZI MUHAMMAD AMIN AHMAD

CIVIL PETITION NO.4570 OF 2019

Against the judgment dated 11.10. 2019 passed
by Islamabad High Court, Islamabad in W.P. No.
2948 of 2018

Nadia Naz ...Petitioner(s)

VERSUS

The President of Islamic Republic of Pakistan, ...Respondent(s)
President House, Islamabad & others

For the Petitioner(s): In person a/w Nadeem A. Sh, ASC (as
probono)

For Respondent No.6: Mr. Agha Muhammad Ali, ASC
Mr. M. Sharif Janjua, AOR

For Respondent No.11: Mr. M. Nazeer Jawad, ASC
Syed Rifaqat Hussain Shah, AOR

Date of Hearing: 22.9.2020

JUDGMENT

MUSHIR ALAM, J.- The facts leading to the instant petition are that the petitioner was appointed on temporary basis as Resource Person (Camera Department) at PTV on 04.09.2007. She filed a complaint alleging workplace harassment under the "*Protection against Harassment of Women at Workplace Act, 2010*" (*'the Act, 2010'*) before the Federal Ombudsman for Protection against Harassment of Women at Workplace against current respondents No 4 & 5 on 08.03.2016. The record shows that during the pendency of complaint before the Federal Ombudsman, the petitioner was proceeded against departmentally, charge-sheeted, show-caused, and consequently terminated from service w.e.f. 13.05.2017 vide order dated 17.05.2016. It may be noted that the Petitioner took no exception to her termination before any forum which, therefore, attained finality. However, the petitioner continued pouring various applications before the Federal Ombudsman, including actions taken against her for disciplinary proceedings.

2. The learned Federal Ombudsman, vide order dated 16.10.2017, not only took cognizance of disciplinary proceedings against the Petitioner, but treated action and proceedings in the departmental enquiry as harassment, as detailed in paragraph 24 of the order, and also condemned the Respondents No. 4 and 5, namely Saeed Ather who was Controller Administration and Personnel, and Abdul Rashid who held the post of Controller. Respondents No.4 and 5 were ordered to be proceeded against and "the penalty of withholding of promotion be imposed on them for a period of two years under Section 4(4)(i)(b) of Act of 2010". The said respondents were further burdened with fine of Rs.100,000/- which was to be paid to the Petitioner. The departmental disciplinary proceedings against the Petitioner were set-aside and she was reinstated into service. In paragraph 26 of the order, the Ministry of information was directed to investigate on the Department of Administration and Personnel to root out the cause of this perpetual harassment against the Appellant and take appropriate action against the conspirators including and besides respondents in the matter.

3. The Ministry of Information, Broadcasting and National Heritage, created an inter-departmental inquiry commission, which observed in its inquiry report dated 05.07.2017 that '*no incident of harassment had taken place*'.

4. The Federal Ombudsman's Order dated 16.10.2017 was successfully challenged by the affectees' respondents before the President of Pakistan. The Petitioner also made as many as seven (7) Complaints before the President of Pakistan. All the Representations by the affectees-Respondents and Complaints filed by the petitioner were heard, the record was examined, and the case was decided together.

5. The President of Pakistan, on examining the record came to a conclusion that in consideration of the fact that the decision of learned Federal Ombudsman is exceptional in the eyes of law and required to be set-aside by the appellate forum holding that "*Undoubtedly, the issue of the complainant revolves around the component of discipline/administrative issue in service matter and not*

covered under sexual harassment as mentioned in the particular definition of sexual harassment provided by the Protection against Harassment of Women at the Workplace Act, 2010, elaborated supra.” and “Thus the complainant could not able to prove the allegations of sexual harassment before the appellate forum beyond any shadow of doubt.” Consequently, representations filed by the Respondents were *accepted*, while the representation of the complainant was set-aside. However, the complainant was left with option to *“avail the remedy for redressal of her grievance in service/administrative matter before the competent forum under the law, if so desired”*.

6. The petitioner challenged the order of the President dated 05.01.2018 before the learned Islamabad High Court which upheld the order of the President vide judgment dated 11.10.2019 impugned before this Court through the instant petition.

