JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P No.227635 of 2018

Meera Shafi

Versus

Office of the Governor Punjab & others

J U D G M E N T

Date of Hearing.	02-10-2019
PETITIONER BY:	Mrs. Hina Jillani, Barrister Muhammad Ahmad Pansota and Mr. Saqib Jillani, Advocates.
RESPONDENTS BY:	M/s Ali Raza, Ali Sibtain Fazli, Hasham Ahmad Khan, Abad ur Rehman, Omer Tariq, Nabil Ahmad and Ms. Sofia, Advocates for respondent No.3.

Shahid Karim, J:- This constitutional petition seeks the setting aside of the order dated 11.7.2018 passed by the Governor Punjab on a representation made by the petitioner herein in terms of Section 9 of The Punjab Protection Against Harassment of Women At The Workplace (Amendment) Act, 2012 (**Act, 2012**). A decision made by the Ombudsperson on 03.05.2018 was brought under challenge before the Governor Punjab and which was passed on a complaint filed by the petitioner alleging harassment at the workplace.

Facts:

2. The facts may be stated shortly. As adumbrated, the petitioner filed a complaint before the Ombudsperson on 30.04.2018 under Section 8 of the Act, 2012. She alleged that the respondent No.3 committed harassment within the meaning of the term as defined by section 2(h) of the Act,

2012 and was thus liable to be proceeded against under the provisions of the said Act. The Ombudsperson disposed of the complaint by holding that:

> *"Complaints of harassment at workplace are taken up for decision under the Protection Against Harassment at the Workplace Act, 2010. According to section 8 (1) any employee shall have the option to submit a complaint either to the Ombudsperson or to the Inquiry Committee of complainant's organization. The complainant has attached a copy of an agreement between her and J.S Events and Production and according to its clause 6.11, the agreement contains an express provision that it shall not be deemed to create any partnership or employment relationship. "6.11 this Agreement shall not be deemed to create any partnership or employment relationship between the parties.*
>
> *So, the complainant has no locus standi to submit a complaint under the Protection Against Harassment at the Workplace Act, 2010, she not being an employee, as per the definition contained in section 2(f)."*

3. A representation was filed before the Governor Punjab and the crux of the holding of the Governor is encapsulated in paragraph 7 which, for facility, is reproduced as under:

> *"I have gone through record of case including the written submissions made by the parties. The Representationist signed an agreement with JS Events 07.12.2017, and this has been relied upon in support of her claim that the parties were amenable to the jurisdiction of Ombudsperson under the Act. The agreement was made for specific performance by the Representationist at an event at Serena Hotel Islamabad on 22.12.2017. The agreement contained a work plan and other ancillary matters between parties. Clause 6.11 of the agreement stipulated: "This Agreement shall not be deemed to create any partnership or employment relationship between the parties". It is also pertinent to note that the Respondent was not a signatory to the said agreement, as said in his written reply. He has also stated that there is no other independent agreement between the parties available on record. As such, there is nothing to substantiate the status of Respondent either as employee, accused, employer, or owner of workplace under the Act. Moreover, the agreement including its exclusion clause 6.11, were agreed to and signed by the parties with free will, knowledge and consent, and it*

> *must be interpreted as discernable by the plain language of agreement. The case law relied upon by the Representationist on the nature of employment concerns with law relating to industrial relations and employee old age benefits. As such, the cited judgments of superior courts are clearly distinguishable and not attracted to facts of present case. It should be kept in view that proceedings under the Act are quasi-criminal in nature and standard of interpretation of a penal statute is different from that of a civil law. Consequently, the Ombudsperson has rightly declined to entertain the complaint filed before her by the Representationist."*

The petitioner has sought judicial review of these decisions by filing the instant constitutional petition.

The Governing Law:

4. The Parliament enacted the Protection Against Harassment of Women At The Workplace Act, 2010 (**Act, 2010**) which was published in the gazette of Pakistan on March 11, 2010. The Province of Punjab brought about certain amendments in the Act by enacting the Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act, 2012. These amendments merely tweaked the structure to make it a provincial law and do not have any substantial impact on the controversy which has been raised in this constitutional petition. At the heart of the controversy is the Act, 2012 and whether it applies to the petitioner or not. In other words, is the petitioner competent to apply in terms of the Act, 2012 by setting in motion the proceedings before the Ombudsperson to inquire into a complaint regarding the harassment at the workplace. Some of the definitions which will come in play and will have to be considered for

the resolution of the controversy are reproduced hereunder for facility:

