

Sexual Harassment at Workplace: *Asif Saleem v Chairman BOG University of Lahore*

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Introduction

The recent judgment of the Lahore High Court in *Asif Saleem v Chairman BOG University of Lahore*¹ is being celebrated for its contributions to the jurisprudential debate surrounding the issue of sexual harassment at workplaces in Pakistan. This judgment can rightly be considered to hold landmark status in Pakistani case law for the reasons to be discussed in this case note. It concerns the removal of a professor at the University of Lahore on charges of sexual harassment and has caught the interest of the populace for several reasons. This judgment expands the scope of the definition of harassment, workplace, employer, and the employee to cover the cases which get overlooked because of restrictive understanding of these terms. It also provides a unique application of the doctrine of *in limine* control, referring to court's authority to dispose of the case at the very beginning.

This case note discusses the aforementioned case by first delineating the facts, reasoning, and the ruling of the court along with the analysis of the precedents relied upon in the judgment. Following this, it explores the prior laws on the case and provides a brief account of the history of the Protection of Women against Workplace Harassment Act 2010. After setting the judgment in its legal-historical context, the case note analyses the Lahore High Court's reasoning in deciding the matter at hand.

Facts and Rulings

The case pertains to sexual harassment at the workplace, wherein the petitioner was serving as an Assistant Professor at the University of Lahore and was also a student of Doctorate at the same university. The petitioner was accused of sexual misconduct by one of his students. The

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¹ 2019 LHC 1620.

student claimed that the petitioner has sexually harassed her by sending her vulgar text messages while she was making an academic query. She also alleged that the petitioner used to force her to come to his bachelor accommodation and cook food for him. Moreover, she alleged that when she, being the class representative for girls, asked for class results, the petitioner diverted the conversation towards sex and expressed his intention for a sexual relation. She also claimed that some other girls also faced sexual harassment from him. An inquiry was initiated, and the petitioner was dismissed from the service under the Protection against Harassment of Women at the Workplace (Amendment) Act 2012 and was also expelled from the Doctorate program. The petitioner filed an appeal against this decision to Ombudsperson. The Ombudsperson altered the punishment from 'dismissal' to 'removal' from the service, the difference being that 'dismissal from service' renders the employee disqualified from future employment while 'removal from service' does not bar from future employment. Against this decision, the petitioner filed an appeal before the Governor of Punjab which got dismissed for being not maintainable. Therefore, the petitioner filed a writ petition before the Lahore High Court under Article 199 of the Constitution of Islamic Republic of Pakistan 1973 ('Constitution') and challenged the orders issued by the University on ground of violation of the due process right as guaranteed under Article 10A of the Constitution. In the writ petition, the counsel for the petitioner argued that he was not given an opportunity for a personal hearing and was, thus, condemned unheard. Furthermore, the petitioner argued that the Act was not applicable to his case and the case against him was based on jealousy. On the other side, the respondents opposed these arguments and prayed for dismissal of the petitioner. In light of these arguments, the court framed three primary issues:

- I. Whether the Respondents were justified to impose penalty of removal from service against the Petitioner, under the Act?
- II. Whether the Respondents were justified to expel the Petitioner from the PhD. programme of the University?
- III. Whether this petition can be dismissed in *limine*?²

² Ibid.

To determine the first moot problem, the court begun with the reiteration of legislature's commitment to provide a safe and secure environment for women, as encapsulated in the objectives of the Protection against Harassment of Women at Workplace Act 2010 (as amended by the Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act 2012). The court also referred to the constitutional obligations as enshrined under Articles 14, 25 and 34 to protect the dignity of persons, and take special measures to ensure equal and full participation of women in all spheres of national life. Although Article 34, being part of the Principles of Policy, is not justiciable, its violation combined with the violation of other provisions of law provides a cogent ground to decree an order. Against these legislative commitments to ensure the protection of women from harassment at workplace, the court closely looked into the definitions of harassment, workplace, employee, and the employer to determine the merits of the case. Referring to the definition of harassment as provided under section 2(h) of the Act, the court observed that it provides an exhaustive list of the acts (including, 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) linked with employment or work environment, which may be considered as harassment.