7. The learned Bench of the Islamabad High Court, placing reliance on the case of “Shahina Masood etc. vs. Federal Ombudsman Secretariat for Protection of against Harassment at Workplace etc” rendered in Writ Petition No. 1665-2019, (since reported as reported as **2020 PLC (CS) 186**), wherein it was held that *“when the definition of a particular expression has been given in a statute then its ordinary meaning becomes irrelevant nor, can it be considered”*. The cited judgment, taking into consideration the definition of harassment as expounded in the case, examined the merits of the case in hand and came to a conclusion that no case for *harassment*, within the contemplation of *section 2(h) of the Act, 2010* was made out. It was further held that the learned Federal Ombudsman had no jurisdiction to order re-instatement of the complainant. The Order of the President was accordingly maintained through judgment impugned before us.

8. Learned counsel for the petitioner, appeared as *probono* counsel, along with the petitioner, contended that she was subjected to workplace *harassment* by her colleagues/respondents and when she filed a complaint before the Federal Ombudsman under the Act 2010, she was dragged into unnecessary disciplinary proceedings and departmental inquiries. It was further urged that instead of taking action against the harassers and the delinquent officers, she was victimized; the departmental proceedings were drawn against her and

she was terminated from services *vide* order dated 17.05.2016 illegally and unjustifiably. The learned counsel for the petitioner supported the order of the Federal Ombudsman's dated 16.10.2017 to be just and argued that she was rightly reinstated into service. He further argued that the Federal Ombudsman was justified to direct penal action against the respondents on cogent reasons. It was contended that the impugned judgment dated 26.07.2019 of the Islamabad High Court, upholding the order of the President and dismissing the writ petition of the petitioner, is not tenable under the law, facts, and circumstances of the case due to which it needs to be set aside and the order of the Federal Ombudsman to be restored.

9. Learned counsels for the respondents supported the impugned decision of the President of Pakistan and judgment of the High Court, by contending that only when an act of *harassment*, as defined in the *Act of 2010*, is established against the accused that the Federal Ombudsman has authority and jurisdiction either to impose minor and/or major penalties, as prescribed under Section 4 (4) of the Act, 2010 and not otherwise. It was argued that the Federal Ombudsman has no jurisdiction to attend or entertain complaints against disciplinary and departmental proceedings not relatable to *harassment* of the kind cognizable under the Act, of 2010 and pass any order to reinstate the petitioner into service under the provisions of the *Act of 2010*. Learned counsel placed reliance on a recent judgment of the Islamabad High Court, in the case titled *Shahina Masood (supra)*, as relied in the impugned judgement. It was also argued that against the termination of service, despite the observation of the President in its order, the petitioner has till yet not challenged her termination, which has since attained finality.

10. We have heard the arguments and perused the record through the able assistance of the petitioner and the learned counsels for the parties. The learned bench of Islamabad High Court drew the distinction between *harassment* in a generic sense and *harassment* as an act made actionable under section 2 (h) of the *Act, 2010*. The learned bench of the Islamabad High Court referred to paragraphs No. 6 to 10 of the judgment rendered by another bench in earlier case of

*Shahina Masood*¹ (*supra*) to arrive at a conclusion that no case for interference in the order of the President is made out.

11. Two main questions that call for resolution in instant case, have attracted our attention are;

1) *Whether the actionable "harassment", as defined in section 2(h) of the Act, 2010, is of restricted application or applies to all manifestations of harassment.*

2) *Whether the Federal Ombudsman has the jurisdiction and/or authority to reinstate the petitioner into service under the provisions of the "Protection Against Harassment of Women at Workplace Act, 2010"?*

12. The title and the preamble of "*Protection Against Harassment of Women at the Workplace Act, 2010*" hold out assurance to provide a legal regime for the "*protection of women against harassment at workplace*". When the Act, 2010 is examined as a whole, it does not live up to expectation as title and preamble of the Act suggest. In its present form, surprisingly the *harassment* against which a woman is provided an assurance of protection is just another piece of cosmetic legislation; it is blinkered in its application. The Act, 2010 caters to grievance of the *complainant* [section 2(e)], may it be '*men*' or '*women*', against the act of misdemeanor defined as '*harassment*' [under section 2(h)] on the part of an '*accused*' [section 2(a)], who may either be an '*employee*' or '*employer*' of an organization, against whom a '*complaint*' to the '*Ombudsman*' [under section 8] or to the '*Inquiry Committee*' [under section 4] is made.