> *"(e) "**Complainant**" means a woman or man who has made a complaint to the Ombudsperson 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;*
>
> *(g) "**Employer**" in relation to an organization, means any person or body of persons whether incorporated or not, who or which employs workers in an organization under a contract of employment or in any other manner whosoever and includes–*
>
> > *(i) an heir, successor or assign, as the case may be, of such person or, body as aforesaid;*
> >
> > *(ii) any person responsible for the direction, administration, management and control of the management;*
> >
> > *(iii) the authority, in relation to an organization or group of organizations run by or under the authority of the Government, the Federal Government or any other Provincial Government, appointed in this behalf or, where no such authority is appointed, the head of the organization or group of organizations;*
> >
> > *(iv) the office bearer, in relation to an organization run by or on behalf o f the local authority, appointed in this behalf, or where no officer is so appointed, the chief executive officer bearer of that authority;*
> >
> > *(v) the proprietor, in relation to any other organization, of such organization and every director, manager, secretary, agent or office bearer or person concerned with the management of the affairs thereof;*
> >
> > *(vi) a contractor or an organization of a contractor who or which undertakes to procure the labour or services of employees for use by another person or in another organization for any purpose whatsoever and for payment in any form and on any basis whatsoever; and*
> >
> > *(vii) office bearers of a Federal or a Provincial or local authority who belong to the managerial, secretarial or directional cadre or categories of supervisors or agents and those who have been notified for this purpose in the official Gazette;*

> *(l) "**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;*
>
> *(n) "**Workplace**" means the place of work or the premises where an organization or employer operates and includes building, factory, open area or a larger geographical area where the activities of the organization or of employer are carried out and including any situation that is linked to official work or official activity outside the office."*

5. Section 8 enumerates the powers of the Ombudsperson to inquire into a complaint and provides that:

> *"8. Ombudsperson to enquire into complaint.– (1) Any employee shall have the option to prefer a complaint either to the Ombudsperson] or the Inquiry Committee.*
>
> *(2) The Ombudsperson shall within 3 days of receiving a complaint issue a written show cause notice to the accused. The accused after the receipt of written notice, shall submit written defense to the Ombudsperson within five days and his failure to do so without reasonable cause the Ombudsperson may proceed ex-parte. Both the parties can represent themselves before the Ombudsperson.*
>
> *(3) The Ombudsperson] shall conduct an inquiry into the matter according to the rules made under this Act and conduct proceedings as the Ombudsperson deems proper.*
>
> *(4) For the purposes of an investigation under this Act, the Ombudsperson may require any office or member of an organization concerned to furnish any information or to produce any document which in the opinion of the Ombudsperson is relevant and helpful in the conduct of the investigation.*
>
> *(5) The Ombudsperson shall record his decision and inform both parties and the management of the concerned organization for implementation of the orders."*

6. Section 10 delineates the powers of the Ombudsperson and for our purposes amongst others, conferred on the Ombudsperson the power to impose any minor or major penalties. Sub-section (2) of section 10 reads as under:

> *"S. 10(2) Ombudsperson shall while making the decision on the complaint may impose any of the minor or major penalties specified in sub-section (4) of section 4.*

7. The provisions of the Act, 2012 which will exercise a gravitational pull on the decision that follows will be adverted to and referred at the time of dealing with the arguments of the learned counsel for the parties.

The Agreement of 7th December, 2017:

8. Clause 6.11 of the Agreement executed on 7.12.2017 (**The Agreement**) was the basis on which the Ombudsperson rejected the complaint of the petitioner. This agreement is the pivot around which the controversy revolves and was executed between the petitioner and JS Events and Production ("**JS Events**") on 7.12.2017. Significantly, the respondent No.3 is not a party to the said agreement. The petitioner, in terms of the Agreement agreed to perform at a major concert in Islamabad as an Artist, scheduled on 22nd December, 2017. Thus the Agreement was a one-off service provider agreement executed by the petitioner as an Artist and terminated as soon as the show ended. The Ombudsperson as well as the Governor culled out from the Agreement the conclusion

that the petitioner by the execution of the Agreement did not enter into an employment contract with JS Events and thus was not covered by the definition of the term 'employee' given in the Act, 2012. In the opinion of the forums below a relationship of the nature envisaged by the Agreement did not confer the status of an employee on the petitioner and so she did not have a right to petition the Ombudsperson on that basis. At best the Agreement was for the provision of services and clause 6.11 was a sufficient reflection of the intention of the parties not to create an employment relationship. The learned counsel for the petitioner argued that notwithstanding clause 6.11, the petitioner is still entitled to apply under the Act, 2012 as she can very well claim to be included in the definition of an employee since the provisions of the Act will be triggered in case an expansionist view is taken in order to fulfill and serve the purpose of law.

9. The various clauses of the Agreement which will shed some light on the relationship between the petitioner and JS Events and form its core are necessary to be brought forth. The relevant clauses are reproduced as under:

> *"1.3 "The Event" shall mean the Event to take place on December, 2017 at the Serena Hotel.*
>
> *1.3 "The Work Plan" shall mean the detail of the nature of the services of the Artist to be provided to JS under this Agreement, a copy of which is attached to and forms part of this agreement.*

> *2. ENGAGEMENT OF THE Artist*
>
> *2.1 JS agrees to engage the Artist for the purpose of providing services to JS for the Event as set out in the Work Plan.*
>
> *2.2 In consideration of the Artist Fee and the Artist's Expenses, the Artist agrees to provide his services to JS for the Even as set out in the Work Plan.*
>
> *3.2 JS and Artist agree that any material arising from the services of the Artist as set out in the Work Plan shall only be used by JS for the Event. This material shall not be released on social media or broadcasted on any medium without giving a preview to the artist and without prior written consent of the Artist."*

