P L D 2019 Lahore 17

Before Ayesha A. Malik and Muzamil Akhtar Shabir, JJ

IMRAN MAQBOOL, PRESIDENT MCB BANK LTD.---Petitioner

versus

FEDERATION OF PAKISTAN through Secretary Law, Justice and Human Rights Division, Islamabad and others---Respondents

Writ Petitions Nos.71556, 54146 and 60723 of 2017, heard on 6th September, 2018.

(a) Protection Against Harassment of Women at the Workplace Act (IV of 2010)

----S. 7(1)---Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act 2012 (III of 2013), S. 6---Penal Code (XLV of 1860), S.509---Harassment at workplace---Subject of harassment at the workplace, being a crime under the Penal Code, 1860, meant that Parliament and the Provinces both were competent to make laws with respect to the crime, procedure or evidence---Subject of protection of women from harassment fell under the Federal domain consequent to its international obligations and to the extent that the subject related to criminal law.

(b) Protection Against Harassment of Women at the Workplace Act (IV of 2010)

----S. 7(1)---Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act 2012 (III of 2013), S.6---Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order (I of 1983), Art.9---Federal/Provincial Ombudsman for Protection Against Harassment of Woman at the Work Place---Jurisdiction---Scope---Where an organization was clearly a trans-provincial organization, the Federal Ombudsman for Protection Against Harassment of Woman at the Work Place was competent to look into a complaint---Jurisdiction of the Federal Ombudsman was not limited to the Federal Capital Area, rather the Federal Ombudsman had jurisdiction in relation to all employers, organizations, institutions and workplaces which had a Federal character or were established under a Federal law or were directly consequent to an international obligation under an international treaty or convention---Jurisdiction of Federal Ombudsman could not be limited to the Federal Capital Area and could be exercised all over Pakistan over a Federal employer, institution, organization or workplace---Where the employer or organization and its workplace fell strictly within the territorial boundaries of the Provincial Ombudsman, then jurisdiction vested with the Provincial Ombudsman

and where the employer or organization transcended provincial boundaries then jurisdiction vested with the Federal Ombudsman.

Salim Javed and others v. Federal Ombudsman and others PLD 2016 Lah. 433 distinguished.

Farooq Zaman Qureshi and Riaz Hussain Haleem for Petitioner (in W.P. No.71556 of 2017).

Parvez I, Mir for Petitioner (in W.Ps. Nos.54146 and 60723 of 2017).

Nasar Ahmad, DAG along with Naveed Ahmad Goraya, Senior Law Officer in the Office of Respondent No.1 for Respondents.

Mrs. Samia Khalid, Addl. A.G. and Anwar Hussain, Addl. A.G. for Respondents.

Amna Tahir, Respondent No.5 in person.

Date of hearing: 6th September, 2018.

JUDGMENT

AYESHA A. MALIK, J.---This Judgment decides upon the issues raised in the instant Petition along with connected W.Ps. Nos.54146 and 60723 of 2017 whereby the Petitioners have challenged the jurisdiction of the Federal Ombudsman for Protection Against Harassment of Woman at the Work Place ("Federal Ombudsman") while hearing a complaint filed by Respondent No.5, Amna Tahir under the Protection Against Harassment of Women at the Workplace Act, 2010 ("2010 Act").

Facts and arguments

2. The common facts are that Respondent No.5 filed a complaint, before the Federal Ombudsman, against Saqib Rasheed, Petitioner in W.Ps. Nos.54146 and 60723 of 2017 and Imran Maqbool, Petitioner in W.P. No.71556/2017 along with five other officers of MCB Bank Limited on 23.6.2017 under the 2010 Act. The Petitioners along with others filed their replies before the Federal Ombudsman and raised an objection with respect to the jurisdiction of the Federal Ombudsman on two grounds; firstly, that the matter stood decided by the case cited at PLD 2016 Lahore 433 titled "Salim Javed and others v. Federal Ombudsman and others" ("Salim Javed Case") in which it was stated that jurisdiction in such cases lies with the Provincial Ombudsman and secondly that Respondent No.5 had also invoked the jurisdiction of the Provincial Ombudsman and therefore, could not seek remedy before both the Ombudsman at the same time.

