

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

CP No.D-6107 of 2020

Muhammad Rizwan Dalia, Syed Moonis Abdullah Alvi,
Col (R) Wahid Asghar and Khalid Rafi.....Petitioners

Versus

1. Ombudsman (The Protection Against Harassment of Women at the Workplace) Sindh;
2. Muhammad Khan Bhatti, Assistant Director at the Ombudsman (The Protection Against Harassment of Women at the Workplace) Sindh.
3. Ms. Mahreen Aziz Khan daughter of Aziz-ur-Rehman Khan (Late).....Respondents

1. For hearing of CMA No.26254/2020
2. For hearing of main case.

Date of Hearing: 13.09.2021

Petitioners through Mr. Abid S. Zuberi, Advocate
Respondents No.1 and 2 through Mr. Abdul Jalil Zubedi, AAG
Respondent No.3 through Mr. Raj Ali Wahid Kunwar, Advocate

JUDGMENT

AHMED ALI M. SHAIKH, CJ.- Through the medium of instant Petition Petitioners, members of Senior Management of K-Electric (Private) limited (the “K-Electric”), have called into question the show cause notice dated 24.11.2020 under Section 8(2) of the Protection against Harassment of Women at the Workplace Act, 2010, (the “2010 Act”) issued by the Assistant Director, Ombudsman, Respondent No.2 herein, in complaint No.30(KHI)/2020 directing the Petitioners to appear and submit written defence within five days of the receipt of the Notice.

2. Brief facts giving rise to this Petition are that in October, 2019, the K-Electric appointed the Respondent No.3 as a Consultant vide Agreement dated 11.11.2019 under which the Respondent No.3 was to work on a four point agenda i.e. covering gap analysis, crisis communications and media training and workshops of employees and senior management at K Electric. The task assigned to the Respondent No.3 was defined in Schedule A to the Agreement. In terms of Clause 2 thereof, the appointment of the

Respondent No.3 was for a period of thirty-five business days commencing from 11.11.2019, renewable with mutual consent of the parties. Later, said Agreement was terminated as on 26.12.2019 the Respondent No.3 was appointed as full time employee on contract basis as the Chief Marketing & Communication Officer. Per pleadings, on 14.10.2020 the services of the Respondent No.3 were terminated subsequent to which in November, 2020 Respondent No.3 filed a complaint under Section 8 of the 2010 Act before the Respondent No.1 alleging therein that in the first week of her employment with the K-Electric, Petitioner No.2 Syed Moonis Abdullah Alvi called her alone to discuss something. It is alleged that the Petitioner No.2 asked the Respondent No.3 complainant to accompany him either for coffee or dinner and he will pick her up from latter's residence. Again in June, 2020, the Petitioner No.2 commented on her figure as under:-

“oh you've lost weight from your tummy and kept your shape (feminine curves) how did you do that.”

3. The Respondent No.3/Complainant further alleged in the complaint that in January when her probation was to be completed the Petitioner No.2 extended it on the ground that she was not seeing him enough. The Petitioner No.1 Muhammad Rizwan Dalia also started advising the Respondent No.3 to go the office of the Petitioner No.2 (“Chehra dikhayein unko rozana”). In the complaint she mentioned details of the harassment, intimidation, comments and treatment allegedly being meted out to her in the office. To further substantiate her allegation, the Respondent No.3 also annexed audio recording saved in a mobile phone memory card, annexure G to the complaint, between her and Petitioners in the office of the CEO. She also reproduced the transcript in paragraph No.42 and annexed its copy separately with the complaint.

4. At the very outset, learned counsel for the Petitioners raised a question as to the maintainability of the Complaint and legality of the proceedings pending before the Respondent No.2. He submits that since the Respondent No.3's services were terminated by the K Electric prior to filing complaint before the Respondent No.1, the impugned show cause notice issued by the Respondent No.2 is illegal, without jurisdiction and malafide. According to him the impugned notice was received by the Petitioners on 26.11.2020 calling upon them to file written defence within five days of the receipt of the notice whereas the complaint was fixed for hearing on 30.11.2020; thus provision of Section 8(2) of the 2010 Act, which provides