10. Attached with the Agreement was a work plan and which laid out the detail and nature of the services of the artist to be provided to JS Events under the Agreement. It will be noticed that throughout the Agreement the petitioner has been referred to as an artist and a fee was also agreed between the parties which was the artist's fee. For all intents therefore the Agreement is for services to be provided by the petitioner as the artist and was to last for a show which was to take place at Islamabad and the Agreement has admittedly terminated on the performance in the show. The parties do not quarrel that this case does not relate to any obligation arising out of the Agreement and the petitioner does not allege a complaint either in respect of the owner of JS Events or any of its employees. The complaint has been filed in respect of certain alleged acts committed by the respondent No.3 who admittedly is not an employee of JS Events and was not an executant of the Agreement too. Thus not only that this petition engages the question whether the petitioner is an employee

within the definition given in the Act, 2012 but also whether a complaint could competently be made in respect of a person who is neither an employee nor an employer. In a crux, though the harassment within the meaning of the term given in the Act, 2012 was committed allegedly in the workplace, will it be triable by the Ombudsperson under Section 8 of the Act if neither it is made by an employee of the organization nor is the accused in that complaint an employee of that organization.

11. The learned counsel for the petitioner invites this Court to expand the definition of employee and to include within that definition a person who renders services under an agreement of the nature which was executed between the petitioner and JS Events.

Discussion and Conclusion:

12. As a prefatory, it has to be emphasized that this case concerns justiciability of the petitioner's complaint before the Ombudsperson and does not seek to return a finding on the merits of the complaint for that stage was not reached before the forums below. Much emphasis was laid by the learned counsel for the petitioner on the policy and purpose of the Act, 2010. It was asserted and I would tend to agree that the Act was promulgated to make provision for the protection of women from harassment at the workplace. There is no doubt that the enactment was the need of the hour and gave a sense of security and

protection to the women who had no remedy at their disposal for acts which were committed against them at workplaces and which were in the nature of unwelcome sexual advance, request for sexual favours or other verbal or written communication or physical conduct of a sexual nature. All of these acts constitute sexually demeaning attitudes, causing interference in their work performance besides creating intimidating, hostile and offensive work environment. The purpose of the Act has been encapsulated in the preamble of the Act as also in the Statement of Objects and Reasons which was put forth by the Ministry-in-Charge (Prime Minister) Islamic Republic of Pakistan in the following words:

> *"The objective of this Act is to create a safe working environment for women, which is free of harassment, abuse and intimidation with a view toward fulfillment of their right to work with dignity. It will also enable higher productivity and a better quality of life at work. Harassment is one of the biggest hurdles faced by working women preventing many who want to work to get themselves and their families out of poverty. This Act will open the path for women to participate more fully in the development of this country at all levels.*
>
> *This Act builds on the principles of equal opportunity for men and women and their right to earn a livelihood without fear of discrimination as stipulated in the Constitution. This Act complies with the Government's commitment to high international labour standards and empowerment of women. It also adheres to the Human Rights Declaration, the United Nation's Convention for Elimination of all forms of Discrimination Against Women and ILO's convention 100 and 111 on workers' rights. It adheres to the principles of Islam and all other religions in our country which assure women's dignity.*
>
> *This Act requires all public and private organizations to adopt an internal Code of Conduct and a complain/appeals mechanism aimed at establishing a safe working environment, free of intimidation and abuse, for all working women. It shall also establish an Ombudsman at Federal and provincial levels.*

13. As observed earlier, there is no cavil with the object of the Act which was designed to create a safe working environment for women which was free from harassment, abuse and intimidation. It was designed to be an enabler for better quality of life at work as undoubtedly harassment is one of the biggest hurdles faced by working women. Of equal importance was the purpose of creating opportunities both for men and women in the right to earn a livelihood without fear of discrimination. The learned counsel for the petitioner particularly emphasized the words "for all working women" used in the 'Statement of Objects and Reasons' to argue that the ensuing Act was meant to be applicable to all working women in a workplace and did not specify whether those women were the permanent or contractual employees of an organization or were rendering services in a different capacity. This submission should receive a short shrift. The Statement of Objects and Reasons does not control the enactment which is finally passed by the legislature and this Court is only concerned with the law which has finally seen the light of the day and thus falls to be interpreted by this Court.

14. While doing so, this Court is cognizant of its primary duty to interpret the law and not to make new law, for Judges are interpreters and not law makers. From a cumulative reading of the Act, 2012 it is an ineluctable conclusion that the law applies to harassment at a

workplace in respect of an employee of an organization who can, upon an application of harassment, bring a complaint before the Ombudsperson against that employer or any of the persons employed in that organization. The purpose of the law has been circumscribed in respect of harassment of women who are employees either regular or contractual in an organization and thus it cannot be argued that the purpose of law will be defeated if the petitioner were not to be included in the definition of the term "employee". The law does not speak to every woman but only to a woman employee who happens to be harassed at a workplace. Clearly, the Act, 2012 impacts a large number of women who have benefited out of it and so the purpose of the law has been served. On the basis of this argument, it would neither be appropriate nor expedient to continue to expand the periphery of the law so as to include within its fold persons who are not employees within the strict meaning of the term defined in the Act, 2012 and who have other remedies which can be pursued.