3. Learned counsel for the Petitioners argued that Respondent No.5 has never filed any complaint against the Petitioners before the Bank and that the entire proceeding before the Federal Ombudsman was filed with a view to damage their reputation and to blackmail and harass them. Learned counsel also argued that the Federal Ombudsman does not have jurisdiction in the matter and despite various different restraining orders from this Court she proceeded with the matter having no regard whatsoever of the orders of this Court. In another W.P. No.54146/2017 filed by Saqib Rasheed, an interim order was passed on 24.07.2017 in which the Federal

Ombudsman was restrained from proceeding with the matter yet despite issuance of the interim order, the orders of 4.8.2017 and 24.8.2017 were passed by the Federal Ombudsman. Learned counsel further argued that in the instant petition, repeated interim orders were passed by this Court, however, the Federal Ombudsman despite the warnings continued to proceed with the matter and ultimately passed judgment on 18.12.2017. Learned counsel argued that this is in total defiance of the orders of this Court which attitude was also displayed earlier by the same Federal Ombudsman in the Salim Javed Case. While relying on the said judgment, learned counsel argued that the question of jurisdiction has been decided, therefore the Federal Ombudsman could not proceed with the matter.

4. Respondent No.5 in person argued her case. She stated that she filed a complaint before the Bank, however, they did not respond to her complaint. She then filed a complaint before the Provincial Ombudsman, however, subsequently withdrew it on 22.6.2017 believing it to be a matter for the Federal Ombudsman. She then filed a complaint before the Federal Ombudsman, who proceeded with the matter and at that time she had no knowledge of the Salim Javed Case. She argued that the Bank is a trans-provincial entity and as per the law is governed by Federal law, hence the Federal Ombudsman has jurisdiction in the matter. She also stated that this case is distinguishable from the Salim Javed Case, which was a case of an advocate whose offices are in Lahore, hence the court concluded that in such cases jurisdiction vests with the Provincial Ombudsman.

5. On behalf of the Federal Government Mr. Nasar Ahmad, DAG argued that the Federal Ombudsman has jurisdiction to entertain all complaints which have a federal character including complaints of trans-provincial organizations. He explained that the Provincial Ombudsman cannot exercise jurisdiction over a federal organization or its officers as they transcend the provincial boundaries and can be transferred out of the Province at any time rendering the claim before the Provincial Ombudsman as redundant. Further explained that the Salim Javed Case did not take these factors into consideration as the issue was with a local advocate. He further argued that the Federal Legislative List, Item No.13 provides for Federal Ombudsman, meaning thereby that if the subject matter in which a Federal Ombudsman is to be created falls within the domain of the Federal Government than the Federal Government is competent to make a Federal Ombudsman. In this case, the subject matter pertains to harassment at the work place for which the Federal Government has ratified several international conventions and treaties. Furthermore in terms of the dicta laid down by the august Supreme Court of Pakistan in Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others (2018 SCMR 802) ("NIRC case"), jurisdiction lies with the Federal Ombudsman.

6. The stance of the Province/Respondent No.3 as submitted by Mrs. Samia Khalid, Additional Advocate General and Mr. Anwaar Hussain, Additional Advocate General is that jurisdiction vests with the Provincial as well as the Federal Ombudsman. It is argued that the complainant has a choice of forum based on convenience as well as cause of action. In the event that the organization is a federal organization, the Provincial Ombudsman can still hear the matter and present its recommendations to the federal government. Reliance is placed on

Article 141 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") to urge the point that the Parliament can make laws for the whole or any part of Pakistan and that the Provincial Government shall ensure its compliance. Further argued that even after the Province adopted the 2010 Act in the year 2012, the 2010 Act still holds the field, meaning that jurisdiction continues to vest with both Ombudsman. It is also argued that both the Federal and Provincial laws are beneficial legislation, hence the doctrine of convenience is applicable and if considered necessary the place of occurrence can be the place where the complaint is filed.

