Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 2593 OF 2015

Jubilee Life Insurance Company Limited

Vs

The Federal Government through Secretary Law, etc.

PETITIONER BY:	Mr. Mudassir Bashir Awan, Advocate.
RESPONDENTS BY:	Raja Saad Sultan, Assistant Attorney General. Mr. Ikram Haider, Advocate for respondent No.3.
DATE OF HEARING**:**	01.03.2021.

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BABAR SATTAR, J.- The petitioner is aggrieved by order of respondent No.2/Federal Ombudsman for Protection Against Harassment of Women at Workplace, Islamabad (**"Federal Ombudsman")** appointed under Protection Against Harassment of Women at the Workplace Act, 2010 ("**Federal Act**") whereby it was ordered that respondent No.3 be reinstated in the employment of the petitioner ("**Impugned Order**").

2. Learned counsel for the petitioner stated that respondent No.3 was involved in stealing of a cheque in the amount of Rs.30,000 and facilitated encashment during her employment with the petitioner when she was discharging her duties at Habib Bank Limited (HBL) and was subsequently dismissed on the basis of inquiry dated 19.04.2013. That respondent No.3 filed a complaint

with the Police which was registered as FIR No. 205/2014 involving allegations of harassment against employees of HBL who purportedly interrogated her in relation to stealing and encashment of the cheque in question. The said FIR was cancelled on 19.02.2015 by the learned Magistrate First Class, Pattoki on the basis of report submitted by the Investigating Officer who found the allegations to be false and frivolous. That respondent No.3 then filed a complaint before the Banking Mohtasib who by order dated 23.02.2015 disposed of the complaint on the basis that it related to a service matter against the petitioner, which fall beyond the jurisdiction of the Banking Mohtasib. Respondent No.3 then filed another complaint before the Federal Ombudsman who passed the Impugned Order. Learned counsel for the petitioner stated that the Impugned Order is without jurisdiction for the following reasons:

> (i) After the establishment of the office of the Provincial Ombudsperson under the Protection Against Harassment of Women at the Workplace Act, 2010, in view of scheme of the respective laws the Federal Ombudsman had no jurisdiction in relation to an occurrence that took place in Punjab. The learned counsel relies on *Salim Javed Baig v. Federal Ombudsman* (2016 PLD 433 Lahore) and *SZABIST (Shaheed Zulfiqar Ali Bhutto Institute of Science and Technology) through Authorized Representative v. Federal Ombudsman/ Ombudsperson through Registrar and 3 others* (PLD 2018 Sindh 581).
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> (ii) That the subject matter of the complaint relates to a service matter and does not fall within the definition of harassment under section 2(h) of the Act as no allegation of sexual harassment was levelled by respondent no.3 against the petitioner and consequently such complaint and its adjudication does not fall within the provisions of the Act

as enunciated by this Court in *Shahina Masood, etc. v. Federal Ombudsman Secretariat through Federal Ombudsman, and 2 others* (2020 PLC (CS) 186).

(iii) That the Federal Ombudsman had no jurisdiction to pass an order for reinstatement of respondent No.3 as such order does not fall within the list of penalties prescribed under section 4 of the Act.

(iv) The learned Ombudsman could only pass an order against individuals accused of harassment or a person responsible for oversight of the workplace but the learned Ombudsman did not pass any order against the individuals who had purportedly harassed respondent No.3 or the entity in whose premises respondent No.3 was situated at the time of the alleged incident and instead imposed a penalty on the petitioner who was not involved in the incident in any way.

