

Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR

JUDICIAL DEPARTMENT

W.P.No.3253-P of 2018

Ghulam Muhammad

Vs.

Regional Commissioner for Federal
Ombudsman under Protection Against
Harassment of Women at Workplace, ,
Peshawar and others.

Date of hearing on 01.04.2021 and date of announcement on 05.04.2021

Petitioner (s) by Mr. Danial Khan Chamkani, Advocate

Respondent (s) by Mr. Nauroz Khan, Advocate


JUDGMENT

MUHAMMAD NASIR MAHFOOZ, J:- Through the instant petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, petitioner has prayed this Court for the following relief:-

It is, therefore, most humbly prayed that on acceptance of the writ petition, in exercise of the extra ordinary constitutional jurisdiction, this honorable Court be pleased to:-

Declare judgment dated 02.03.2018 and 13.06.2018 of R.No.01 & 02 to be illegal, improper, unjust, without lawful authority, discriminatory, malafide and of no legal effect.

2. Brief facts of the case are that Anti-Corruption

 Establishment of Khyber Pakhtunkhwa, on receipt of complaint from one Afshan Bibi on 06.04.2011, against the

present respondent No.3, initiated inquiry to probe the matter, and during the inquiry, respondent No.3 made complaint to respondent No.1 on 16.01.2018 alleging therein that she is Assistant Director in Education Department and the petitioner uses his powers of I.O. as medium to compel for friendship and sends messages on her personal cell number in connection with her inquiry being pending since long on the anonymous complaint of one Israr Khan President of PPP. Further alleged that petitioner continuously threatens her on telephone for lodging of F.I.R, leading her arrest and suspension from her service. She also alleged that her social life has disturbed due to the hands of petitioner by misusing his authority for illegal purposes and harassment. Petitioner was served with a notice and in response thereto, he filed written statement. Pro and contra evidence was recorded. The learned Regional Commissioner/respondent No.1, after hearing arguments, found the petitioner guilty of harassment and penalized him in two sets under the head "Minor penalties" vide judgment/order dated 02.03.2018. Against the aforesaid judgment/order of learned Regional Commissioner/respondent No.1, the petitioner and respondent No.3 filed separate appeals before respondent No.2, who vide judgment/order dated 13.6.2018, modified the judgment/order of respondent No.1. Hence the instant writ petition.

3. Written comments, on behalf of respondent No.3, reveals several legal and factual objections supporting the impugned order passed by President of Pakistan by accepting the representation of respondent No.3 and rejecting the representation of petitioner in terms of modifying the order dated 02.3.2018 of Federal Ombudsman under the Protection Against Harassment of Women at the Workplace Act, 2010 and awarding major penalty of compulsory retirement from service. All the allegations of the petitioners have been denied.

4. Respondents No.1 and 2 have not submitted any comments.

5. We have heard arguments of learned counsel for the parties and perused the record.

6. The learned counsel for the petitioner argued that ombudsman, under the provisions of **Protection Against Harassment of Women at the Workplace Act, 2010**, could not dilate upon any matter which relates to terms and conditions of service nor it can impose any minor or major penalty on a civil servant but it can only forward the same to the organization against whom the complaint has been filed.

7. The learned counsel for respondent No.3 supported the impugned order in addition to the grounds raised in the written statement.



8. Before we proceed to examine the merits and demerits of the impugned order of the President of Pakistan performing functions under the Protection against Harassment of Women at the Workplace Act, 2010 reference would necessarily be made to certain relevant provisions of the Act.

Section-2 (h, i & l) defines different terms as under:-

(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.

(i) "Inquiry Committee" means the Inquiry Committee established under sub-section (1) of section 3;

(l) "organization" means a Federal or Provincial Government Ministry, Division or department, a corporation or any autonomous or semi autonomous body, Educational Institutes, Medical facilities established or controlled by the Federal or Provincial Government or District Government or registered civil society associations or privately managed a commercial or an industrial.

Section-3 provides for Inquiry Committee to be constituted by organization:-

Section-3 sub-section (1) Each organization shall constitute an Inquiry Committee within thirty days of the enactment of this Act to enquire into complaints under this Act.



Furthermore, section-7 of the Act provides for appointment of ombudsman at federal and provincial levels.

Section-8 sub-section-5 empowers the Ombudsman to finally pass such order:-

Section-8 (5): The Ombudsman shall record his decision and inform both parties and the management of the concerned organization for implementation of the orders.

9. Under section-11 an employer is legally bound to ensure implementation of this Act, to incorporate the code of conduct and to form inquiry committee under section-3.

