

**ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI**

C.P. No.D-316 of 2008

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| Date | Order with signature of Judge |
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Present:

Mr. Justice Muhammad Ali Mazhar.

Mr. Justice Abdul Maalik Gaddi.

Shehzad Nisar

.....

Petitioner

V E R S U S

Federation of Pakistan & others.....

Respondents

31.01.2017

Mr. Muhammad Akram Shahbaz, advocate for the petitioner.

Mr. Shakeel Ahmed advocate for the respondent No. 2 & 3.

Muhammad Ali Mazhar, J: The brief facts of the case are that the petitioner participated in the auction proceedings conducted by the Custom department on 22.12.2005 for the lot of hair colours which was perishable item. The petitioner offered Rs.15 million and was declared successful bidder. He deposited Rs.2 million against a bid value on 22.12.2005. The petitioner made repeated, verbal and written requests to the concerned officials for issuance of payment sheet for the balance amount which was not issued to the petitioner, thereafter, seven months lapsed but the matter was kept in abeyance. It is further stated that concerned staff of the Collectorate advised the petitioner to wait for the issuance of payment sheet. However, on 23.08.2006, the Respondent No. 3 intimated the petitioner that since the petitioner failed to deposit the outstanding amount, the amount deposited by him

as an earnest money has been forfeited for the reasons mentioned in the letter dated 23.08.2006. The petitioner made various efforts for the refund of earnest money but to no avail. In furtherance thereof, the petitioner filed a complaint to the Federal Tax Ombudsman and his complaint was decided vide order dated 27.02.2007. The relevant paragraph No. 16 of the order is reproduced as under:-

“16- From the circumstances of the case it transpires that the decision to forfeit earnest money is arbitrary, unjust, oppressive and unlawful as the Complainant has not been given a fair deal, disregarding his request for cancellation of auction and refund of earnest money; the order of its forfeiture was passed eight months after auction. Maladministration is established. It is recommended that CBR direct the Collector of Customs to

- (i) refund the earnest money within fifteen days; and
- (ii) compliance be reported to this office within thirty days.”

2. The learned Federal Tax Ombudsman directed the respondents to refund the earnest money within fifteen days and compliance report was directed to be submitted within thirty days. Being aggrieved by this order, the respondents filed representation under Section 32 of the Establishment of the Office of Federal Tax Ombudsman, Ordinance, 2000 which was decided by the competent authority on 28.09.2007. The relevant paragraphs No. 4 and 5 of the order passed on the representation are reproduced as under:-

“4. The Customs deny the complainant’s allegation. The complainant was reminded to make payment. The payment of the balance auctioned amount was payable within the time prescribed by law. The complainant must be aware that expiry of statutory time cannot be avoided by oral promises. No element of maladministration is discernable.

5. Accordingly, the President has been pleased to set aside the FTO’s recommendation dated 27.02.2007 in complaint No. 1055-K/2006.”

3. Learned counsel for the petitioner argued that the action of the respondent No. 2 & 3, whereby, earnest money was forfeited was without jurisdiction as they failed to supply mandatory payment sheet for the payment of balance amount of the offered price. The provisions of Custom Act do not empower/ authorize the respondents to forfeit the earnest money. He further argued that on the face of it, the order passed on the representation does not seem to be in accordance with law nor it is a speaking order while the learned Federal Tax Ombudsman passed speaking order taking into consideration the entire material and relevant facts.

4. Learned counsel for the Custom authority argued that in the representation, the petitioner raised a question that FTO granted 15 days' time for complying with the recommendations and the representation was filed after the expiry of said time which is time barred. On the contrary, he argued that against the representation, 30 days' time was available and the authority has rightly observed that the time for filing the representation cannot be reckoned from the expiry of time specified for complying with the FTO recommendation and the FTO recommendation cannot override the statutory provisions. When we asked learned counsel as to why other aspects have not been dealt with and discussed by the authority in the order on which he conceded that no other ground has been discussed in the order.