3. It was submitted on behalf of respondent No.3 that she was harassed by the Branch Manager and Operations Manager at Habib Bank Limited's Omerabad Branch, Tehsil Pattoki, District Kasur in relation to the theft and encashment of a check in the amount of Rs. 30,000, for which she was not responsible. That respondent no. 3 was removed from service on the basis of a bogus inquiry conducted by the petitioner. That the instant petition is not maintainable as an adequate remedy in the form of a representation is competent against the Impugned Order of the Federal Ombudsman. That the petitioner did not object to the jurisdiction of the Federal Ombudsman during the proceedings conducted before the Federal Ombudsman and is barred from raising a jurisdictional objection at this stage. And that under the Punjab Office of the Ombudsman Act, 1997, the Ombudsman (Mohtasib) Punjab, only has jurisdiction in

relation to incidents of maladministration and not those of harassment.

4. Learned Assistant Attorney General who appeared on behalf of respondent No.1 did not defend the Impugned Order.

5. For purposes of determination of jurisdiction of respondent No.2, it will be useful to cite in detail the judgment of the learned Lahore High Court in *Salim Javed Baig vs. Federal Ombudsman* (PLD 2016 Lahore 433) where it decided that the Federal Ombudsman's jurisdiction is ousted in relation to events that emanate in a province and fall within the domain of the Provincial Ombudsperson under The Punjab Protection Against Harassment of Women at the Workplace Act, 2012.

> *"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 11.03.2010 with jurisdiction extending to the whole of Pakistan under section 1(2) of the Federal Act. Constitution (Eighteenth Amendment) Act, 2010 was introduced on 20.04.2010. 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 loses 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) v. 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 04.01.2016 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 had no jurisdiction to entertain the complaint, other grounds agitated by the petitioners need not be gone into.*

6. The said judgment was then relied upon by the learned Sindh High Court in ***SZABIST vs Federal Ombudsman*** (PLD 2018 Sindh 581) to hold that the act of the Federal Ombudsman to assume jurisdiction in relation to a matter that fell within the domain of the Provincial Ombudsman for Protection against Harassment of Women at Workplace at Karachi was unconstitutional and devoid of legal authority.

7. This Court is in agreement with the decision of the learned Lahore High Court in ***Salim Javed Baig*** to the extent that (i) Parliament promulgated the Federal Act prior to the promulgation of the Eighteenth Constitutional Amendment, which was protected under Article 270AA(6) of the Constitution, (ii) in exercise of its powers under Article 270AA(6), the provincial legislature, as the competent authority, amended the said Federal Act and promulgated the Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act, 2012, after which the office of the Federal Ombudsman appointed under the Federal Act was devoid of territorial jurisdiction in relation to acts transpiring within the territorial jurisdiction of the Province of Punjab.

8. This Court is however not necessarily in agreement with the opinion of the learned Lahore High Court in ***Salim Javed Baig*** regarding (i) metamorphosis of a federal law into a provincial law by virtue of a constitutional declaration to be inferred from the Eighteenth Constitutional Amendment, and (ii) automatic realignment of executive authority under a federal statute protected under Article 270AA(6) of the Constitution, for purposes of Article 97 of the Constitution, and its devolution to the provinces without any amendment in law by the competent authority, for the following reasons:

(i) After the Eighteenth Constitutional Amendment, legislative competence of the Parliament is limited to the Federal Legislative List and it cannot promulgate laws on subjects in the erstwhile Concurrent Legislative List. As the executive authority of the Federation extends to such subject matter in relation to which Parliament has the authority to make laws, it is arguable that the Federal Government no longer has the authority to exercise executive authority vis-a-vis areas falling within the abolished Concurrent List. Notwithstanding this, a statutory authority that continues to exist for being protected under Article 260AA(6) as a body corporate created under a valid federal law and not as a subordinate office or attached department of the Federal Government, would not automatically stand devolved to the provinces due to amendment in Article 142 of the Constitution and omission of the erstwhile Concurrent Legislative List.