15. The threading of the provisions of the Act, 2010 will lend some actuality to the entire analysis. We will begin by section 8 which confers the power on the Ombudsperson to enquire into a complaint. An employee has an option to prefer a complaint either to the Ombudsperson or the Inquiry Committee. The Inquiry Committee is a Committee which each organization is

obliged to constitute within 30 days of the enactment of the Act to enquire into complaints under the Act. The petitioner chose to file a complaint with the Ombudsperson and not to the Inquiry Committee for obvious reasons. For, the remit of the Inquiry Committee extends to holding an inquiry in respect of an accused and which has been defined in the Act to mean an employee or employer of an organization against whom the complaint has been made under the Act. Clearly, the accused in the instant case is the respondent No.3 who is neither an employee nor an employer of the organization and was thus not amenable to the jurisdiction of the Inquiry Committee. This is so because the respondent No.3 does not admit to be either an employee or employer of JS Events and no question, therefore, arises for an enquiry to be held against him. On the same analogy the enquiry by the Ombudsperson cannot be held against the respondent No.3, for an Ombudsperson is possessed of the same powers as that of an Inquiry Committee upon a complaint being preferred. By virtue of sub-section (2) of section 10, while making the decision on the complaint, the Ombudsperson may impose any of the minor or major penalties specified in sub-section (4) of section 4. It would be interesting to reproduce the penalties stipulated by sub-section (4) of section 4 which the Ombudsperson or the Inquiry Committee may decide to impose at the conclusion of the enquiry. Sub-section (4) states that:

> *"(4) The Inquiry Committee shall submit its findings and recommendations to the Competent Authority within thirty days of the initiation of inquiry. If the Inquiry Committee finds the accused to be guilty it shall recommend to the Competent Authority for imposing one or more of the following penalties:-*
>
> *(i) Minor penalties–*
>
> *(a) censure;*
>
> *(b) withholding, for a specific period, promotion or increment;*
>
> *(c) stoppage, for a specific period, at an efficiency bar in the time-scale, otherwise than for unfitness to cross such bar; and*
>
> *(d) recovery of the compensation payable to the complainant from pay or any other source of the accused;*
>
> *(ii) Major penalties–*
>
> *(a) reduction to a lower post or time-scale, or to a lower stage in a time-scale;*
>
> *(b) compulsory retirement;*
>
> *(c) removal from service;*
>
> *(d) dismissal from service; and*
>
> *(e) Fine. A part of the fine can be used as compensation for the complainant."*

16. A reading of the above provision would undoubtedly help in resolution of this wrinkle. It shows that any penalties which the Committee or the Ombudsperson may impose would constitute such penalties which are relating to the term of employment of an employee in an organization and none of the penalties could, by no stretch of imagination, be imposed on the respondent No.3 herein who is not an employee of the organization. The major penalties that may be imposed consist of a reduction to a lower post, compulsory retirement, removal from service and dismissal from service. Out of the penalties

enumerated by sub-section (4) the only penalty which can remotely be associated with the respondent No.3 was at clause (e) of sub-section (4) which states 'fine' as a penalty. However, the imposition of fine is to be done in conjunction with the other expressed penalties and is preceded by word 'and' which makes it conjunctive and not disjunctive and there are no nuances about it. Therefore, quite clearly the penalty of fine cannot be imposed separately but has to be imposed along with other major penalties prescribed by sub-section (4).

17. Thus, the question whether the petitioner is an employee of the organization and thus competent to bring a complaint to the Ombudsperson is tied in with the question whether the respondent No.3 is an accused or not within the meaning of the term as defined in the Act, 2010 itself. In my opinion, both the conditions have to exist *coterminous* for the Ombudsperson to proceed on the complaint and the entire tenor of section 8 is an indication that in case one of the conditions is absent, the Ombudsperson is denuded of his powers to determine the complaint. These constitute jurisdictional facts which must exist on the threshold for the complaint to be proceeded with. It may be noticed that although the term 'complainant' has also been defined in section 2(e) the term used in section 8 is an ***employee*** and not the ***complainant***. It follows that a person filing a complaint

before the Ombudsperson or the Inquiry Committee must firstly be an employee in order to become a complainant in a case. Thus the controversy dwells on the true import of the term 'employee' used in the Act, 2010.