5. We have examined the order passed by the learned FTO in which detail discussion was made regarding the refund of earnest money and the delay, if any, caused for the purpose of making further payment. In paragraph 11 of the FTO order, a statement of Assistant Collector has also been reproduced in which he *inter alia* admitted that the payment sheet might have been prepared and signed by the Principal Appraiser on 30.12.2005 but office copy of the sheet is not available in the file. He further stated that the said documents were given to

the bidders by hand but there was no evidence of delivery in person or by postal or courier service. The judgment rendered by the hon'ble Supreme Court in the case of **Federation of Pakistan Vs. Muhammad Tariq Pirzada reported in 1999 SCMR 2189** amply demonstrates that the petition was filed under Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973, read with Order XXVI, Supreme Court Rules, 1980 for seeking review of the judgment, dated 22-2-1999 passed by the honourable Supreme Court in Civil Petition No.49 of 1999. In the judgment, the apex court observed that *“under Article 32 of the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 (President’s Order 1 of 1983) (hereinafter referred to as the Order), the President has full and complete powers to arrive at his own conclusion in order to do justice but in the exercise of such powers he must act justly and fairly and if the recommendations made/findings recorded by the Mohtasib are intended to be interfered with in the interest of justice, valid reasons must be assigned. It was further observed that the President while seized of a representation under Article 32 of the Order is under legal obligation to deal with it fairly and justly and a complainant in whose favour a finding has been recorded/recommended made by the Mohtasib, has a legal right to demand that the President should decide his representation, affecting his valuable rights, by assigning valid reasons if findings/recommendations made by the Mohtasib are sought to be set aside/reviewed or modified, irrespective of the fact whether acting independently or on the advice of the Prime Minister.”* It was further held that *“the jurisdiction vested in the President under Article 32 partakes of appellate jurisdiction. Application of judicial mind is a must for reaching a fair and just conclusion on the lis brought before the President/Wafaqi Mohtasib. Such an approach is in consonance with the scheme of the order, in that, the office of Wafaqi Mohtasib (Ombudsman) has been created in order to diagnose, investigate, redress and rectify any injustice done to a person through maladministration.....”*.

6. The above dictum unequivocally demonstrates that on dilating upon Articles 32 and 11 of the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983, the Apex Court held that jurisdiction vested in the President partakes of appellate jurisdiction and the application of judicial mind is a must for reaching a fair and just conclusion on the lis brought before the President/Wafaqi Mohtasib. It was further held that the functions performed by the Wafaqi Mohtasib are quasi-judicial. The concept of representation envisaged by Article 32 as to where the Mohtasib has failed to record just and proper findings/recommendations, the President should undo the wrong done to the complainant for the advancement of the purposes of the Order. The powers vested in the President under Article 32 have to be exercised in conformity with section 24-A of the General Clauses Act, 1897, as amended by General Clauses (Amendment) Act, 1997. Though in the case hand the representation was filed against the order of Federal Tax Ombudsman but the judicial precedent cited above is fully applicable to the present case as in this case also the provisions for representation is identical and once the representation is filed, it is obligatory for the competent authority to decide the representation after proper application of mind and considering all the relevant aspects of the order impugned before him. On the contrary, survey of the impugned order passed on the representation obviously displays that no cogent reasons have been assigned in the order passed on the representation to take departure or setting aside the order passed by the learned Federal Tax Ombudsman. The Learned counsel for the petitioner referred to the order passed by the learned Division Bench of this court in this petition on 29.01.2009 in which the contention of the learned counsel for the petitioner was recorded but the matter was adjourned and on 11.03.2009 again the arguments were discussed and the petition was admitted for regular hearing with the directions to the respondents to deposit the earnest money with the Nazir of

this court. According to the learned counsel for the Custom Authority, this amount has already been deposited with the Nazir of this court and the endorsement made by the Nazir on the order sheet of 11.03.2009 corroborates the deposit of this amount.

7. As a result of above discussion, the order dated 28.09.2007 communicated by the Section Officer, Justice & Human Rights Division, Government of Pakistan to the petitioner is set aside. The matter is remanded back to the competent authority to decide the representation afresh within ninety (90) days and copy of order may also be transmitted to this court so that further fate of amount deposited with the Nazir may be decided as soon as possible.

Judge

Judge

Aadil Arab