(ii) The Eighteenth Amendment introduced Article 270AA (Declaration and Continuance of Laws etc.) prescribing transitional arrangements to strike the right balance between continuity and change and one reading of the Constitution could lead to the following conclusions:

a. Article 270AA(6) explicitly protects laws, rules and regulations already validly promulgated by

Parliament in exercise of its legislative mandate and states that the competent legislature can alter, amend and repeal an existing law. Article 270AA(8) provided a time-line of up to June 30, 2011 for devolution of the matters mentioned in the erstwhile Concurrent Legislative List by requiring the creation of an Implementation Commission;

b. Consequently, acts promulgated by Parliament pursuant to exercise of erstwhile legislative authority under the Concurrent Legislative List, and their continuance stands protected under Article 270AA(6) and it is only the "appropriate legislature" that is the "competent authority" to alter, amend or repeal these laws (as defined under Article 270AA(2) of the Constitution);

c. Had Parliament intended to vest in the Implementation Commission or the Federal Government the authority to devolve statutory bodies to the provinces, the Eighteenth Amendment would have stated so and the Implementation Commission would have discharged such obligation along with devolution of executive authority vested in the Federal Government, its subordinate offices and attached departments, as defined by the Rules of Business, 1973.

(iii) Federal laws passed by the Parliament have not automatically transformed into provincial laws as a consequence of the Eighteenth Amendment, which neither vests authority in the Federal Government nor in courts to adapt existing federal laws as provincial laws to undertake devolution of statutory bodies (such authority was vested in the Executive and the Judiciary through Article 268 of the Constitution at the time of promulgation of the Constitution of 1973 to facilitate transitional arrangements). And that such authority has been reserved

under Article 270AA(6) for provincial legislatures to the extent of their respective territorial competence.

(iv) Eighteenth Amendment transcribes the authority of the Federal Government for purposes of Article 97 and such limitation of authority has been given effect by the Implementation Commission created under Article 270AA that oversaw the devolution process. But that the Eighteenth Amendment does not automatically inscribe the term provincial government for federal government (in laws validly passed by Parliament in exercise of legislative authority under the erstwhile Concurrent Legislative List) wherever executive authority is conferred on the Federal Government under a statute. It remains for the provincial legislature to make such change in a federal law protected under Article 270AA to give it provincial character and endow executive authorities within the province with relevant authority under such law.

9. As this judgment relies on the ratio of ***Salim Javed Baig*** to hold the Federal Ombudsman lacks territorial jurisdiction in relation to matters that fall within the domain of the Provincial Ombudsman for Protection against Harassment of Women at Workplace, the aforesaid opinion regarding possible points of disagreement with the opinion rendered in ***Salim Javed Baig*** has been expressed. But as the question of scope of authority of the Federal Government under Article 97 read together with Article 270AA in the aftermath of the Eighteenth Amendment is not before this Court in the instant case, no definitive judgment is being passed re the scope of such authority, which can be decided in an appropriate case. In this regard, this Court is guided by principles for adjudication of constitutional questions summarized by the august Supreme Court in ***Lahore Development Authority v. Imran Tiwana*** (2015 SCMR 1739), wherein it was held, inter alia,

that*, "[i]f a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question" and that "the Court will not decide a larger constitutional question than is necessary for the determination of the case."*

10. The Impugned Order also suffers from jurisdiction defect from a subject-matter perspective. The conduct that falls within the definition of harassment under the Act and the mandatory sexual undertone of such conduct for it to fall within the subject-matter domain of the Federal Ombudsman was elucidated in detail by this Court in ***Shahina Masood vs. Federal Ombudsman Secretariat*** (2020 PLC (C.S.) 186) in the following terms:

> *"8. The Act of 2010 was enacted and notified in the official gazette on 11-03-2010. Its preamble declares the object and purpose of the legislation as providing for the protection against harassment of women at the workplace. Section 2 defines various expressions. The expression "harassment" has been defined in clause (h) of section 2 of the Act of 2010 as follows:*
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> > *"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."*
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> *"10. When the provisions of the Act of 2010 are read as a whole, it unambiguously shows that the public office of the Ombudsman has been established with a specific object and purpose i.e. to protect women against harassment as defined ibid and not merely harassment at workplace as understood in its ordinary dictionary meaning. When the definition of a particular expression has been given in a statute then its*

ordinary dictionary meaning becomes irrelevant nor can it be considered. The legislature is not expected to use an expression in a statute unnecessarily. If an enactment has defined an expression then it has to be construed by confining the interpretation solely to the language used therein. The purpose of a definition clause is to give certainty to the expression defined. The definition may either be extensive or restricted and exhaustive. It is extensive when the phrase 'includes' is used and exhaustive when it explicitly states what an expression 'means'. The expression harassment has been defined in section 2(h) of the Act of 2010 which has been reproduced above. The definition is exhaustive and not extensive. It explicitly refers to various phrases such as "unwelcome sexual advance", "request for sexual favours", "physical conduct of a sexual nature", "sexually demeaning attitudes". The later portion of the definition i.e. "other verbal or written communications 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 with such a request" cannot be read in isolation. It inevitably has a nexus with the nature of acts referred to in the earlier part of the exhaustive definition. The act, conduct or attitude essentially has to be sexual in nature to be covered under the definition of 'harassment' for the purposes of the Act of 2010. As an adjective, the expression sexual is related to 'the instincts, physiological processes and with physical attraction or intimate physical contact between two individuals'. It is, therefore, obvious that a gesture made towards another person with the intention of gaining sexual gratification would fall within the definition of 'harassment' in the context of the Act of 2010. For physical conduct to attract the consequences described in the Act of 2010 it has to be of a sexual nature. The legislature, through unambiguous language, has defined the expression 'harassment' and its *exhaustive meaning has been confined to acts, advances, requests, attitudes, conduct etc which are of a sexual nature. Depending on the facts and circumstances, harassment for the purposes of the Act of 2010 can be of different forms, verbal, non verbal or physical. The most crucial ingredient for determining jurisdiction of the Ombudsman is that the*

> *conduct, attitude or act etc complained of must be of sexual nature and the other factors mentioned in section 2(h) are also in existence. The legislature has obviously not intended to extend the scope of the Act of 2010 to the expression 'harassment' as it is understood in its ordinary sense explained in the dictionaries."*

11. In the present case, respondent no. 3 made no allegation of harassment against the petitioner. To the extent that respondent no.3 made any allegation of harassment, it was against two employees of HBL against whom no findings were recorded by the Federal Ombudsman in the Impugned Order. There were no allegations made against the petitioner or any of its employees that they sexually harassed respondent no.3. For that matter respondent no.3 also did not allege that the employees of HBL harassed her sexually. The learned Federal Ombudsman did not record any findings against the petitioner or any of its employees, and did not pass a reasoned order holding that respondent no.3 was harassed in terms of Section 2(h) of the Federal Act, and also did not impose any penalties that could have been affixed under the Federal Act. The acts complained of did not constitute sexual harassment on part of the petitioner as defined under section 2(h) of the Federal Act. It has already been discussed above that the acts that formed the subject-matter of the complaint before the Federal Ombudsman transpired in the Province of Punjab and fell beyond the territorial jurisdiction of the Federal Ombudsman.

12. In view of the ratio in ***Salim Javed Baig***, the learned Federal Ombudsman was vested with no jurisdiction to entertain the complaint as she was devoid of territorial jurisdiction in view of provisions of The Punjab Protection Against Harassment of Women at the Workplace Act, 2012 promulgated in the aftermath of the

Eighteenth Constitutional Amendment, and further the allegations in the complaint did also not fall within the definition of harassment for purposes of section 2(h) of the Act as enunciated by this Court in ***Shahina Masood***.

13. The Impugned Order thus suffers from foundational jurisdictional defects and is set aside for being void *ab initio* and of no legal effect. In view of the above this petition is **ALLOWED** with no order as to costs.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 26.03.2021.

JUDGE

Approved for reporting.

Saeed.