13. Harassment, in all forms and manifestations, may it be based on *race, gender, religion, disability, sexual orientation, age-related, an arrangement of quid pro quo, and/or sexual harassment etc*² affects and violates the *dignity of a person*³, as guaranteed under the

¹2020 PLC CS) 186

² Equality Act 2010, Chapter 2, Section 4, each of the characteristics as noted herein are classified as protected characteristic and elaborately dealt with in UK Act.

³ Article 14 of the Constitution of Pakistan 1973

Constitution of Pakistan, 1973. Even though anyone may be subject to sexual harassment, in a culture and society like Pakistan, women are the distressing majority of victims. Harassment in any society or organization is a testament to regressive behavior that creates an intimidating, hostile, degrading, humiliating, and offensive environment which has a devastating effect on any society or organization by adversely affecting its overall performance and development. The Act, 2010, rather than addressing issue of harassment in all its manifestation, as noted above, in a holistic manner, is a myopic piece of legislation that focused only on a minute fraction of *harassment*⁴. The Act, 2010 confines or limits its application to sexualized forms, including orientation of unwanted or unwelcome behavior, or conduct displayed by an accused person towards a victim in any organization. It may be observed that insulting modesty or causing sexual harassment at work place or public place etc. has been criminalized under Section 509 of the Pakistan Penal Code, 1860, which is punishable for a term which may extend to three years, or with fine up to five hundred thousand rupees, or both w.e.f. 02.02.2010.

14. Attending to first formulation, it is of extreme importance to unravel the issue of explaining what does the term '*harassment*' mean that has been made actionable wrong under the Act, 2010. Section 2(h) of the Act, 2010 clearly defines the term "*harassment*" as follows;

"(h) harassment" means any unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment."

15. As could be seen from the definition of harassment as reproduced above, any misdemeanor, behavior, or conduct unbecoming of an employee, or employer at the workplace towards a fellow employee or employer, in any organization, may it be generically classifiable harassment, is not actionable *per-se* under the Act, 2010,

⁴ Section 2(h) of the Act, 2010

unless such behavior or conduct is shown to be inherently demonstrable of its 'sexual' nature. Any other demeaning attitude, behavior, or conduct which may amount to *harassment* in the generic sense of the word, as it is ordinarily understood, howsoever grave and devastating it may be on the victim, is not made actionable within the contemplation of actionable definition of "*harassment*" under *section 2 (h) of the Act, 2010*. Giving such restricted meaning to "*actionable*" *harassment*, by the legislature in its wisdom, impinges the very object and purpose for which the Act, 2010 was promulgated. The impact of *harassment*, as generically understood, and how restrictive its application has been made is very well articulated and thrashed out in paragraph 10 of the judgment rendered by the Islamabad High Court in the case of *Shahida Masood*⁵ (*supra*) which needs no further elaboration.

16. The Act, 2010 above has specifically been legislated to protect not only working women but men as well only against "*harassment having sexual nature*" at the workplace and, therefore, any conduct amounting to harassment of any other kind and nature, as noted in paragraph 13 above, despite howsoever distasteful and injurious, is not made cognizable before the Federal Ombudsman. The meaning of the term 'harassment' as given in Section 2 (h) of the Act, 2010 cannot be stretched to other conduct being not of sexual orientation. Apparently, the reason for limiting the actionable offence of 'harassment' could possibly be for the reason it may have a serious impact on all those involved, which includes both the potential 'harasser', the potential victims, and the responsibility for avoiding instances of harassment on workplace regulators. Such an approach is not unique to Pakistan and is in fact similarly followed in India. The Indian Supreme Court formulated the guideline known as *Vishaka Guidelines*⁶ which made it mandatory for institutions across the country to put in place measures to prevent and redress sexual harassment at the workplace. The *Vishakha Guidelines* laid the foundation for the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*.

⁵ 2020 PLC (CS) 186 @193

⁶ Vishaka Guidelines formulated after the seminal decision in *Vishaka v State of Rajasthan* by the Supreme Court of India, concerning the gangrape of Bhanwari Devi, a Dalit women, in 1992.