18. Employee has been defined to mean a regular or contractual employee. While defining the term 'employee' in actual fact that term has not been elaborated upon and the legislature has merely given two categories of employees, one regular and the other contractual so as to include them in the compendious term 'employee'. Thus, the legislature assumed that the term shall be taken to mean as one in ordinary parlance and in the commercial sense as connoting a person who is for the time being exclusively in the administrative and supervisory control of an employer. The agreement between the petitioner and JS Events was for one event and at best was to last for 10 days. That agreement has long expired. Therefore, if at all a relationship of employment was created, it was for a period of 10 days between the petitioner and JS Events. A schedule has been made part of the Act, 2012 and which prescribes a Code of Conduct for protection against harassment of women at workplace. Some of the clauses in the Code of Conduct give an inkling into the precise nature of the definition of an employee. Some of the clauses are being reproduced for the purpose of making an informed decision:

> *"(iv) A complainant or a staff member designated by the complainant for the purpose 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 her discretion in the spirit of this Code. The request may be made orally or in writing.*
>
> *(v) If the case is taken up for investigation at an informal level, a senior manager from the office or the head office will conduct the investigation in a confidential manner. The alleged accused will be approached with the intention of resolving the matter in a confidential manner.*
>
> *(viii) The complainant may make formal complaint through her incharge, supervisor, CBA nominee or worker's representative, as the case may be, or directly to any member of the Inquiry Committee. The Committee member approached is obligated to initiate the process of investigation. The supervisor shall facilitate the process and is obligated not to cover up or obstruct the inquiry."*

19. Some of the provisions of the Code of Conduct set forth above clearly show that the entire emphasis is on employees who are the permanent staff of an organization whether regular or contractual and are in that capacity beholden to the organization. A complainant may report an incident of harassment informally to her supervisor or a member of the Inquiry Committee. Clearly, the petitioner does not claim that any of the officers in the organization was her supervisor. Then if the case is taken up for investigation, a senior manager from the office will conduct the investigation in a confidential manner. This too will not be countenanced by the petitioner and she will not be subject to an investigation by a senior member from the organization as she has not filed any complaint against the organization or any accused who is a member of the organization. Once again, clause (viii) of the Code of

Conduct gives a right to the complainant to make a formal complaint through her incharge, supervisor, CBA, nominee or worker's representative and thereupon the Committee is obligated to initiate the process of investigation. Once again, the Code of Conduct does not envisage a person who would assert that she does not have an incharge, supervisor, nominee or worker's representative. All of these offices and the making of the complaint to persons holding these offices in an organization once again lead to the clear inference that an employee defined in the Act,2010 has a supervisor or an incharge in an organization. The purpose of referring to the various provisions of the Code of Conduct is to substantiate the conclusion sought to be drawn that the petitioner was not an employee of JS Events either regular or contractual and on this basis could not have sought to assert her right to maintain the complaint.

20. The petitioner invites this Court to hold that the purpose of the law is to include even an independent and self-employed woman to be included in the term 'employee'. This will be a mockery of law. Not only that many of such women would be loathe to be conferred such a status and subject themselves to the complete control and sway of an employer. For, certainly they cannot be heard to say that they be selectively treated as an employee for the purposes of this Act and not otherwise. If the

petitioner seeks to be treated as an employee, it must be in the entirety of the concept and not on the basis of a strained construction put on words, whimsically. Secondly, a male who enters in such a contract will not be treated as an employee at all, either under this law or otherwise. For the term 'contractual employee' cannot be so defined to exclude a male contractual employee. This begs the question: Would the petitioner submit herself to the complete administrative and functional control of JS Events by the mere signing of the agreement? Did the petitioner have no other contractual obligation of a like nature and by that very fact, was an employee of various other organizations as well at the relevant time? The petitioner does not deny that she is an independent, self-employed Artist who agrees to render artistic performance for various firms and individuals. In most cases (considering the petitioner's stature and accomplishments) it is those firms or individuals who approach her to solicit her services. Being labeled an employee would certainly demean her stature to her detriment.

21. If the legislature had a different intention, it would not have used the term 'employee' as one who could file a complaint. It could easily have provided "Any woman in a workplace for the time being" may bring a complaint. The purpose of law certainly is to protect female employees of an organization from harassment at the hands of male

employees who interact with each other, day in day out. These female employees were at the forefront of the thought behind enacting this law. The purpose is not to expand the scope to include strangers, who are not employees of that organization, and who walk into a workplace, to be caught by the mischief of the law.

22. The determining factor as hammered in by the learned counsel for the petitioner is not the 'workplace' but is a combination of factors, such as, employer, employee and an accused. If an act is to be within the ambit of this law, that act must involve an employer, employee and an accused at the particular workplace. Simply because an act took place at a workplace will not, *ipso facto*, trigger the law. On a proper objective analysis of the Act, read cumulatively, there is no doubt that the law does not present an open-textured concept of any woman preferring a complaint who happens to be at a workplace of an organization. The reach of the law cannot be extended in such a way so as to make it untenable for an organization (whose workplace it is) to exercise proper control or supervision. For, we must bear in mind that the concept which permeates the Act (and which must be taken to be the policy of the law too) is to enable the 'management of an organization' to have complete sway over the matter and correspondingly to assume duties laid down in the Act. This, in turn, presupposes that both the complainant and

the accused are under the administrative and managerial / supervisory control of the organization. Ultimate supervision and control are the crucial factors which underlie the purpose of the law for otherwise the law will have no meaning. Why would a stranger agree to submit to the supervisory control of an organization for the purposes of the Act without executing a contract of employment? Notice the various provisions of the Act, which cast a duty on an organization, for example, to constitute an Inquiry Committee, to follow the procedure for holding enquiry and for the competent authority to impose a penalty which too are penalties that can be imposed on an employee of an organization and none else.