The law and its purpose

7. The 2010 Act was promulgated as Act No. IV of 2010 and notified in the official gazette on 11.3.2010. In terms of its preamble it is an Act to make provisions for the protection against harassment of women at the workplace. Harassment is defined in Section 2(h) of the 2010 Act describing certain kinds of behaviour and attitude to be harassment because it causes interference with work performance or because it creates an intimidating, hostile or offensive work environment. The law is premised on the fundamental right of equal opportunity, for both men and women, to earn their livelihood and in furtherance of this right an obligation has been created on the employer at the workplace to create a safe working environment where both men and women can contribute and work efficiently and safely without discrimination and harassment.

8. The 2010 Act was passed in pursuance of Pakistan's obligation under the Universal Declaration of Human Rights ("UDHR"), the Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW"), the International Labour Organization Convention 100 ("ILO 100") which is the Convention for Equal Remuneration for Men and Women for Work and Convention 111 ("ILO 111"). Pakistan ratified all the above mentioned treaties and conventions which provide equal opportunity at the workplace and necessitate a safe work environment. The 2010 Act extends to the whole of Pakistan. It defines the term 'Employer' to mean an organization, a person or body of persons whether incorporated or not and includes an authority, office bearer or proprietor run by the Federal Government or Provincial Government. The word 'Organization' is defined to mean Federal or Provincial Government Ministry, Division or a Department, a corporation or any autonomous or semi-autonomous body and medical institutes and faculties established or controlled by the Federal or Provincial Government or the District Government or privately managed and includes private sector organization and institutions. The term 'workplace' defines the place of work or the premises where the activity of the organization or the employer are carried out and includes work at the premises or official activity outside the office. Hence the 2010 Act is applicable over the entire gambit of workplace, employer and organization including all employees, organization and workplace in the public and private sector. In terms of Section 7 of the 2010 Act, the respective Federal and Provincial Governments are to appoint an Ombudsperson at the Federal and Provincial level. On 5.1.2013 the Government of Punjab adopted this law which is called the Punjab Protection Against Harassment of Woman at the Work Place (Amendment) Act, 2012 (III of 2013). Effectively the Provincial Assembly adopted the federal law

with some changes so as to make it functional at the provincial level. Hence there is a federal law and a provincial law on the subject of protection against harassment of women at the workplace.

9. The basic issue in these petitions is with respect to the jurisdiction of the Federal Ombudsman and the Provincial Ombudsman and in particular whether Respondent No.5, Amna Tahir was to file her complaint before the Provincial Ombudsman or the Federal Ombudsman. In terms of the Salim Javed Case the Federal Ombudsman does not have jurisdiction to hear the complaint of Respondent No.5 as the matter falls within the ambit of the Provincial Ombudsman. The facts of the Salim Javed Case are that a female advocate filed a complaint against advocate Salim Javed before the Federal Ombudsman. The respondent in that case objected to the assumption of jurisdiction by the Federal Ombudsman as it was his case that the cause of action arose in Lahore, hence the Provincial Ombudsman was competent to hear the complaint. The opinion of the Court is that the Federal Ombudsman exercises jurisdiction only to the extent of the federal capital area and jurisdiction in all other situations vests with the Provincial Ombudsman. The Court concluded that the federal law lost its federal character and stands converted into a provincial law after the 18th Amendment. For ease of reference relevant paragraphs are reproduced hereunder:

> 8. I have considered the arguments addressed at the bar and have examined the law. The fundamental constitutional cum legal question that requires determination by this Court is the scope of Article 270AA(6) of the Constitution and the effect of the omission of the Concurrent List on the nature and character of the existing federal law. In the present facts, the Court has to determine the extent of jurisdiction enjoyed by the Federal Ombudsman under the Federal Act. In other words, whether Federal Ombudsman, under the Protection Against Harassment of Women at the Workplace Act, 2010 can assume jurisdiction over a complaint in which the cause of action arose in Punjab or whether, in such like matters, the jurisdiction vests with the Provincial Ombudsperson under the Punjab Protection Against Harassment of Women at the Workplace Act, 2012 ("Provincial Act") post 18th constitutional amendment.
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> 9. The Federal Act was promulgated on 11.3.2010 with jurisdiction extending to the whole of Pakistan under Section 1(2) of the Federal Act. Constitution (Eighteenth Amendment) Act, 2010 was introduced on 20.4.2010. The said amendment omitted the Concurrent List from the Fourth Schedule to the Constitution, thereby enlarging and expanding the legislative domain of the provincial legislature and more importantly reinvigorating the constitutional theme of federalism and provincial autonomy. The preamble to the Amendment Act echoes the promise to establish "a Federal ... State wherein ... the Provinces have equitable share in the Federation." Admittedly, the Federal Act drew its legislative competence from entry 25 i.e. social welfare, of the erstwhile Concurrent List. Post 18th Amendment, this area stands devolved onto the Provinces. Under Article 270AA(6) of the Constitution, the Federal Act remains in force (as a Provincial Act, as discussed later) irrespective of the omission of the Concurrent List until

such time that the Federal Act is altered, repealed or amended by the Competent Authority (legislature). Any such alteration or amendment in the law by the competent legislature does not affect its continuity and the law continues to be in force, albeit, as a provincial law, not because of the alteration or amendment but because of the constitutional declaration under the 18th amendment. It is only on repeal that the law comes to an end.

10. The Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act, 2012 (Act III 2013) has amended and altered the Federal Act (interestingly retaining the same title). It is actually the constitutional declaration of devolution, the underlying constitutional theme of federalism and provincial autonomy under the 18th Amendment which has metamorphosed the Federal Act into a Provincial Act. Alteration and amendment by the competent provincial legislature is a legislative exercise to align the law according to the wishes of the provincial legislature and has no bearing on the character of the law which already stands transformed into provincial law by the constitutional declaration on the promulgation of the Amendment Act.

11. Considering it from another angle, if the federal law under Article 270AA (6) can only be subjected to alteration, amendment and repeal by the provincial legislature, it means that the Federal law has lost its federal character and stands transformed into a Provincial law. What if the appropriate legislature does not carry out any amendment or alteration in the federal law, it still automatically stands converted into provincial law and remains in force as such. This is also because with the omission of the Concurrent List, the federal legislature looses its legislative fiat and command over the areas in the Concurrent List to the provincial legislature and as a consequence the federal law is deprived of its federal character. It is important to underline, that with the legislative shift from federal to provincial, the executive authority, under Article 97 also gets realigned and changes hands from federal executive to the provincial executive.

12. The Amendment Act, as well as, the Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act, 2012 constitutionally trims the Federal Act and restricts its jurisdiction to territories of Pakistan that fall outside the Provinces in terms of Article 1(2) of the Constitution. The continuance of the Federal Act in federal areas finds support under Article 142(d) of the Constitution that provides that the Federal Legislature has the exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province. The territorial jurisdiction of the Federal Act under Section 1(2) extends to the whole of Pakistan. This geographical extent has to be pruned according to the constitutional mandate under the 18th amendment. The best interpretational tool to apply is that of reading down. Reliance is placed on Messrs Chenone Stores Ltd. through Executive Director (Finance Accounts) Federal Board of Revenue through Chairman and 2 others (2012 PTD 1815) and Nadeem Asghar Nadeem and others v. Province of the Punjab and others (2015 CLC 1509). Therefore, in order to align the Federal Act with the constitutional

scheme, section 1(2) of the Federal Act is read down thereby limiting the extent of the Federal Act to areas which do not form part of any province. Reliance is also placed on Syed Imran Ali Shah v. Government of Pakistan and 2 others (2013 PLC 143).

13. The complaint filed by respondent No.2 on 14.9.2015 is based on cause of action arising in Lahore, the alleged accused also reside in Lahore, therefore, the jurisdiction to entertain and hear the complaint of respondent No.2 is with the Provincial Ombudsperson under the Provincial Act and the Federal Ombudsman has no jurisdiction to entertain the said complaint. The impugned judgment dated 4.1.2016 passed by the Federal Ombudsman along with all the prior orders assuming jurisdiction in the matter are hereby declared to be unconstitutional, illegal and without lawful authority and therefore set aside. The complaint shall be deemed to have been returned to respondent No.2, who may file the same before the Provincial Ombudsperson, if so advised. Considering that the Federal Ombudsman has no jurisdiction to entertain the complaint, other grounds agitated by the petitioners need not be gone into.