Keeping the legislative intent “to protect all employees from being harassed or exploited during employment” in consideration, the court liberally interpreted the definitions of employee and workplace and held that: “any worker whoever is employed in any manner or capacity with the employer is protected from being harassed.”³ Therefore, in light of such interpretations of the definition clause, the petitioner, being a teacher, was held as the employee as well as the student of the University who in his employment as teacher exploited and harassed the student by sending her vulgar messages for illicit purpose.⁴ With these observations, the court held that the petitioner has failed to prove any illegality or legal perversity in the impugned orders (decreed by the University committee and the

³ Ibid, 12.

⁴ Ibid.

Ombudsperson), and, thus, the respondents were justified in imposing the penalty of removal from service under the Act.⁵

For the second issue pertaining to the expulsion of the petitioner from the PhD program, the court relied upon the constitutional obligation to provide a safe and secure environment, and ensure equal participation of women in the national life. In view of these constitutional obligations, the court held that given that the petitioner had been found guilty; his presence in the university would be a threat to the victim and other female students. Therefore, “to create a safe and healthy educational environment for all the female students, the presence of the petitioner in the said University is unwarranted and unjustified.”⁶

In the final issue, the court recognized the inconvenience caused because of the general practice adopted by the courts whereby they issue notices to the parties instead of dismissing the petition at limine stage. Given the unnecessary inconvenience caused and the increasing backlog of the cases in Pakistan, the court opined for adopting the Limine Control Doctrine in application of which, the court may exercise its discretion in disposing of the matter before it, at the beginning. However, such discretion is supposed to be “grounded on good public policy and case management place.”⁷

In light of the aforementioned discussion, the court dismissed the petition *in limine*.

Background

The issues of sexual harassment at workplace and the policy measures to tackle them have always remained under discussion throughout the history of Pakistan. To address this issue, several attempts were made in the past dating back to 1976 when the Pakistan Women's Rights Committee was

⁵ Ibid, 24.

⁶ Ibid, 27.

⁷ Ibid, 36.

set up.⁸ The objective of this committee was to review the existing laws of the country regarding women and make recommendations for uplifting their status. However, because of the political instability and frequent changes in the government, those recommendations could never be materialized. Then in 1985, a Commission on the Status of Women was established with the mandate to make suggestions to safeguard the rights of the women and to ensure their maximum participation in education, healthcare, and employment.⁹ In 1990s, third substantial attempt was made in the form of a constitution of The Commission of Inquiry for Women in 1994. The Commission was entrusted with the task of examining all existing laws with the object of making necessary measures for elevating the status of women in Pakistan.¹⁰ The reports of the 1994 Commission were submitted in 1997 wherein it was recommended to repeal some laws and come up with effective methods of enforcement. However, its fate was the same as that of the earlier ones.

In the wake of growing domestic and international pressure, a separate legislation to deal with the issue of sexual harassment at workplace was enacted in 2010 with an aim to make the workplace environment safe for women. This Act proved to be a lot better in terms of implementation and giving voice to the victims. One of the very first cases was filed in 2013 under this Act, wherein the Federal Ombudsman determined the scope of the term ‘harassment’ as defined under section 2(h) of the Protection against Harassment of Women at the Workplace Act 2010. The question mooted before the Ombudsman was: whether the words ‘*Jahil and Badtameez Aurat*’ (Illiterate and ill-mannered woman) used by the accused come within the ambit of harassment as defined in the above-mentioned provision of the law? While dilating upon the scope of harassment, the Ombudsman held that the key part of the definition used in section 2(h) of the Protection against Harassment of the Women at Workplace Act, 2010 was the use of words ‘unwelcome’ or ‘uninvited’ conduct, or communication of a sexual nature.¹¹ Moreover, the

⁸ Iftikhar Ahmad Tarar, ‘Sexual Harassment: Comparative Analysis of Legislative and Institutional Arrangements in India and Pakistan’ (2018) 31 (2) *Journal of the Punjab University Historical Society* 87.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid, 92; 2013 MLD 198.

