

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3374 of 2019
Prof. Dr. Qamar ul Wahab
Versus
Federation of Pakistan and others

Date of Hearing: 11.11.2024
Petitioner by: M/s Syed Qamar Hussain Sabzwari and
Zia-ul-Haq Kiyani, Advocates.
Respondents by: Mr. Arshid Mehmood Kiani, learned
Deputy Attorney-General.
Mr. Owais Awan, Advocate for respondent
No.4.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition the petitioner, Professor Dr. Qamar ul Wahab, impugns the order dated 12.09.2019 passed by respondent No.2, the Federal Ombudsman for Protection against Harassment of Women at Workplace (“the Federal Ombudsman”), only to the extent whereby the complaint filed by respondent No.4, Ms. Sidra Younas, against the petitioner was transferred to the office of the Provincial Ombudsperson at Peshawar established pursuant to the provisions of the Khyber Pakhtunkhwa Protection against Harassment of Women at the Workplace (Amendment) Act, 2018 (“the 2018 Act”).

2. Learned counsel for the petitioner submitted that the office of the Provincial Ombudsperson at Peshawar has been created pursuant to the 2018 Act; that neither under the Protection against Harassment of Women at the Workplace Act, 2010 (“the 2010 Act”) nor under the 2018 Act does the Federal Ombudsman have the power to transfer complaints to the Provincial Ombudsperson; and that respondent No.4 is at liberty to institute a fresh complaint before the Provincial Ombudsperson under the provisions of the 2018 Act.

3. On the other hand, learned counsel for respondent No.4 objected to the maintainability of the instant petition on the ground that Section 18 of the Federal Ombudsmen Institutional Reforms Act, 2013 (“the 2013 Act”) and Article 29 of the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 (“the 1983 Order”), the jurisdiction of all

Courts and other authorities from interfering in orders passed by the Ombudsmen has been ousted. Furthermore, it was submitted that since the petitioner did not avail the alternative remedy of filing a review application under Section 13 of the 2013 Act or a representation to the President of Pakistan under Section 14 of the said Act against the order dated 12.09.2019 passed by the Federal Ombudsman, the instant writ petition is not maintainable.

4. Learned counsel for respondent No.4 further submitted that at the time when respondent No.4 filed the complaint dated 11.06.2018 against the petitioner before the Federal Ombudsman, the 2018 Act had not been enacted by the Provincial Assembly of Khyber Pakhtunkhwa, and therefore she filed her complaint before the office of the Federal Ombudsman at Islamabad under the provisions of the 2010 Act; that thereafter, respondent No.4 applied for the transfer of her case to the Regional Office of the Federal Ombudsman at Peshawar; that after the enactment of the 2018 Act by the Provincial Assembly of Khyber Pakhtunkhwa, respondent No.4 applied to the Federal Government for the transfer of the case to the Provincial Ombudsman; that after the case was transferred to the Regional Office of the Federal Ombudsman, it was re-transferred to Islamabad on the petitioner's application; that since respondent No.4's harassment took place within the territorial jurisdiction of the Provincial Ombudsman and since the University of Technology, Nowshera is also located within the territorial jurisdiction of the Provincial Ombudsman, it is the office of the Provincial Ombudsman which has the jurisdiction to conduct proceedings pursuant to respondent No.4's complaint; that the petitioner also shared the said view of respondent No.4 as he had filed a writ petition No.5409/2018 before the Hon'ble Peshawar High Court challenging the jurisdiction of the Federal Ombudsman to conduct proceedings on respondent No.4's complaint on the ground that the office of the Provincial Ombudsman had been established pursuant to the provisions of the 2018 Act; that the office of the Federal Ombudsman has no jurisdiction over matters which relate to departments or organizations situated in the Provinces or which do not fall within the meaning of trans-provincial organizations; and that the order dated 12.09.2019 passed by the Federal Ombudsman for the

transfer of the said case to the Provincial Ombudsman does not suffer from any legal infirmity. Learned counsel for respondent No.4 prayed for the writ petition to be dismissed.

5. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

6. The record shows that in the year 2018, respondent No.4 was working as Assistant Registrar (Academics) at the University of Technology, Nowshehra. On 11.06.2018, she submitted a complaint to (i) the Governor, KPK, (ii) Chief Minister, KPK, (iii) Chief Secretary, Government of KPK, (iv) ACS through DG (M&E) KPK (v) Chairman, National Accountability Bureau, (vi) Secretary Industries, Government of KPK, (vii) Secretary Establishment, Government of KPK, (viii) Secretary Finance, Government of KPK, and (ix) Secretary, HEC voicing her grievance against her transfer by the petitioner, who was serving as the Vice Chancellor of the said university. In her complaint, she took the position that such transfer was in violation of the terms of her letter of appointment as well as the policy of the Provincial Government. Additionally, in the said complaint, respondent No.4 alleged that she has been sexually harassed by the Vice Chancellor and the Registrar of the said university in the following form:-

- "a. Abuse of authority*
- b. Creating a hostile environment for [respondent No.4]*
- c. Obstructing performance*
- d. Advancement upon to comply*
- e. Job threats"*

7. She has also alleged that the said officials had committed "*personal harassment*," "*psychological harassment*" and "*verbal harassment*." The said complaint does not specify the nature of the sexual harassment that she claims to have been subjected to.

8. There is no document on the record to explain as to how respondent No.4's complaint was submitted to the Federal Ombudsman. However, the documents on the record show that respondent No.4's complaint was registered as complaint No.1(474)/2018-FOS(Reg) on 08.08.2018 by the office of the Federal Ombudsman. After the Federal Ombudsman took cognizance of respondent No.4's complaint, the petitioner filed a detailed reply contesting respondent No.4's complaint. Order dated 04.10.2018

passed by the Federal Ombudsman shows that the petitioner's complaint was transferred from Islamabad to the Federal Ombudsman's Regional Office at Peshawar. This transfer was made on respondent No.4's application who felt unsafe in travelling to Islamabad. After the complaint was transferred to Peshawar, the petitioner, on 04.12.2018, filed an application for the transfer of the complaint to the Federal Ombudsman's Head Office at Islamabad. Vide order dated 13.12.2018, the Regional Commissioner at the Federal Ombudsman's office at Peshawar transferred the complaint back to Islamabad. Thereafter, the petitioner filed an application for the transfer of the case to the Provincial Ombudsman on the ground that since the office of the Provincial Ombudsman had been established pursuant to the provisions of the 2018 Act, the matter lay within the jurisdiction of the Provincial Ombudsman. Vide impugned order dated 12.09.2019, the said application was allowed and the Federal Ombudsman transferred the complaint to the Provincial Ombudsman.

9. The mere fact that the Federal Ombudsman, vide impugned order dated 12.09.2019, transferred the complaint to the Provincial Ombudsman, amounts to an acknowledgement by the Federal Ombudsman that he did not have the jurisdiction to conduct proceedings on respondent No.4's complaint after the establishment of the office of the Provincial Ombudsman pursuant to the provisions of the 2018 Act. Since the complaint before the Federal Ombudsman was filed prior to the enactment of the 2018 Act, respondent No.4 sought its transfer to the Provincial Ombudsman. The vital question that needs to be answered is whether the Federal Ombudsman was vested with the jurisdiction to transfer respondent No.4's complaint to the Provincial Ombudsman.

10. After the enactment of the Constitution (Eighteenth Amendment) Act, 2010, the concurrent legislative list was omitted from the Constitution which *inter alia* led to the subject of social welfare to be devolved to the Provinces. The Provincial Assembly of KPK through the 2018 Act adopted the 2010 Act with certain amendments. The contesting parties are in unison on their submission that after the enactment of the 2018 Act, the office of the Provincial Ombudsman had been established and that the

subject matter of respondent No.4's complaint lies within the jurisdiction of the Provincial Ombudsman.

11. There is also no provision in the Constitution (Eighteenth Amendment) Act, 2010 which provides for the transfer of any case or complaint pending before a forum constituted under a Federal statute prior to the enactment of the said Act to be transferred to a forum constituted under a Provincial statute subsequent to the enactment of the said Act.

12. Section 96(6) of the Constitution (Eighteenth Amendment) Act, 2010 reads thus:-

“Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority.”