five days period for submitting written defence is violated. He went on to say that the aforesaid act on the part of Respondents No.1 and 2 prima facie reflects that the impugned notice was issued in post-haste manner without applying judicial mind and depriving the Petitioners of the opportunity to prepare and submit their written defence. Emphasizing on the aforesaid aspect, counsel further contended that the very filing of the Complaint, issuance of the notice and fixation of hearing on 30.11.2020 amounts to violation of the provisions of the 2010 Act. He referred to the Section 2 of the 2010 Act, which also provides definitions of "harassment" and "employee" respectively. Per counsel as per Section 2(f) the "employee" means a regular or contractual employee whether employed on daily, weekly, monthly or hourly basis, and includes an intern or an apprentice" whereas in terms of Section 8 any employee shall have the option to prefer a complaint either to the Ombudsman or the Inquiry Committee. Per counsel since the Respondent No.3 was no more in the employment with K Electric her complaint ought to be dismissed without even looking into the allegations of harassment, which even otherwise are evasive, false, fabricated and after thought levelled with the sole object to get herself reinstated in service, which fact was not considered by the Respondent No.1. He submitted that a bare reading of the provisions of the 2010 Act would clearly show that any employee during his employment with the employer can file a complaint thereunder either before the Ombudsman or the Inquiry Committee. However, in the instant case, the Respondent No.3 after termination of her services with the K-Electric filed the subject complaint.

5. Mr. Abid S. Zuberi, learned Counsel for the Petitioners further emphasized that the contents of the complaint badly lacks the ingredients of "harassment" which means any unwelcome sexual advance, request for sexual favours 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. He submitted that it is quite strange and does not appeal to reason why the Respondent No.3 remained mum and did not prefer/file any complaint either to the Ombudsman or the Inquiry Committee while in service. However, once her services were terminated she as a counter blast filed the complaint on baseless allegations, which are nothing but the brainchild of the Respondent No.3 with the sole purpose either to get reinstatement in

service or to malign the Petitioners, who hail from respectable families and enjoy good reputation in the society. He further argued that the basic grievance of the Respondent No.3 pertains to her termination from service however, under the garb of alleged harassment she has attempted to twist the facts purposely in order to gain sympathy and to malign and humiliate the Petitioners who possess unblemished career.

6. While highlighting the conduct of the Respondent No.3, learned counsel submitted that even before filing the Complaint and issuance of show cause notice by the Respondent No.2, contents of the complaint were made public and circulated on the social media. With regard to the question of maintainability of the proceedings before the Respondent No.2, learned counsel submitted that the Respondent No.3 by means of the complaint also sought declaration that she was wrongfully terminated from the service of the K-Electric, which relief is out of purview of the 2010 Act, the domain and powers of the Respondent No.1. According to him, the Respondent was in essence aggrieved with the termination of her services and the allegations concerning harassment raised in the complaint are fictitious, tainted with malice and nothing but a figment of her imagination. Referring to Section 7 of the 2010 Act, learned counsel contended that Ombudsmen are to be appointed by the Federal and Provincial Governments, and the K-Electric being a trans-provincial entity, is regulated by the Federal Law, therefore, the Respondent No.1 being a Provincial Ombudsman would have no jurisdiction in instant case, therefore, impugned show cause notice is liable to be set aside.

7. While concluding his arguments, counsel for the Petitioners submitted that in terms of Section 8 of the 2010 Act, an aggrieved employee shall have the option to prefer a complaint either to the Ombudsman or the Inquiry Committee and though the departmental Inquiry Committee was functional, the Respondent No.3 while in employment did not raise the allegations of harassment to any member of the Committee.

8. Per contra, Mr. Raj Ali Wahid Kunwar, learned counsel for the Respondent No.3 while rebutting the contentions advanced at the bar by the learned counsel for the Petitioners contended that the Respondent No.3 did complain to the Board of Directors about the harassment and bad language used by the Petitioner No.1 and as a sequel thereto, a month after, in October she was fired from the job. He then referred to the Schedule to

the 2010 Act, describing Code of Conduct for protection against harassment of women at the workplace and submitted that the Code postulates three significant manifestations of harassment in the work environment, namely: (a) Abuse of authority; (b) Creating a hostile environment; and (c) Retaliation. He submitted that an employee can complain about a demand by a person in authority, such as a supervisor, for sexual favour 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. He further submitted that clause (iv) of the Code of the Conduct provides that a complainant may report an incident of harassment informally to her supervisor, or a member of the Inquiry Committee, in which case the supervisor or the Committee member may address the issue at discretion in the spirit of the Code and the request can be made orally or in writing. Learned counsel while highlighting the contents of paragraphs No.27 and 39 of the complaint submitted that during employment the Respondent No.3 did complain to the Petitioner No.1 and Board Members of the K-Electric regarding harassment by the CEO.