Ombudsman also held that to bring a particular sex-based behaviour within the bound of harassment, it shall be “so severe or persuasive to alter the conditions of the victim’s employment and create an abusive working environment or render the work place atmosphere intimidating, hostile or offensive.”¹² As far as the use of disputed words like *Jahil and Badtameez Aurat* were concerned, the Ombudsman held that the same were adequately affronting to bring about unease for a female; however, the same could not be construed to be interfering with her employment.¹³ If determined on this scale, the words uttered by the appellant would not qualify for the term sexual harassment by any stretch of imagination.¹⁴

Similarly, the question of applicability of the said Act to educational institutions has also come under contestation before the Federal Ombudsman in 2013.¹⁵ In this case, the Mohtasib held, that being an education institution, the university was an organization within the scope of section 2(L) of 2010 Act.¹⁶ With regards to the definition of harassment and employee, the Mohtasib further held that: “Sexual harassment as defined is not in any way limited in its application to the employees of an organization. In view of this, it is held that the female students even otherwise being part of the university cannot be deprived of the remedy provided by the Act if sexually harassed.”¹⁷ This provides an idea of how the Act functioned in reality to protect the victims from a vast range of institutions.

With these enactments and the consequent developments in the law, more cases started to get reported in different educational institutions. For example, a four-member committee at Quaid-i-Azam University in

¹² Ibid, 7.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ 2013 MLD 225.

¹⁶ “Organization” means a Federal or Provincial Government Ministry, Division or department, a corporation or any autonomous or semiautonomous body, Educational Institutes, Medical facilities established or controlled by the Federal or Provincial Government or District Government or registered civil society associations or privately managed a commercial or an industrial establishment or institution, a company as defined in the Companies Ordinance 1984 (XLVII of 1984) and includes any other registered private sector organization or institution.

¹⁷ (n 15) 10.

Islamabad took strict action against two faculty members who were accused of sexually harassing female students. After a rigorous 30-day inquiry of the case, one faculty member was formally terminated and the other was forced to take retirement. This penal measure was first of its nature in the history of educational institutions and was later followed by Punjab University and the University of Peshawar in similar cases.¹⁸

A legal remedy outside the organization against sexual harassment can also be sought under section 509 of Pakistan Penal Code 1860, which penalizes sexual harassment with imprisonment up to three years or fine up to five hundred thousand rupees or with both.¹⁹ However, in *Asif Saleem* case, this penal section would have not been applicable as it was filed as an appeal against the decisions of the University and the Ombudsman.

The Act dealing with the issue of sexual harassment also finds its roots in Article 14 of the Constitution of Islamic Republic of Pakistan that

¹⁸ Nosheen Abbas, 'Pakistan: An Update on the Anti-Sexual Harassment Bill' (*HuffPost*, 10 April 2011) <www.huffpost.com/entry/pakistan-sexual-harassment-bill_b_991265?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAEnsYnosdsLaUk82lmMBhoXVzuFlzjBy0TVMlj5fm9ZJH4H5b7p7QqW7oM_1NMhGYYITC7boCAdxCe1URGdD413nh32ZHexsrMxPpmRoztn cTnBO5vs2eZY6ydtzidkvaSaxW2LJNwb5sI_1vp998Hu_9NaJSK7hEds0tzl4aF6H> accessed 15 September 2019.

¹⁹ Pakistan Penal Code 1860, s. 509.

“509. Insulting modesty or causing sexual harassment. Whoever, -

(i) intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any objects, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman;

(ii) conduct sexual advances, or demand sexual favours or sues verbal or non-verbal communication or physical conduct of a sexual nature which intends to annoy, insult, intimate or threaten the other person or commits such acts at the premises of workplace, or makes submission to such conduct either explicitly or implicitly a term or condition of an individual employment or makes submission to or rejection of such conduct by an individual a basis for employment decision affecting such individual, or retaliates because of rejection of such behaviour, or conduct such behaviour with the intention of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment;

shall be punished with imprisonment which may extend to three years or with fine up to five hundred thousand rupees or with both.”

