

# IN THE HIGH COURT OF SINDH AT KARACHI

CP D 1057 of 2018

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

Board of Secondary Education  
vs.  
Province of Sindh and Others

For the Petitioner: Mr. Abrar Hassan, Advocate.

For the Respondent Nos. 1 & 3: Mr. Meeran Mohammad Shah  
Assistant Advocate General Sindh

For the Respondent No. 2: Barrister Alizeh Bashir

Date of Hearing: 30.10.2018

Date of Announcement: 24.12.2018

## **JUDGMENT**

**Agha Faisal, J:** The crux of this judgment is the determination of whether a contractual dispute could be entertained, adjudicated and determined by the Provincial Ombudsman Sindh ("**Ombudsman**").

2. Mr. Abrar Hassan, learned counsel for the petitioner, inter alia, argued that the Ombudsman had no jurisdiction to entertain a civil dispute of a contractual nature and hence his decision and the decision in review thereupon, rendered by the Governor of Sindh, were void in the eyes of law. The arguments advanced by the learned counsel are encapsulated and presented herein below:

- i) The petitioner, being the Board of Secondary Education Karachi, had entered into a contract with respondent No.2

for the provision on rental basis of furniture, which was to be utilized at examination centers for the SSC Examination, 2012 being conducted by the petitioner.

- ii) It was demonstrated that the respondent No.2 submitted a bill amounting to Rs.18,846,285/-, in respect of the rental amount claimed from the petitioner. It is an admitted fact that an amount of Rs.13,959,954/- was paid by the petitioner to the respondent No.2, however, the respondent No.2 claimed to have been aggrieved as an amount of Rs.4,886,631/- was said to have been short paid.
- iii) The respondent No. 2 claimed that a total of nine days remained unpaid, in respect whereof the due amount was outstanding. However, respondent No.2 offered to waive the rental for four days. The said offer was subsequently withdrawn by respondent No. 2 and a complaint was filed before respondent No.1 herein, being the Ombudsman, for redressal of the grievance of the respondent No. 2.
- iv) The Ombudsmen considered the complaint and delivered his decision thereupon on 26.12.2016 ("**Ombudsman Decision**"), operative part whereof is reproduced hereinbelow:

#### "FINDINGS

9. I have examined the case and noted that:

- i. The furniture remained entirely in the custody of BSE, Karachi in all the Examination Centers for the hole period

of 34 days during the examination whereas one day extra rental was payable as per agreement.

- ii. During the entire period of examinations, no intimation/direction from BSE authorities were received to lift the furniture on any specific dates or gaps.
- iii. The complainant is justified in claiming the payment of remaining 04 (four) days which has not been paid by the BSE, Karachi.
- iv. This act of not informing the complainant when to lift the furniture is an act of maladministration on the part of the Agency whereas delay in payment of outstanding dues to the complainant can in no way be considered justified. Hence the payment for 04 days rent must be made by BSE to the complainant.

### DECISION

10. I, therefore, in exercise of powers vested in me under Section 11 of the Establishment of the office of Ombudsman for the Province of Sindh Act, 1991, hereby direct the Chairman, Board of Secondary Education (BSE), Karachi, to clear the outstanding balance rent for 04 days to the Supplier viz. M/s Liaquat Sons inside 45 days hereof and report compliance to me.”

- v) The Ombudsmen Order was the subject of a representation by the petitioner before the Governor Sindh, being the respondent No.3 herein, and the said representation culminated in the order dated 13<sup>th</sup> November, 2017 (“**Governor’s Order**”) wherein the Ombudsman Decision was upheld. The operative part of the Governor’s Order is reproduced herein below:

“i) Irrespective of dates on which the exam was held, the furniture supplied by M/s Liaquat Sons remained at examination centers during whole period of exams held from 5<sup>th</sup> April, 2012 to 8<sup>th</sup> May, 2012 (34 days). The said position has been verified by Center Superintendents, and the BSE, Karachi through letter No.BSE/P&P/21/2017,

dated 05.07.2017, has also asserted that exam was held during the period from 05.04.2012 to 08.05.2012.

ii) The Review Committee of the BSE Karachi in its meeting held on 12.11.2015 inter alia found that the word “actual days” was neither included in the advertisement published in the local dailies nor in the Job order. The committee concluded that merit has been established when the BSE, Karachi, availed the offer of vendor (M/s. Liaquat Sons) for 4 days discount out of their total claim for payment of remaining 09 days in addition to already made payment for 26 days as such the claim of the supplier was partly admitted by the agency (Representationist). There is also an ambiguity in clause 20(vi) as the words “actual number of exams days” mentioned therein may also be taken for the days from commencement to end of exam.

iii) Offer of discount by the Supplier was not timely availed by the BSE Karachi and payment of five days was made in April 2016 after the supplier had already lodged complaint with POS on 05.01.2016.

iv) Prior to year 2012, the BSE Karachi had been making payment of rent from date of commencement to date of end of exam without deducting rent for gaps and holidays.

The Governor Sindh, therefore, exercising his powers conferred vide Section 32 of the Establishment of Office of the Provincial Ombudsman Sindh Act, 1991, has been pleased to uphold Provincial Ombudsman Sindh’s decision dated 26.12.2016 in complaint No.POS/09/2016/KC by dismissing your Representation there against, for being devoid of merits.”

vi) It was argued by the learned counsel that the respondent No.2 could have filed a civil suit for determination of the contractual dues, however, the same could not be assailed before the Ombudsman. The learned counsel referred to the Establishment of the Office of Ombudsmen for the Province of Sindh Act, 1999 (“**Act**”) and stated that the jurisdiction of the Ombudsman was only attracted in the cases of maladministration and the dispute raised before the Ombudsman pertained to a divergent interpretation of a contract and not of maladministration. Learned counsel argued that the proceedings to determine the dispute

between the petitioner and the respondent No.2 required evidence and the interpretation of the bid documentation and the same did not fall within the jurisdiction of the Ombudsman. Being aggrieved by the Governor's Order, upholding the Ombudsman Decision, the petitioner preferred the present petition.