13. In view of the said provision, the office of the Federal Ombudsman did have the jurisdiction to conduct proceedings on respondent No.4's complaint until the enactment of the 2018 Act by the “*competent authority*,” i.e. the Provincial Assembly of KPK. As mentioned above, it is after the enactment of the 2018 Act by the Provincial Assembly of KPK that respondent No.4 was prompted to apply to the Federal Ombudsman for the transfer of her case to the office of the Provincial Ombudsman.

14. What the Federal Ombudsman did through the impugned order dated 12.09.2019 is to “*transfer*” the complaint to the Provincial Ombudsman. After the enactment of the 2018 Act, the 2010 Act was not amended to entrust the Federal Ombudsman with the power to transfer a complaint to the Provincial Ombudsman. Indeed there is no clog on the power of the Federal Ombudsman to transfer complaints to its own Regional Offices as such offices are adjuncts or *alter ego* of the Federal Ombudsman's office. However, the office of the Provincial Ombudsman has been constituted pursuant to the provisions of a Provincial statute, i.e. the 2018 Act and not the 2010 Act which is a Federal statute. There is no provision in the 2010 Act which provides for complaints transferred by the Federal Ombudsman to be registered with the office of the Provincial

Ombudsman. There is also no provision in the 2018 Act to the effect that all complaints in respect of any matter under the jurisdiction of the Provincial Ombudsman pending before the Federal Ombudsman immediately before the commencement of the said Act shall stand transferred to the Provincial Ombudsman.

15. The right to apply for the transfer of a case from one Court or Tribunal to another partakes the nature of a substantive right and therefore has to be specifically conferred by law. This Court cannot read into the provisions of either the 2010 Act or the 2018 Act a provision for the transfer of a complaint from the office of the Federal Ombudsman to that of the Provincial Ombudsman or *vice versa* or for the saving of proceedings conducted by an Ombudsman up to the stage of the transfer.

16. Where the legislature intends for a statutory forum to be conferred with the power to transfer a complaint or a case to another forum, it makes an express provision to such effect in the statute. It ought to be mentioned that by virtue of the provisions of the National Accountability (Amendment) Act, 2023, certain offences were taken out of the ambit of the National Accountability Ordinance, 1999 and resultantly the Accountability Courts constituted under the provisions of the said Ordinance ceased to have jurisdiction to conduct trials with respect to such offences. In the statute amending the 1999 Ordinance, the fate of the proceedings already pending before the Accountability Courts, which by virtue of the amendments no longer remained within the jurisdiction of such Courts, were specifically catered for. By the virtue of the National Accountability (Amendment) Act, 2023, Section 4(6) was inserted in the 1999 Ordinance which provided for all pending inquiries, investigations, trials and proceedings relating to matters not falling within the jurisdictional domain of the National Accountability Bureau and/or the Accountability Courts to be transferred to the concerned agencies, authorities, departments, Courts, Tribunals, or forums having jurisdiction under the respective laws.

17. The Islamabad High Court Act, 2010 was enacted on 02.08.2010. Prior to the enactment of the said Act, appeals, petitions and other proceedings in relation to the Islamabad Capital Territory were to be filed before the Hon'ble Lahore High Court. By virtue of Section 9 of the said

Act, all appeals, petitions and other proceedings pending before the Hon'ble Lahore High Court or any other High Court in relation to the Islamabad Capital Territory immediately before the appointed date (i.e. 13.12.2010) stood transferred to the Islamabad High Court. Reference to the said enactment has been made to bring home the point that where the legislature intends for pending proceedings before one forum to be transferred to another, it makes an express provision for such transfer in the statute.

18. Even where the statute provides for the power to transfer a case from one Court / Tribunal to another, the same has to be strictly construed. Article 186A of the Constitution empowers the Hon'ble Supreme Court to transfer any case, appeal or other proceedings pending before any High Court to another High Court. In the case of Bushra Vs. Muhammad Naeem (2003 SCMR 115), it was held that it was clear from the provisions of Article 186A that the Hon'ble Supreme Court vested with the power to transfer a case pending before one High Court to another but not a case pending before any Court subordinate to the High Court of a Province to a Court subordinate to a High Court of another Province.