10. Section-10 of the ibid Act, 2010 empowers the ombudsman to exercise the same powers as are vested in a civil court under the Code of Civil Procedure, but to the matters mentioned therein. Under clause (vi), the ombudsman shall have the same powers as the High Court has to punish any person for its contempt. Under section-10 (2), ombudsman shall while making the decision on the complaint may impose any of the minor or major penalty specified in sub-section-iv of section-4. It may be noted that section 4 (iv) pertains to minor and major penalties that shall be imposed by the **Competent Authority** on the recommendation of **Inquiry Committee**. Now, the competent authority under section 2 (d) of the Act means the authority as may be designated by the **management** for the purpose of this Act. Clause (j) defines management while



section-3 provides for an Inquiry Committee that shall be constituted by each organization to enquire into the complaints under this Act. No doubt that both the ombudsman or the Inquiry Committee under section-8 shall entertain the complaint but u/s 8 (iii), the ombudsman shall conduct an inquiry into the matter **according to the rules** made under this Act. Supposing an ombudsman is empowered to order removal of any employee of organization not only proceedings to be initiated under the Efficiency and Discipline Rules shall be construed as redundant but the Efficiency & Discipline Rules that are framed by the organization, shall also become redundant when it is only the competent authority empowered to impose minor or major penalty.

11. The wordings of section-6 of the Act further leads us to hold that in case ombudsman had the power to impose minor or major penalty without the concurrence of the parent department, then no appeal would lie against his order passed u/s 10 (2). This conclusion is drawn when we read the commencing words "**Any party aggrieved by the decision of competent authority**". So, the competent authority is defined in section 2 (d).



12. Now adverting to the subject matter of writ petition. One Israr Khan submitted a complaint on

30.03.2016 to Chief Minister complaint cell regarding embezzlement/corruption against respondent No.3. One Afsar Bibi had earlier on 06.04.2011 had already submitted complaint to Director, E&S Education, Peshawar, and the matter was reported in print media as well. Finally, on 05.05.2011 Principal GGHS Mathra, Peshawar, was appointed as Inquiry Officer and submitted inquiry report on 23.5.2011 and submitted following findings:-

FINDINGS:-

1. Experience Certificate regarding National Institute of Management Science is bogus.
2. No mortal person having a physical body can be present at two place at one time.

The case is with Mian Gul Raj performing her duty at two places at same time i.e.

(i) with effect from 01.09.1999 to 30.09.2001 at National Model School (Annexure-I), as well as w.e.f. July 2000 to July 2004 at Islamic Institute of Modern Studies (Annexure-II).

(ii) With effect from September 2004 to May 2005 at Oriental Degree College (Annexure-III), and at the same time w.e.f. August 2004 to 25-11-2007 at Abasyn Institute of Management Sciences (Annexure-IV) and with effect from 01.11.2006 to 06.03.2007 at National Institute of Management Sciences (Annexure-V).

13. It appears that the matter somehow came to Anti-Corruption department and was referred to the petitioner who was appointed as Inquiry Officer. During inquiry, he allegedly indulged in sending some messages to



respondent No.3 so she submitted complaint against him to the Director Anti-Corruption on 15.02.2018, she also submitted W.P.No.2683-P of 2018 in this Court which was disposed of on 13.9.2018 and simultaneously filed complaint to respondent/ Ombudsman on 16.01.2018 that culminated through the impugned orders.

14. Be that as it may, when we confine ourselves to definition of “**harassment**” it pertains to allegations of advancement for sexual purposes. While going through the impugned order of respondent No.3 the allegations have been reproduced as under:-

Mst. Gul Raj alleged that respondent No.1, Mr. Ghulam Muhammad uses his powers of I.O. as medium to compel her for friend-ship and sends messages on her personal cell number in connection with her inquiry being pended since long on the anonymous complaint of one Israr Khan prevailed at the verge of Anti-Corruption Establishment Peshawar.

That I.O. Ghulam Muhammad, respondent No.1 threatens her on telephone for lodgment of FIR subject to her suspension from service.

That her grace and reputation is at stake.

That oral complaint was also made to the SHO concerned against respondent No.1 about his harassment/teasing but in vain.

That the social life of complainant has disturbed in due course to the mis-use of authority of respondent No.1 by way of harassment for his unlawful motives.

[Handwritten signature]

15. We would not indulge into verifying the contents of complaint of respondent against petitioner or any complaint against respondent No.3 regarding corruption but would confine ourselves to the legality of major penalty of removal from service of petitioner by Ombudsman office/ respondent No.1.

16. The Rules are framed under the ibid Act of 2013 called Protection Against Harassment of Women at the Work Place Rules, 2013. It also defines the scope of complaint, contents of complaints, inquiry committee, procedure of inquiry committee, recommendations, imposition of penalty, procedure before the ombudsperson, remedial measures, advice and counseling, policy and procedure under rules-3 to 12. Besides, issuance of show cause notice by the ombudsperson, he shall inform the employer about the complaint received under sub-section (1) of section-8 of the Act. Under the ibid Act or the rules framed there-under, upon conducting an inquiry, the ombudsman shall record his decision and inform both the parties and the management of the concerned organization for implementation of the orders. In case, the powers of imposition of minor or major penalties specified in sub-section-iv of section-4 is considered to vest with the ombudsman then it was not legally necessary to incorporate the provision of procedure of inquiry and empower the inquiry committee to impose the minor and



major penalties that has been alluded to by the ombudsman with the same powers of Competent or Appointing Authority. We also noted section which provides right of appeal not against the decision of Ombudsman but against the decision of competent authority.