9. Learned counsel while referring to the various provisions of the 2010 Act submitted that the Act does not exclude a former employee from filing a complaint and submitted that the expressions used in a statute should ordinarily be understood in a sense in which they best harmonize with the object of the statute and which effectuate the very object of the legislature. He further submitted that the alleged acts of harassment were done during employment of the Respondent No.3 with the K-Electric. He also submitted that even otherwise the 2010 Act does not provide any limitation for filing a complaint and where no limitation period is provided complaint can be filed if not considerably delayed. In the instant case, the Respondent No.3 was terminated from the employment in October and in November, 2020 she preferred the complaint. He emphasized that it is settled principle of law that a Statute has to be read as a whole, thus it is to be interpreted beyond the relationship of employee and employer as long as the harassment did take place at the workplace. Per counsel the alleged acts of harassment took place while the Respondent No.3 was in employment of the K- Electric. He submitted that haplessness of the Respondent No.3 could be gathered from the circumstances that on the one hand she was being continuously harassed not by an ordinary co-employee but by the CEO of the Company and she made oral complaint, as permissible under the law, even to the Board Members but ultimately she was deprived from the butter and bread.

According to him, this aspect could not be overlooked in the likewise situation and such occasions/acts of sexual harassment if gone unnoticed majority of the women will go through the similar trauma and remain quiet just to save their source of livelihood. He during arguments very candidly conceded that apart from the prayer regarding wrongful termination of the Respondent No.3 from service of the K-Electric, the Respondent No.1 is well within his jurisdiction to entertain the complaint and issue show cause notice. With regard to the jurisdiction of the Respondent No.1, he submitted that operations of K- Electric, a private limited company, having head office in Karachi, and distributing electricity to some parts of Balochistan is not a trans-provincial organization therefore Federal Ombudsman has no jurisdiction in the matter.

10. The learned AAG supporting the impugned show cause notice adopted the arguments advanced by the learned counsel for the Respondent No.3.

11. We have heard the learned counsel for the Petitioner, Respondent No.3 and AAG and perused the material available on record. The controversy involved in instant case revolves around the 2010 Act. Besides, the learned counsel for the Petitioner at the very outset raised plea that as the Respondent No.3 was an ex-employee the complaint in terms of Section 8 of the 2010 Act is not maintainable. With profound respect the intent of the legislature in promulgating the 2010 Act is to provide a safe and secure working atmosphere to women and to protect them against harassment having sexual nature. The object behind this legislation is to recognize the fundamental rights of citizens to dignity of person. Inter alia, section 8(1) provides options to any employee to prefer a complaint either to the Ombudsman or the Inquiry Committee while subsections (c), (f) and (h) to Section 2 ibid provides following definitions of "complainant", "employee" and "harassment" respectively:

"(c) "Complainant" means a woman or man who has made a complaint to the Ombudsman or to the Inquiry Committee on being aggrieved by an act of harassment;

(f) "Employee" means a regular or contractual employee whether employed on daily, weekly, monthly or hourly basis, and includes an intern or an apprentice;

(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.”

12. The conjunctive reading of the Section 8(1) and the three quoted subsections with preamble/title of the 2010 Act clearly provides that a woman, employed on contractual, daily, hourly or monthly basis including an intern/apprentice, being aggrieved by an act of harassment at the workplace either in the shape of sexual advance or request for sexual favour or verbal or written communication or physical conduct of a sexual nature etc., may prefer a complaint to the Ombudsman or the Inquiry Committee. The 2010 Act provides no bar that a woman only during her employment can file complaint regarding alleged sexual harassment at the workplace. It is pertinent to mention here that the acts of harassment as claimed by the complainant had allegedly taken place in the office of the K-Electric during the period that the Respondent No.3 was working there.