19. As mentioned above, after the establishment of the office of the Provincial Ombudsman pursuant to the provisions of the 2018 Act, no provision was inserted in the 2010 Act empowering the Federal Ombudsman to transfer complaints or proceedings to the Provincial Ombudsman. If respondent No.4 wanted the Provincial Ombudsman to conduct proceedings on her complaint, she could have applied to the Federal Ombudsman for the return of her complaint so that she could file the same before the Provincial Ombudsman. There is nothing preventing respondent No.4 from applying to the Federal Ombudsman for the return of her complaint so that she could file the same before the Provincial Ombudsman. Unlike Article 10(3) of the 1983 Order, which provides for a limitation period of three months for filing the complaint, there is no limitation period provided either in the 2010 Act or the 2018 Act for filing a complaint. In the case of Adnan Afzal Vs. Sher Afzal (PLD 1969 SC 187), while proceedings instituted by a minor through his mother against his father were pending before the City Magistrate of Sialkot under Section 488 of the Code of Criminal Procedure, 1898 for the recovery of

maintenance, the West-Pakistan Family Courts Act, 1964 (“the 1964 Act”) was enacted. After such enactment, the father applied for the proceedings to be filed as, according to him, they were no longer entertainable or adjudicable before the Magistrate. The application was made on the strength of Section 5 of the said Act which vested the Family Court with an exclusive jurisdiction in the matter. There was no provision in the 1964 Act for the transfer of cases pending before the Court of a Magistrate to a Family Court. The Magistrate accepted the application and directed the minor to seek his remedy from the Family Court. The Magistrate’s order was upheld up to the High Court. The Hon’ble Supreme Court referred the Schedule to the 1964 Act which when read with Section 5 thereof vested the Family Court with the jurisdiction to decide claims for the recovery of maintenance. It was held that the 1964 Act had *inter alia* changed the forum for filing claims for the recovery of maintenance. By virtue of this, the Hon’ble Supreme Court held that the Magistrate was right in holding that his Court was no longer vested with the jurisdiction to entertain a claim relating to maintenance and that such claim could be filed before a Family Court, but the Supreme Court also held that the Magistrate was wrong in dismissing the application for the recovery of maintenance and that he should have returned the application for the recovery of maintenance for its presentation before the proper Court.

20. The power of the Federal Ombudsman to transfer a complaint to the Provincial Ombudsman had to be found either in an express provision of statute or by necessary implication. Since there is no provision in the 2010 Act for the transfer of a complaint pending before the Federal Ombudsman to the Provincial Ombudsman, therefore, in my view, there is no warrant for any such implication. In the case of Muhammad Vs. State (1976 PCr.LJ 1037), the question that arose for determination was whether a Sessions Judge was competent to transfer a case from his Division to a Court of Sessions Judge of another Division. In the said case, the Additional Sessions Judge, Bahawalnagar had heard the arguments in a revision petition, but before he could dictate and pronounce the judgment, he was transferred to Rahim Yar Khan as Sessions Judge. His successor at Bahawalnagar sent the case file to Rahim Yar Khan so that he could write the judgment and send it to Bahawalnagar for

pronouncement. It is in this backdrop that the question which arose for consideration before the High Court was whether the Additional Sessions Judge, Bahawalnagar was competent to transfer the case to the Court of the Additional Sessions Judge at Rahim Yar Khan. It was held that under the law it is the High Court alone which was competent to transfer a case from one Sessions Division to another Sessions Division, and that in the absence of any provision of law authorizing one Sessions Judge to transfer a case from his Division to another Sessions Division, the transfer of the case to the Court of the Additional Sessions Judge, Rahim Yar Khan was clearly without lawful authority.