23. The definition of an 'Employer' flies in the face of the petitioner's arguments. It means any person whether incorporated or not, which "***employs workers***" in an organization '***under a contract of employment***'…..Thus an organization can only be held accountable under the Act, in respect of 'workers' it employs and who have executed a contract of employment. The petitioner neither claims to be a worker of JS Events nor does she admit to have entered into a contract of employment with it. Apart from this, the complaint is not in respect of an employee of JS Events and who can be summoned as an accused and punished. The accused under the law, must be an employee of the organization which operates the

workplace and if it is not, then the complaint suffers from legal infirmity and must fall on barren ground.

24. The argument of the learned counsel for the petitioner cannot prosper on another ground, too. The construction sought to be put on the term 'employee' is likely to ensnare a large number of persons who enter into contracts to prove services to an organization of the same kind that the petitioner agreed to do so. Just as the petitioner wants her to be treated an employee, so can any male service provider be considered an accused (an employee of the organization) on the same analogy. This will be sheer pedantry. It would have such an unpalatable effect that perhaps no person (male) would be expected to enter into a contract to provide services for fear of prosecution under the law.

The Agreement:

25. The petitioner admits that only an employee is entitled to apply. She, however wants this Court to treat her an employee and for her complaint to be justiciable. This is despite the fact that the Agreement is '***to engage the Artist for the purpose of providing services***' (clause 2.1). The petitioner is described as 'the Artist' in the Agreement which expression exudes an elevated notion of dignified independence and certainly rubbishes any semblance of employment. Throughout the body of the Agreement, the parties have taken pains to recognize the

status of the petitioner as a celebrity with high standing so the Artist's fee and other facilities have been made commensurate with that status (read clauses 4.1-4.8). The petitioner clearly seems to have executed the Agreement as a party proudly flaunting her status as a top Artist and doing so on her own terms. Her contention now for her complaint to be justiciable by the Ombudsperson is incompatible with the tenor of the Agreement. She cannot be permitted to lower herself from that exalted position (and thus to be treated as an employee) merely to make herself (and respondent No.3) amenable to the jurisdiction of the Ombudsperson under the Act. The petitioner is palpably wrong in taking these mutually contradictory positions.

26. Clause 6.11 in the Agreement constrained and compelled the Ombudsperson as well as the Governor to dismiss the complaint on the threshold. The clause stipulates that:

> *"6.11 This Agreement shall not be deemed to create any partnership or employment re-Governing Law."*

27. There is no ambiguity about the intention of the parties reflected through this stipulation. It benefits both the parties, but more so, the petitioner. Clearly she did not want to be treated as an employee of JS Event. This was for obvious reasons and the clause best served her interest at the relevant time. She cannot be permitted to turn *volte face* and argue an entirely different proposition which

blatantly belies the clear intent reflected in clause 6.11. The clause cannot be construed selectively to mean differently in different times to suit the petitioner's interest. The interest of the parties, gathered from a reading of the Agreement was for the petitioner to provide services as an Artist and while doing so, to make clear, as an abundant caution, that no employment relationship was crated thereby. The clause merely stated the obvious: Had it not been a term of the Agreement the result that I propose to arrive at would still be the same.

28. The principles of interpreting commercial contracts are well-settled. They should be interpreted in accordance with the:

'Common sense principles by which any serious utterance would be interpreted in ordinary life'. (Investors Compensation Scheme Ltd. v. West Bromwich Society (No.1) [1998] 1 W.L.R 896 (HL) at 912).

29. The petitioner cannot be heard to say that clause 6.11 in the Agreement was not a serious utterance during the making of the Agreement and a term which ought to be ignored. This will have serious consequences and tends to undermine the rights of JS Events too in that the petitioner may claim not only employment rights but may also lay claim to rights by asserting partnership. For if the terms of clause 6.11 can be ignored for one aspect, they can be ignored for other aspects, too.

30. The iterative process of contractual interpretation, too, requires that where the wording of a contractual provision is clear, there is limited room for the court to conclude that these words were used by mistake and that 'the key is to recognize the importance of ascertaining the commercial purpose of a contract". (***2012 Law Quarterly Review 41***).

31. It was laid down in *[1977] I.C.R 590 at 595C,* per Lord Denning M.R that 'where a situation is in doubt or ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be".

32. The U.K Supreme Court confirmed that the approach should be to identify the actual legal obligations between the parties by ascertaining what was actually agreed between the parties as set out in the written terms. *[2011] UKSC41*.

33. Chitty on Contracts, Vol.II (Thirty Third edition) enumerates the factors identifying a contract of employment. These are:

> *"**The factors to be considered** The case law suggests that the factors relevant to the process of identifying a contract of employment may usefully be listed as follows:*
>
> *1) the degree of control exercised by the employer;*
>
> *2) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;*

3) *whether the worker was properly regarded as part of the employer's organization;*

4) *whether the worker was carrying on business on his own account or carrying on the business of the employer;*

5) *the provision of equipment;*

6) *the incidence of tax and national insurance;*

7) *the parties' own view of their relationship."*

34. None of the above factors can be invoked to aid by the petitioner. Apart from control and superintendence, the organization test specified in *Chitty* is a significant pointer to a contract of employment.