13. Regarding second contention of the learned counsel that the contents of the complaint lacks the ingredients of harassment as defined in the 2010 Act and the basic grievance of the Respondent No.3 is to get herself reinstated in the service. In the complaint the Respondent No.3 sought three prayers out of which one pertained to declaration that she was wrongfully terminated. In support and to fortify her stand of sexual harassment at the workplace the Respondent No.3 alongwith her complaint has filed multiple transcripts of messages, few highlighted in the preceding paragraph herein. The Schedule to the 2010 Act provides code of conduct for protection against harassment of women at the workplace and three significant manifestations of harassment in the work environment i.e. (a) Abuse of Authority; (b) Creating a hostile environment; and (c) Retaliation. The latter category defines that “the refusal to grant a sexual favour 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 behaviour is also a part of the harassment.” However, as the matter is subjudice before the Ombudsman and no evidence is recorded as yet, we refrain from expressing ourselves. Nonetheless, it is settled that the learned Ombudsman has no jurisdiction either to reinstate or to inquire into and give finding as regards the disciplinary proceedings against an employee

of an organization as such matters fell beyond the domain/authority and jurisdiction of the Ombudsman under the 2010 Act.

14. So far the contention of the learned counsel that against the alleged acts of harassment sexual in nature, taken place during employment, she did not raise voice or file complaint but later as a counterblast raised her grievances before the learned Ombudsman, the same is seemingly untenable. The Respondent No.3 in her complaint claimed that during employment in the months of July and September, 2020 she verbally complained to the Petitioner No.1 and the Board of Directors of the K-Electric but in October, 2020 her services were terminated conceivably in retaliation. She accordingly in November, 2020 filed the complaint before the learned Ombudsman.

15. Reverting to the submission of the learned counsel for the Petitioners that the K-Electric is a trans-provincial organization and is in fact regulated by federal law, therefore, Federal Ombudsman has jurisdiction rather the Respondent No.1, Provincial Ombudsman of Sindh. There is no cavil to the proposition that previously the K-Electric was a state-owned corporation. It was privatized in the year 2005. Perusal of the Consultancy Agreement dated 11.12.2019 entered into between the K-Electric and the Respondent No.3 reveals that the K-Electric is engaged in generation, transmission and distribution of power within the metropolitan city of Karachi and some part of Balochistan and Sindh provinces. Even it is not generating, transmitting and distributing power to the entire Sindh province and in Hyderabad, Sukkur, Larkana different electric supply companies are supplying power, thus, it cannot be termed as a trans-provincial organization. As the alleged incident complained of, the complainant's abode and the K-Electric, mainly engaged in generation, transmission and distribution of power within the metropolitan city of Karachi, and its workplace falls within the territorial limits of the Provincial Ombudsman, the jurisdiction vests with the Provincial Ombudsman to entertain and decide the complaint filed by the Respondent No.3.

16. The learned counsel for the petitioners places reliance on the Judgment of the Islamabad High Court in the case reported as Mazhar Hussain versus President of the Islamic Republic of Pakistan 2018 MLD 327. With utmost respect, we are unable to agree with the conclusion drawn by the learned single Judge of the Islamabad High Court in the aforementioned

case in as much as the definition of “harassment” in terms of Section 2(h) of the 2010 Act, as reproduced hereinabove, clearly envisages that even a request for sexual favour, etc that “is made a condition for employment” falls within the scope of that term. From this, it can be gathered that the law is intended to even encompass a situation arising prior to the relationship of employment being formed. As such it beggars’ belief that an aspiring candidate for employment subjected to such harassment at the pre-employment stage would have to endure the same and succumb thereto in order to secure employment for bringing her/himself within the definition of “employee” so as to then be able to agitate the matter before the Ombudsman. As such, where pre-employment harassment is envisaged as a cause, we are not convinced by the submission that a complainant cannot invoke the jurisdiction of the Ombudsman regarding harassment that allegedly occurred during course of employment, after such relationship has been terminated.

17. Lastly, as to the prayer that the underlying Complaint and the show cause notice issued by the Respondent No.2 be quashed is concerned, we, in view of the foregoing, are of the opinion that it would be premature to pass such orders as evidence in the matter is yet to be recorded and soon after issuance of the impugned show cause notice the Petitioners/accused have approached this Court and since then no progress has been made in the proceedings pending before the Respondent No.2. The Petitioners are directed to file their reply to the show cause notice, which will be considered on its own merits.

Upshot of the above discussion is that instant petition merits no consideration and is accordingly dismissed.

Judge

Chief Justice