17. In this respect, we seek guidance from plethora of case law but specifically refer to **2007 SCMR 1313 titled Federation of Pakistan through Establishment Division Vs. Brig. (Rtd) Zulfiqar Ahmad Khan and others**, the relevant para of the judgment is reproduced as under:-

By looking at the very grievance of the respondent, as it has been agitated before the High Court and also before Wafaqi Ombudsman was with regard to the award and non-award of pensionary benefits depending on the conditions as to whether he has completed tenure of 10 years in the civil service which is purely relatable to the terms and conditions of service. By no stretch of imagination, this case could be brought out of the ambit of the terms and conditions of civil servant and in such view of the matter bar contained under Article 212 of the Constitution attracts and the High Court has wrongly assumed the jurisdiction despite the constitutional bar while accepting writ petition of the respondent. Reliance can be placed on Peer Muhammad V. Government of Balochistan through Chief Secretary and others 2007 SCMR 54 and Province of Punjab, through Secretary Education V. Shamsah Begum 2004 PLC (C.S. 1027).

In another case **PLD 2016 Supreme Court 940 titled Peshawar Electric Supply Company Ltd Vs. Wafaqi Mohtasib (Ombudsman) Islamabad and others**, similar

view has been taken. The relevant para is reproduced as under:-

The question as to whether the learned High Court can entertain a Constitutional Petition against an order of the Wafaqi Mohtasib, it is well established law that his order can be interfered with by the learned High Court in exercise of its constitutional jurisdiction if the petitioner satisfies that the order of the Wafaqi Mohtasib is without jurisdiction. We have not lost sight of Article 32 of the Order which provides alternate remedy to the aggrieved to approach the President of Pakistan by filing a representation against the Order of Wafaqi Mohtasib, but where the Order of the Wafaqi Mohtasib, on the face of it, is against the language of Article 9 of the Order or without jurisdiction, the High Court can exercise its constitutional jurisdiction so as to prevent injustice done to an aggrieved.

18. True, that establishment of office of Wafaqi Muhtasib (Ombudsman) Order, 1981 does not consist of any provision similar to section-10 (2) but the parliament while designating any authority would not divest a competent authority or appoint a parallel authority to perform same functions simultaneously. Each and every part of statute has to be given its meaning so that any ambiguity in an enactment must be avoided. The test is to resolve the ambiguity. Reference is made to case law reported in 1999 SCMR 1852 titled Sheikh Saeed Ahmed and another Vs. Abdul Wahid. The relevant para is reproduced as under:-

10. The primary test as to whether a provision in a Statute is ambiguous as laid down in *Kikness v. John Hudson & Co. Ltd*, (1955) 2 All ER 345, 366 (HL) and quoted at page 544 in *Bindra's Interpretation of Statutes*, 7th Edition, is

that "it contains a word or phrase which in that particular context is capable of having more than one meaning". It was further observed that "by an ambiguity is meant a phrase fairly and equally open to diverse meanings". In this context, the author, in his Commentary, quoted from Motor owner's Insurance Co. Ltd. v. Jadavji Keshoji Modi (22 Guj LR 1208 (SC)), the following observations on the Subject: ----

"Where the language is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the Court of ascertaining the true meaning. It is in this area of legislative ambiguities that Courts have to fill up gaps, clear doubts and instigate hardships which leaves a sufficient discretion for the Judges to interpret laws in the light of their purpose".


19. Since section-11 of the ibid Act, 2010 ensure implementation on the part of the Competent Authority referred to in section-4 and section-12 provides for enforceability in addition to and not in derogation of any other law for the **time being enforce**, so we hold that the competent authority of the petitioner could not be held bereft of the powers to initiate any proceedings against petitioner. However, much time has lapsed by now and the ombudsman/ ombudsperson and its office have conducted proceedings by recording some evidence in the matter, so the same shall remain to be treated in the lawful exercise of powers while to the extent of imposing penalty of compulsory retirement against the petitioner, it is hereby declared as without jurisdiction and without lawful authority.



20. In view of the above discussion, the instant writ petition is consequently allowed to the extent of setting aside the imposition of major penalty and the proceedings of inquiry shall be forwarded to the organization/Anti-corruption department who shall treat the same as regular inquiry under the Efficiency and Discipline Rules regulating his terms and conditions of service and proceed with the matter strictly in accordance with law.

Announced
05.04.2021


JUDGE


JUDGE

(D.B.) Hon'ble Justice Musarrat Hilali and
Hon'ble Mr. Justice Muhammad Nasir Mahfooz

(Shahid Ali, Court Secretary)