> *"**The "organization" test**An employee is usually a regular unit in the complex organization of a business: he or she is an integral part of the firm, not a casual or temporary person engaged only for the purpose of completing a specific task which is accessory to the main business."(pp.1521-25,vol.II)*

35. It is a truism that the petitioner is a self-employed independent contractor who is not an integral part of JS Events and was engaged for the purpose of completing a specific task. She was not at any time during her performance at the show under the control and supervision of JS Events as an employee. She was not an integral part of the firm and was merely engaged for the purpose of completing a specific task.

36. The petitioner relied upon two cases as precedents for the proposition advanced. The first is *Messrs Allied Precision Engineering Products (Pvt.) Ltd. through Notified Factory Manager and others v. Jhanda Khan*

Maree and others (**2011 PLC 286**), a judgment by the Quetta High Court and the following observations:

> *"5 We have heard the respective contentions of the learned counsel and carefully gone through the record. The sole question to be decided is, whether respondents were employees of the petitioner (as claimed by them) or of contractor (as alleged by the petitioner)? To determine the real status of a worker, as to he/she were employees of an establishment/industry/company ("company") or a contractor, the superior courts, in a number of cases, have introduced the following criteria/test:---*
>
> *(i) Whether the company has administrative control over the worker?*
>
> *(ii) Whether the company based for the work done by the worker?*
>
> *(iii) Whether the company has the power to reinstate and dismiss the worker?*
>
> *(iv) Is the work required to be performed by workman of a permanent nature and is it related to process of manufacturing before the finished goods were sent into market?*
>
> *(v) Whether payment for the worker's services was made by the company?*
>
> *(vi) Whether the goods, that the worker helped to manufacture, when marketed, brought proceeds to the company itself?*
>
> *(vii) The duration the worker had been performing his duties and providing labour in connection with the manufacturing process?*
>
> *(viii) Whether the contractor is a genuine person and has not been set up merely to deny the worker of the benefits under the labour laws?*

37. Firstly, the precedent is wholly irrelevant to the present facts. Here no question arises whether the petitioner is the employee of a company or of another contractor who provides certain services for that company. Secondly, the tests referred to by the Quetta High Court, if applied to the petitioner, would certainly compel a finding that the petitioner is not an employee of JS Events.

38. In any enquiry, the first step is to ask the right question. The right question to ask here is whether the

petitioner is an independent contractor, a self employed businessman or an employee of JS Events.

39. The distinction between an Independent Contractor and an Employee is well-entrenched by now. The question mostly arises in issues relating to Industrial Relation Laws. The distinction has been culled out in *Word and Phrases, Permanent Edition, 14A* by reference to different laws and decided cases as follows:

> *"Sculptor of statute "Third World America" was "independent contractor," rather than "employee," of association to combat homelessness, and, thus, statute that was not commissioned as contribution to collective work was not "work for hire," and association was not "author", sculptor supplied his own tools, worked in his own studio in another city, was retained for less than two months, had absolute freedom to decide when and how long to work, was paid sum dependent on completion of specific job, and had discretion in hiring and paying assistants; and association did not pay payroll or social security taxes, was not business, and did not provide any employee benefits."*
>
> *"The distinction between "independent contractor" and "employee" is found in the nature and amount of control reserved by person for whom work is done, and employment relationship exits whenever employer retains right to direct manner in which business shall be done as well as result to be accomplished."*
>
> *"Common law agency concepts distinguish an "employee" from an "independent contractor," within section of Labor Relations Act providing that the term employee shall not include any individual having status of independent contractor."*
>
> *"An "employee" ordinarily is person presently engaged in employment, and is defined as one employed by another or one who works for wages or salary in service of an employer."*

40. This was brought out in *Dynamex Operations West, INC. v The Superior Court of Los Angeles County (Ct.App. 2/7 B249546)*, (Supreme Court of California) referred by

the respondent, upon skillful analysis of the case law, in the following words:

> *"For the reasons explained hereafter, we conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the "ABC" test, that is utilized in other jurisdictions in a variety of contexts to distinguish*
> *employees from independent contractors. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.*

None of the standards enumerated above would make the petitioner an employee or worker of JS Events.