enshrines protection to the dignity (of man). The most important aspect of this protection is in the constitutionally guaranteed inviolable nature of this right. Chief Justice Nasim Hasan Shah, in a *Suo Motu Constitutional Petition*²⁰ regarding the issue of public execution, held that the dignity and the self-respect of every man has become inviolable, and this guarantee is not subject to law but is an unqualified guarantee. In *Muhammad Yamin Khan v Government of Pakistan*,²¹ the court further consolidated this right and held that a right to earn in a respectable manner falls under the scope of the Article 14 and Article 2A of the Constitution. The court also relied upon Article 25 of the Constitution, which guarantees the right to equality for every citizen. Under this provision, discrimination solely based on sex is not allowed unless the discrimination is done to further the cause of women and children as prescribed by Article 25(3).²²

Analysis

Given the contribution of this judgment in liberal interpretation of the definitions of workplace, harassment, and the extension of the doctrine of *in limine*, this case holds significant value in the jurisprudence upon the issue of sexual harassment. Moreover, this judgment is also expected to uplift the status of women and contribute towards ensuring safe and secure working environment for females. Sexual harassment had been a taboo in our society for a long time. Needless to say, it was a significant impediment in enabling women to work for the society and contribute to their full potential. Sexual harassment also inevitably leads to a loss of economy since a large section of the population is facing obstacles in their working environment.

The issue of sexual harassment is linked with the right to work, which is multifaceted in its very nature. It signifies a bundle of rights including; the rights to remuneration, human dignity, protection from forced labour, just and favourable conditions at the workplace, and free choice of work, among various other basic benefits which are essential in pursuance of the

²⁰ 1994 SCMR 1028.

²¹ PLD 2006 Kar 93.

²² *Shirin Munir v Government of Punjab* PLD 1990 SC 295.

right to work.²³ Sexual harassment violates the right to work primarily due to two reasons. Firstly, any form of harassment makes the working environment unsafe and unhealthy for a person, thus violating their right to just and favourable working conditions. It also leads to an overall loss of trust in people, loss of confidence, poor self-esteem, fear of being ridiculed, and suicidal ideations. This psychological trauma hinders the effective performance of the sufferers and may have a long-term effect on the individual leading towards the road of mental illnesses. Staff morale is reduced; which in turn, lowers their productivity, and increases absenteeism and turnover. It has spill over effects on an individual's career growth, worker productivity, general wellbeing and peace of mind: the basic and inherent rights of the employees.²⁴ The sufferer is not the individual only but the organization also gets affected. Quality of service will be impacted in the organization if its employees are not satisfied and feel unsafe in the work environment. Hence their job performance will decline and will subsequently, damage the reputation of the organization.²⁵

The court began with establishing the constitutional obligation upon the state to protect women from harassment at workplace as a matter of right. To this effect, the court relied upon *Subay Khan v Secretary, Labour Government of the Punjab*²⁶ and held that, since all citizens are born with full freedom and rights; therefore, any effort by the state as to the liberties actually functions to restrict or take away those liberties.²⁷ Using this view, the Lahore High Court ruled that the protection of women against sexual harassment is a right of women which is recognized by law of the state in the following words:

[T]he protection of women from being harassed at the workplace is already enshrined under the Constitution and was given under the Act and protected by the Executive and Judiciary. Moreover, this Act is not confined only to the relationship of an employer and

²³ Maria Khan and Ayesha Ahmed, 'The Protection against Harassment of Women at the Workplace Act 2010' (2016) 3 (1) *LUMS Law Journal* 91–99.

²⁴ Anila Naveed, Ambreen Tharani, and Nasreen Alwani, 'Sexual harassment at workplace: are you safe?' (2010) 22(3) *Journal of Ayub Medical College* 222.

²⁵ *Ibid.*

²⁶ PLD 2019 Lah 253.