10. The findings of the Court are based on the understanding that the subject of harassment against women has devolved onto the Provincial Government post 18th Amendment. The Court considered the subject matter of harassment against women to be covered under Item No.25 of the Concurrent Legislative List ("CLL") being Population, Planning and Social Welfare. As the CLL was abolished by way of the 18th Amendment on 20.4.2010 all areas provided for under the CLL devolved on to the Provinces. Consequently the Court concluded that jurisdiction vests with the Provincial Ombudsman and only to the extent of the federal capital territory, jurisdiction vests with the Federal Ombudsman. We have considered the reasoning advanced in the Salim Javed Case, however we are not persuaded by the same. Harassment, whether verbal or physical is a behavioral issue that adversely affects the work environment. It manifests itself in many different forms of unethical and unwelcomed behaviour which renders the workplace hostile or offensive. Hence it violates the right to a safe and healthy work environment. The right to work is a multifaceted right which is recognized under different international treaties and conventions for creating a safe work environment especially for women. Article 23 of UDHR declares the right to work and the right to favourable conditions of work as a human right. Article 11 of CEDAW specifically requires States to ensure women have equal work opportunity and safe working conditions. As Pakistan has ratified these treaties and conventions it is obligated to protect the right to work and to ensure a favourable work environment. Since the 2010 Act was promulgated pursuant to Pakistan obligations under the international treaties and conventions, the subject matter of protection of the workplace for women falls under Item 3 read with Item 32 of the Federal Legislative List of the Constitution which includes implementing international treaties and conventions. It is also noted that harassment laws aim to regulate behaviour and attitudes which can be subjected to criminal punishment as well as civil liability. Section 509 of the Pakistan Penal Code, 1860 ("P.P.C.") criminalizes behaviour conduced with the intention of unreasonably interfering with an individual's work performance or behaviour which

creates an intimidating hostile or offensive work environment. Therefore the subject of harassment at the workplace being a crime under the P.P.C. means that Parliament and the Provinces both are competent to make laws with respect to the crime, procedure or evidence. Hence we find that the subject of protection of women from harassment does not fall under 'population, planning and welfare' of the CLL, rather it falls under the federal domain consequent to its international obligations and to the extent that the subject relates to criminal law.

11. We also find that the Salim Javed Case is not applicable to this case because the issue of trans-provincial organization was not taken into consideration by the Court in that case. This issue was considered by the august Supreme Court of Pakistan in the NIRC case at great length. The term 'trans-provincial organization' means an organization which operates at a trans-provincial level, that is they operate in more than one province. In terms of the NIRC case the federal legislature has extra territorial authority to legislate on matters which pertain to trans-provincial organizations. The Court relied on Item No.13 in Part II of the Federal Legislative List of the Constitution which provides for inter-provincial matters and coordination, meaning that, the Federation has to make laws relating to inter-provincial matters. Therefore in the NIRC case, the august Supreme Court of Pakistan concluded that the federal legislature has extra territorial authority to legislate, however the same authority does not lie with the provincial legislature. The august Supreme Court of Pakistan also held that in order to preserve and regulate a right which transcends provincial boundaries, only the Federation is competent to legislate on such matters and Item Nos. 58 and 59 of the Federal Legislative List provide the relevant entries to bring it in the federal domain. The Provincial legislature does not have extra territorial legislative competence, therefore it cannot legislate with regard to rights which transcend its provincial boundaries. In the NIRC judgment, the august Supreme Court of Pakistan held that the federal legislature is competent to legislate on all matters in order to discharge its obligations created under international treaties and conventions. In the case, the matter involved was with respect to trade unions and labour disputes, hence it was found that it was a federal obligation created under the International Labour Organization Convention, hence covered under Item Nos.3 and 32 of the Federal Legislative List. In the case of a trans-provincial establishment, the august Supreme Court of Pakistan held that the Federation is competent to interfere in such matters because trans-provincial establishments transcend provincial boundaries. Therefore we are of the opinion that the wisdom enumerated in the NIRC case is applicable to the instant case. Where the organization is clearly a trans-provincial organization, as in this case as it is a bank with branches all over Pakistan, the Federal Ombudsman is competent to look into the complaint of Respondent No.5. The jurisdiction of the Federal Ombudsman is not limited to the federal capital area, rather the Federal Ombudsman has jurisdiction in relation to all employers, organizations, institutions and workplaces which have a federal character or are established under a federal law or are directly consequent to an international obligation under an international treaty or convention. The Federal Ombudsman