"Section 2 (n) of the Act 2013 reads as follows:

(n) "sexual harassment" includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:

- (i) physical contact and advances; or*
- (ii) a demand or request for sexual favours; or*
- (iii) making sexually coloured remarks; or*
- (iv) showing pornography; or*
- (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature; "*

17. The *Vishaka Guidelines* are regarded as the regulatory framework for dealing with sexual harassment against women at workplace in India. The focus under the Guidelines is on the reported conduct being sexual in nature and not otherwise. Likewise, under the Act, 2010, s.11 makes it obligatory on the part of employer to incorporate a '*Code of Conduct for Protection against Harassment of Women at the Work Place*' as a part of management policy. It is appended to the *Schedule to the Act, 2010*, after recapitulating definition of Harassment as given in section 2(h) *ibid*, the *explanation* given under Clause (ii) of the *Code of Conduct for Protection against Harassment of Women at Workplace* is reproduced as follows:

"Explanation:

There are three significant manifestations of harassment in the work environment:

- a) **Abuse of Authority:** *A demand by a person in authority, such as a supervisor, for sexual favors in order for the complainant to keep or obtain certain job benefits, be it a wage increase, a promotion, training opportunity, a transfer or the job itself.*
- b) **Creating a Hostile Environment:** *Any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature, which interferes with an individual's work performance or creates an intimidating, hostile, abusive or offensive work environment. The typical "hostile environment" claim, in general requires the finding of a pattern of offensive conduct, however, in cases where the harassment is particularly severe, such as cases involving physical contact, a single offensive incident will constitute a violation.*

c) **Retaliation:** *The refusal to grant a sexual favor can result in retaliation, which may include limiting the employee's options for future promotions or training, distorting the evaluation reports generating gossip against the employee or other ways of limiting access to his/her rights. Such behavior is also a part of the harassment."*

18. The *Explanations*, as reproduced above, reiterate and leave no room for doubt that the harassment made actionable under the Act, 2010 is confined to the manifestation of harassment that is inherently demonstrable of sexual orientation as defined in *section 2(h)* read with *Explanations*, as reproduced above, which is part of the *Schedule* of the Act, 2010.⁷

19. Contrastingly, in the United Kingdom, workplace harassment is approached in a refreshingly objective manner. It is more in line with the definition of 'harassment' as explained in the Oxford dictionary as:

"The act of annoying or worrying somebody by putting pressure on them or saying or doing unpleasant things to them."

20. Any kind of harassment based on the protected characteristics as noted in para 13 above and defined under section 4 of the UK Equality Act, 2010 is made actionable. Additionally, 'harassment' by itself, is simply defined as:⁸

"1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

21. While our version of the legislation to protect women at workplaces against harassment is titled as '*The Protection against Harassment of Women at the Workplace Act 2010*', however, when the

⁷ Section 2(c) and section 11 of the Act, 2010

⁸ (UK) Equality Act 2010, Chapter 2, Section 26

scheme of the enactment is carefully examined, its contents and application has been restricted to harassment of a purely of sexual orientation and nature. It must be noted that under the Pakistani legislation on the subject, not only in the Preamble but also in the title of the Act, the term '*harassment*' is used and not '*sexual harassment*', but contrarily to the apparent intent, the meaning of the term '*harassment*' has been explicitly given a restrictive meaning under *clause (h) of Section 2 of the Act, 2010*. Meanwhile, other acts of harassment, as noted in para 13 above, cannot be taken cognizance by the Ombudsman, in view of the limitation of authority and jurisdiction, to punish the harassment of the kind defined under the Act, 2010 and in a manner as provided under section 4 *ibid*.⁹ To our great regret, all such acts of harassment that fall beyond the pale of restricted definition of actionable *harassment* under section 2(h) *ibid*; can neither be made cognizable or punishable by the Inquiry Committee and/or the Ombudsman, in view of the fetters placed under Article 12 of the Constitution of Pakistan, 1973.¹⁰ The act, demeanor, behavior, and/or conduct that has been made cognizable is of limited application and, has been nailed down in the definition clause of *section 2 (h) of the Act, 2010* and not as generically reflected either from *Preamble* or the *title of the Act, 2010*. The aggrieved person under the provisions of the Act, 2010 has the responsibility to prove that the perpetrator truly had an accompanying sexual intention or overture with his act, demeanor, behavior, and/or conduct. Since the Act, 2010 itself limits the protection it offers to the harassment having sexual orientation, the Court is shackled to interpret it in line with its express charging *clause (h) of section 2* of the Act, 2010. Any other interpretation advanced by this Court to enlarge the scope of the charging section will violate the rights guaranteed under Article 12 of Constitution. There is no cavil to the proposition that the sexual conduct is cognizable under the provisions of the Act, 2010, however, as held by the President in its order, and as upheld through impugned judgment of the Islamabad High Court, the petitioner has failed to establish that the conduct on the part of respondents 4 & 5 actually amounted to *sexual harassment* within the contemplation of *Act, 2010*.