21. As regards the objection taken by the learned counsel for respondent No.4 to the maintainability of the instant petition on the ground that in terms of Section 18 of the 2013 Act, the jurisdiction of a Court in a matter where the Federal Ombudsman has passed an order is ousted, to begin with a sub-constitution legislation cannot oust the jurisdiction of this Court conferred by Article 199 of the Constitution. This is more so where the order of the Ombudsman which is sought to be quashed by the issuance of a writ of *certiorari* is without lawful authority as in the case at hand. In the case of State Life Insurance Corporation of Pakistan Vs. Wafaqi Mohtasib (2000 CLC 1593), an objection similar to the one taken by the learned counsel for respondent No.4 was taken before the Division Bench of the Hon'ble High Court of Sindh. In the said case, the objection was to the effect that Article 5 of the 1983 Order had ousted the jurisdiction of Courts to question the validity of any action taken or order passed by the Ombudsman. The said objection was spurned in the following terms:-

“Reference was made to Article 29 of the President’s Order which bars the jurisdiction of Court to question the validity of any action taken or intended to be taken or order made or anything done or purported to have been taken, made or done under the aforesaid Order but such protection would be available only in case of the action taken, within the four corners of the President’s Order itself and any action taken or order made beyond the scope of authority cannot be held to be immune from judicial review by a superior Court. It was lastly urged that the petitioner has already made a representation against the impugned order before the President of Pakistan in terms of Article 32 of the Order, which remains undecided so far. Be that as it may, we are of the view that making of a representation to the President for review of an order made by Wafaqi Mohtasib per se, would not oust the extraordinary jurisdiction of this Court under Article 199 of the Constitution.”

22. Additionally, in the case of Pakistan International Airlines Corporation Vs. Wafaqi Mohtasib (1998 SCMR 841), an objection was taken on the maintainability of the writ petition on the ground that Article 32 of the 1983 Order had provided for a remedy of a representation against the decision of the Wafaqi Mohtasib. The said objection prevailed with the High Court but the Hon'ble Supreme Court finding the order of the Wafaqi Mohtasib to be without jurisdiction and dealt with such objection in the following terms:-

11. As to the question, whether the Constitutional petition filed by the appellant before the High Court was competent, it may be pointed out that the learned Judges of the High Court have first referred to Article 32 of P.O.1 of 1983 which provides for a representation to the President in respect of an order passed by the Mohtasib. Reference was also made to Article 29 in the said Order, which bars the jurisdiction of the Courts in this regard. They then went on to hold that since the petition filed by the respondent No.2 before the Mohtasib was competent, no interference with the same in the exercise of the Constitutional jurisdiction was warranted. It may however, be pointed out that, now it is well established that any order passed by the Mohtasib can be interfered with under Article 199 of the Constitution if it suffers from lack of Jurisdiction. In fact, the learned Judges of the High Court have themselves referred to the case of International Cargo Handling Company (Pvt.) Ltd. v. Port Bin Qasim Authority (PLD 1992 Kar. 65) wherein it was held:

“No doubt, the jurisdiction of Courts is barred, inter alia, in respect of any decision or order made including order of injunction or stay, by the Mohtasib but where the order from the face of it is repugnant to law under which it was made or suffers from want of jurisdiction, a Court may invoke its inherent jurisdiction vested in it under law so as to prevent injustice done to an aggrieved person.””

23. Since there is no substantive provision in the 2010 Act empowering the Ombudsman to transfer complaints to the Provincial Ombudsman, I am of the view that the impugned order dated 12.09.2019 is without jurisdiction and therefore without lawful authority. Consequently, the instant writ petition is allowed; the impugned order dated 12.09.2019 passed by the Federal Ombudsman is declared to be without lawful authority and therefore the same is set-aside; the matter is remanded to the Federal Ombudsman who may consider returning the complaint to respondent No.4 so that she files the same before the competent forum, i.e. the Provincial Ombudsman.

24. Before parting with this judgment, I feel obligated to observe that there must be numerous complaints filed before the Federal Ombudsman which by virtue of the enactment of Provincial laws on the subject and the establishment of the offices of the Provincial Ombudsman pursuant to the

provisions of such Provincial laws falls within the jurisdictional domain of the Provincial Ombudsman. Since the provisions of the 2010 Act do not vest the Federal Ombudsman with the power to transfer the complaints to the Provincial Ombudsman, I deem it appropriate to observe that the Ministry of Law and Justice or the Ministry of Parliamentary Affairs ought to consider proposing appropriate amendments in the 2010 Act empowering the Federal Ombudsman to transfer the complaints filed prior to the establishment of the offices of the Provincial Ombudsman to be transferred to such offices, with the provision to save the proceedings conducted by the office of the Federal Ombudsman up to the date of the transfer.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 02/12/2024.

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*