jurisdiction cannot be limited to the federal capital area and can be exercised all over Pakistan over a federal employer, institution, organization or workplace.

12. The question which needs consideration is whether the Provincial Ombudsman has concurrent jurisdiction with the Federal Ombudsman on account of the fact that the harassment committed or complainant reside in the province who sought to complain before the Provincial Ombudsman. Although Mrs. Samia Khalid, Additional Advocate General and Mr. Anwaar Hussain, Additional Advocate General argued that being beneficially both the Provincial and Federal Ombudsman have jurisdiction, however, we are of the opinion that the intent of the law is to create a forum where harassment can be reported, inquired and penalized. If both the Provincial and Federal Ombudsman are given jurisdiction then there may be instances where the Provincial Ombudsman will have to deal with a complaint against a trans-provincial organization, or where the employer or the organization is federal in character making it difficult for the Provincial Ombudsman to proceed with the complaint or to impose penalty on the employer or organization since it falls within the federal domain. Under the circumstances, we hold that if the employer or organization and its workplace falls strictly within the territorial boundaries of the Provincial Ombudsman, then jurisdiction vests with the Provincial Ombudsman and where the employer or organization transcends provincial boundaries such as in this case then jurisdiction vests with the Federal Ombudsman. To clarify we add that for the reasons stated herein we disagree with the findings in the Salim Javed Case that the Federal Ombudsman jurisdiction is limited to the federal capital area as the Federal Ombudsman is competent to hear complaints related to trans-provincial organizations, institutions, employers and workplace.

13. So far as the proceedings conducted by the Federal Ombudsman, we find that they were done in utter disregard of the orders of this Court. On 24.7.2017 an order was passed in W.P. No.54146/17 directing that the proceedings before the Federal Ombudsman shall remain stayed. She ignored the order and proceeded with the matter. In another order dated 9.10.2017 passed in W.P. No.71556/17 she was again restrained, however she proceeded with the case. Thereafter a series of orders were issued by the Federal Ombudsman including the final order on 18.12.2017 without any consideration of the orders of this Court. It was only when the Court restrained Respondent No.5 from proceeding with the execution of the final order that the proceedings were stopped. We note that the Salim Javed Case categorically addressed the issue with reference to the Federal Ombudsman obligation and to obey the orders of the High Court. However, displaying the same attitude as was discussed in that case, the Federal Ombudsman (Justice (R) Yasmin Abbasey) showed no regard whatsoever to the orders of this Court. Under the circumstances all orders passed after 4.8.2017 including the final order dated 18.12.2017 are illegal and void, hence set aside. The complaint of Amna Tahir shall be treated as pending before the Federal Ombudsman who shall decide the same in accordance with law, expeditiously, after hearing all necessary parties.

14. In view of the aforesaid, W.Ps. Nos.71556/2017, 54146 and 60723 of 2017 are allowed to the extent that the impugned orders and the final order dated 18.12.2017 passed by the Federal Ombudsman are set aside. However, the parties

are directed to appear before the Federal Ombudsman on 4.10.2018 so as to proceed with the compliant on its merit. The Registrar of this Court is directed to inform the Registrar of the office of the Federal Ombudsman of the orders of this Court.

MWA/I-11/L Petition allowed.

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