²⁷ *Ibid.*

employee; but it extends to all acts of sexual harassment committed by employer or employee with any women (at the workplace) by misusing/exploiting his/her official position/capacity.²⁸

Another important point raised in the judgment is the use of the doctrine of '*Limine Control*'. The judicial system of Pakistan is jam-packed with cases, with a backlog of nearly 2 million cases pending at all levels of courts from lower courts all the way to the Supreme Court. In such circumstances, it behoves upon judges to make sure the expeditious delivery of justice, which leads to disposing of frivolous lawsuits as early as possible.²⁹ Not only the pendency of cases is affected by such malicious claims, but the respondent's financial condition is also subject to monetary loss as they have to defend against such claims.³⁰ The case in point was therefore dismissed *in limine*, thereby setting a new precedent to be followed by all lower courts. The case law on sexual harassment is at the developing stage in Pakistan and it is essential to give it a proper direction right from the beginning. This will go a long way in developing the jurisprudence on the matters of sexual harassment. In Pakistan, a lot of suits are filed with *mala fide* intentions in order to coerce and blackmail the respondents to comply with earlier wishes of the petitioner. With the use of doctrine of *limine control*, the precedent set by this case allows judges to have more freedom in dismissing frivolous cases on sexual harassment *in limine*. This confers great responsibility on judges as this power which though bestowed for use for betterment of the society can equally be used for wrong purposes. With doctrine of *limine control* being used, it can be ensured that in future, such frivolous suits will not be filed, and justice system will not be used as a tool to reach nefarious ends. This will not only ensure a sense of security among the victims of sexual harassment but will also alleviate unnecessary burden off the Courts. In future, the lower courts, following the precedent set in this case, can dismiss the cases *in limine* and save time and monetary losses.

However, at the same time, a judge can also abuse this power and dismiss cases filed by the victims of sexual harassment. Although

²⁸ (n 1).

²⁹ Ibid.

³⁰ Ibid.

reasoning by analogy will prohibit it, since it will be argued that the cases dismissed using doctrine of *limine control*, as set by these precedents, must be filed by assailant of sexual harassment and should lack any concrete basis, and not by victim of sexual harassment.

Another way to wrongly use this doctrine would be to deprive the petitioner of the right to due process. Whereby, it will be argued that since in the said case, the petitioner was already tried by the inquiry committee of the University and the appeals were heard and appropriately dismissed by the Ombudsperson and Governor of Province respectively, therefore the right to fair trial was not infringed. Also, since there was no infirmity or legal perversity found in the trials that already took place, it can be concluded that right to due process was not violated either.

Despite all the contributions that this judgment has made in the jurisprudence, one issue remains unexplained in the judgment. In response to petitioner's contention that the case was based on the feeling of jealousy and was meant to defame him, the court opined that:

It is a matter of common sense and even a man of prudent mind cannot think that just to defame a person/colleague student, a lady can ruin her modesty/dignity/respect herself by making false complaint of sexual harassment.³¹

Though one agrees with the statement made in itself, however, one can always argue that the reasoning behind is not valid. Merely putting the claim outside the domain of common sense as reason enough to dismiss the claim, is by no means an attribute of proper judicial process and prudent disposal of justice. People are capable of wildest evils imaginable, even if it means putting oneself in harm's way only to get mild satisfaction of revenge. Moreover, common sense is a much subjective standard and is a very deceptive measure of a claim as well, since it varies from person to person, and more so alludes people in general. However, in the case at hand, since University's inquiry committee's findings were that the Petitioner is guilty and since the appeal verdict of Ombudsperson concurs, therefore the petitioner's claim had no basis. It is already well established

³¹ Ibid.

that the High Court does not entertain question on facts of the case, unless the judge deems it necessary, when lower tribunals or courts have dealt with that matter already, and there was no infirmity found in their legal proceedings.

Conclusion

This case note is an effort to initiate a discussion on the issue of sexual harassment in light of the recent judgment rendered by the Lahore High Court. This issue, being endemic in nature, has rotten the roots of our society, affected the mobility of women, and violated their economic and social rights. Given the fundamental guarantees provided in the 1973 Constitution, this recent judgment is an effort to consolidate the intentions of the framers of the Constitution to protect women, ensure their full participation in the national life, and guarantee equal opportunities to them. The liberal interpretation provided to the terms, 'workplace', 'harassment' and 'employee' give this judgment a remarkable value in the jurisprudence developing on the issue of sexual harassment in Pakistan. Moreover, the use of doctrine of *limine* control employed by the court and the emphasis provided to its application also contributes to the value of this judgment. It can reasonably be expected that this judgment would set the judicial culture in favour of the constitutionally guaranteed rights to the woman and initiate a constructive debate on this issue in judicial forums.