41. While on the subject, an important distinction between 'contract of service' and 'contract for service' must be borne in mind. The petitioner's contract was of the latter category and so there was no relationship of master and servant. *Words and Phrases, Permanent Edition, 9A (2005-2017)*, highlights the distinction thus:

> *"Where contractor's obligation is to produce certain net result by means and methods over which, so far as concerns details of management of means and of physical conduct of himself and employees, contractor has own control, contract is "contract for service" not "contract of service" and relation of master and servant does not exist."*

42. A judgment of the Queen's Bench Division *(Ready Mixed Concrete (South East) Ltd. v Minister of Pensions*

and National Insurance, [1968] 2 Q. B 497) was confronted with the same question and held that:

> *"It may be stated here that whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention."*
>
> *U.S. v. Silk was the most important of the American cases cited to me. The case disposed of two suits raising the question whether men working for the plaintiffs, Silk and Greyvan, were "employees" within the meaning of that word in the Social Security Act, 1935. The judges of the Supreme Court agreed upon the test to be applied, though not in every instance upon its application to the facts. It was not to be what they described as "the common law test," viz., "power of control, whether exercised or not, over the manner of performing service to the undertaking." The test was whether the men were employees "as a matter of economic reality." Important factors were said to be "the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation."*

43. The second authority is a judgment by a learned Single Judge of this Court while deciding W.P No.28791 of 2019. Suffice to say that that judgment is not a binding precedent since it was dismissed *in limine,* and without notice to other party. As per the judgment's own showing, it had no *stare decisis* value for the primary focus of the decision was dismissal of petitions on the threshold based on 'Limine Control Doctrine". However, following portions were relied upon to anchor the case of the petitions:

> *"Moreover, this Act is not confined only to the relationship of an employer and 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. As in the instant case, the Petitioner/teacher/employee used his official position to sexually exploit his female student. The intention of the legislature for enacting the Act to protect all employees from being harassed or exploited during employment which can be at the workplace or any environment as specified in their terms and conditions of the employment. Section 2 (f) clearly states that employee means a regular or contractual employee whether employed on daily, weekly, monthly or hourly basis, and includes an intern or an apprentice…"*

44. The petitioner's counsel seems to have been swayed by the words "by employer or employee **with any women**. But the next few lines clarify this apparent anomaly when the learned Judge remarked that "the intention of the legislature for enacting the act to protect all **employees** from being harassed or exploited…". Thus the earlier part of the paragraph has been used in isolation and completely out of context to proffer an argument which is not borne out from the precedent. Further contemporaneous explanation is to be found in the following paragraph:

> *"…The workplace defines under Section 2 (n) which clearly states that any place of work which includes any situation that is linked to official work or official activity outside the office. This means that any worker whoever is employed in any manner or capacity with the employer is protected from being harassed…"*

45. Here the term 'worker' has been used which conforms with the policy of the law.

46. Be that as it may, it seems that the Court was not properly assisted. Further, a case is an authority for its own facts and it cannot be applied to all facts coming

before a court which have distinguishing features. We must bear in mind at all times that courts are not empowered to provide a remedy to a person, under a law, if none is provided by the legislature. For, that will be legislating and not judging. The two roles are not to be confused. We have not been assigned to make the law but to interpret it. In holding that by employer or employee with any woman the court is merely expanding the definition of an employee (as defined) which the legislature restricted to be 'an employee of an organization'. The narrow compass within which the law operates has been undone by the expansiveness of the words used in the precedent. Judges are not to decide cases on the clarion call of a particular class of persons or in response to popular public sentiments. To be swayed by such momentary lapses will only undermine the duty cast on the judicial branch.

47. The petitioner's counsel made an impassioned appeal for justiciability of the complaint under the Act, 2010. Unfortunately that remedy cannot be provided by this Court if none exists. Special law, in particular, are limited in scope and do not bring every person within their mischief. The primary purpose of enacting a statute is to make rights and liabilities certain and defined. Passions, entreaties or even lack of remedy have never been recognized as grounds to permit a person to apply for a

relief to which he is not entitled. The wrongness of the argument is apparent also from the perspective of other bodies and persons, such as the Organization and the accused, coming within the ambit of the law. By this construction, they will be exposed to unforeseen dangers of a varying nature. Unlimited examples can be cited of laws having restricted scope and no one has been heard to complain that his right to approach the forum established by that law has been ousted, unreasonably and thus offends his constitutional right. Perhaps the law ought to have provided for two distinct streams of complaints but until that is done, the interpretation must follow the letter of the law.

48. As Justice John Marshall Harlan warned in the 1960s, an invitation to judicial law making results inevitably in "a lessening, on the one hand, of judicial independence and, on the other, of legislature responsibility, thus polluting the bloodstream of our system of government." (*The evolution of a judicial philosophy: selected opinions and papers of Justice John M. Harlan 291 (1969)*.

49. "The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: *Silence (Equal*

Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc. 575 US____(2015).

50. The learned counsel for the respondent No.3 raised another issue to hinge his defence on. It was that the petitioner was, even by her own showing, not an employee at the time of making the complaint. This issue is not required to be answered for it does not arise as it has been held that the petitioner was not an employee anyway. The next question, therefore, becomes moot. It may be taken up and decided in a future case. As Chief Justice John Roberts (of US Supreme Court) said: "*If it is not necessary to decide more, it is necessary not to decide more*."

51. In view of the above, this petition is incompetent and without merit and is ***dismissed***.

(SHAHID KARIM)
JUDGE

Announced in open Court on 11.10.2019.

JUDGE

Approved for reporting.

JUDGE

⋆

Rafaqat Ali`