⁹ Limitation is place on all Courts to exercise jurisdiction as may be conferred by constitution or by law see Article 175 (2) of the Constitution, 1973.

¹⁰ Article 12 (1) No Law shall authorize the punishment of a person (a) for an act or omission that was not punishable by law at the time of act or omission; or (b)...

22. Now, attending to second formulation as to the authority and jurisdiction of the Federal Ombudsman to grant relief to the complainant, it is the prerogative of the complainant, having encountered hostile act of misdemeanor, behavior, or conduct as defined under the Act, 2010 as '*harassment*' either to make complaint against an accused person, who may be an employer or even an employee to, the Inquiry Committee, constituted under section 3 of the Act, 2010 or to the Ombudsman under Section 10 of the Act, 2010. The procedure and powers of the Inquiry Committee are provided for in section 4 and 5 of the Act, 2010 respectively. The Inquiry Committee on conclusion of the Inquiry may '*recommend appropriate penalty against the accused within the meaning of sub-section (4) of section 4*¹¹ to the Competent Authority'.¹² However, where the Inquiry Committee finds the allegations in the complaint leveled against the accused to be false and made with *malafide*, they may recommend the complaint to the Ombudsman for appropriate action against the Complainant. Unsurprisingly, given the draconian structure of the law, no remedy under the Act, 2010 is provided to the complainant, against whom action may be recommended by the Inquiry Committee for action making false and *malafide* complaint. The remedy of appeal against the decision of Competent Authority is provided before the Federal Ombudsman in terms of *section 6 (1) and (2)* both to the accused who is inflicted penalty and to the Complainant who is aggrieved by any decision of the Competent Authority.

23. In case the complaint against actionable harassment is made directly to the Ombudsman, the procedure to carry out inquiry into complaint and the powers of the Ombudsman are given under Sections 8 and 10 respectively. None of the provisions of the Act, 2010 empowers the Federal Ombudsman to reinstate an aggrieved person back into service. Therefore, the decision of the President, as maintained through impugned judgment of the Islamabad High Court, reversing and setting aside the order and direction of the Federal Ombudsman to reinstate the petitioner is unexceptionable and calls for no interference. It may be observed that the scheme of the Act, the Federal Ombudsman has no jurisdiction to enquire into and give findings as regard to the disciplinary proceeding against an

¹¹ Sub Section (2) of section 5 of the Act, 2010

¹² Under sub section (4) of section 4 of the Act, 2010

employee of the Organization, as disciplinary matter fell beyond the realm of the authority and jurisdiction of Federal Ombudsman under the Act, of 2010, and departmental proceeding and action taken thereunder may be agitated before the appropriate forum, may it be civil Court under its plenary jurisdiction, Writ Jurisdiction and or appropriate Service Tribunal depending on legal status of employee and employer as the case may be.

24. In view of the foregoing discussion, and under the facts and circumstances of the case, the order of the President as maintained through impugned judgment of the learned Islamabad High Court, is well reasoned, calls for no interference. Instant Petition is therefore dismissed. The research carried out by Syeda Saima Shabbir, Sr.R.O of the court in the instant matter is highly appreciated and acknowledged.

Judge

Judge

Judge

ANNOUNCED on 5.07.2021 at Islamabad. **Judge**

"Approved for reporting"