3. Ms. Alizeh Bashir Barrister at Law, learned counsel for the respondent No.2, controverted the arguments articulated on behalf of the petitioner and stated that the issue between the petitioner and the respondent No.2 had rightfully been referred to the Ombudsman and that the findings arrived at in the Ombudsman Decision were after due consideration of the cases presented by the respective parties. It was further argued that the Ombudsman had clearly identified that it was a case of maladministration and had held the petitioner culpable in such regard. It was averred that the petitioner had never challenged the jurisdiction of the Ombudsman and on the contrary the representation filed before the Governor was preferred by the petitioner itself and therefore the petitioner could not raise a belated challenge to jurisdiction simply because the Ombudsman Decision and the Governor's Order had been rendered there against. The learned counsel submitted that the dispute between the respective parties had been duly adjudicated and had attained finality and therefore the present petition was misconceived and therefore liable to be dismissed forthwith.

4. Mr. Meeran Mohammad Shah, learned AAG, adopted the arguments advanced by the learned counsel for respondent No.2 and supported the Governor's Order and the Ombudsman Decision respectively.

5. We have heard the respective learned counsel at length and have also perused the record available before us. The ring-fenced issue for this Court to consider is whether the Ombudsman had the jurisdiction to entertain the contractual dispute between the parties.

6. In order to initiate this discussion it may be pertinent to refer to the definition of maladministration provided in the Act, Section 2(2) whereof states as follows:

“(2) “Mal-administration” includes:

(i) A decision, process, recommendation, act of omission or commission which:

(a) Is contrary to law, rules or regulations or is a departure from established practice or procedures, unless it is bona fide and for valid reasons; or

(b) Is perverse, arbitrary or unreasonable, unjust, biased, oppressive, or discriminatory; or

(c) Is based on irrelevant grounds; or

(d) Involves the exercise of powers or the failure or refusal to do so, for corrupt or improper motives, such as, bribery, jobbery, favouritism, nepotism and administrative excess; and

(ii) Neglect, inattention, delay, incompetence, inefficiency and ineptitude, in the administration or discharge of duties and responsibilities.

7. It is imperative to discuss whether determination of a contractual claim fell within the definition of maladministration, hence, actionable by the Ombudsman. Learned counsel for the petitioner had placed reliance upon a Division Bench judgment of this Court in the case of *Mst. Zamrad Begum & Another vs. Muhammad Rafiq Chaudhry & Others* reported as *2017 CLC 1571* to substantiate his arguments with respect

to the ouster of jurisdiction of the Ombudsman. However, it is observed that the said authority is distinguishable upon the facts of the case as the petitioner therein was not found to have been acting in his official capacity and it was determined that the dispute arose out of contractual obligations between private parties.

8. Although the learned counsel for the respondents did not cite any authority in augmentation of their submissions during the hearing but a perusal of the synopsis filed on behalf of the respondent No. 2 demonstrated that reliance had been placed upon the judgment of the honorable Supreme Court of Pakistan in the case of *Capital Development Authority vs. Raja Muhammad Zaman Khan & Another* reported as *PLD 2007 Supreme Court 121* ("**Muhammad Zaman**"). The aforesaid judgment had relied upon and affirmed an earlier judgment of the honorable Supreme Court in the case of *Capital Development Authority & Another vs. Zahid Iqbal & Another* reported as *PLD 2004 Supreme Court 99* ("**Zahid Iqbal**"). The principle enunciated in the aforesaid judgments was that matters of maladministration by an agency, other than those specifically excluded by the Act, irrespective of the fact whether they stemmed out of contractual obligations or otherwise were well within the powers of the Ombudsman and jurisdiction could not be presumed absent merely on account of a dispute having originated from contractual dispute.

9. *Muhammad Zaman* determined that discriminatory orders passed in an arbitrary manner fell within the definition of maladministration and the jurisdiction of the Mohtasib could not be ousted simply because the matter emanated from a contractual obligation. *Zahid Iqbal* also stressed upon the determination of maladministration regardless of whether the

issue had contractual underpinnings. The present matter calls into question the determination of a purely contractual issue, i.e. quantum payable by the petitioner to the respondent No. 2 pursuant to a rental contract. It is an admitted fact that an amount of Rs. 13,959,954/- was paid in regard to the contract in question and the amount of Rs. 4,886,631/- was not paid since the petitioner did not consider the same to be due under the contract. The issue herein is the very interpretation of a contract and not that of any maladministration ancillary to a contract, hence, *Muhammad Zaman* and *Zahid Iqbal* are duly distinguishable in the facts and circumstances of the present case.

10. A Division Bench of the learned Lahore High Court was seized of similar issues in the case of *Capital Insurance Company Limited vs. Securities & Exchange Commission of Pakistan & Others* reported as *2013 CLD 1075* and observed that the presence of an element of dishonesty may be relevant to qualify an act or omission within the parameters of maladministration. The relevant constituent of the judgment is reproduced herein below:

“The question arose whether the petitioner’s act refusal to honour the respondent No.4’s claim is an act of mal-administration or not, the petitioner’s contention is that claim was not received within 15 days of the expiry of the period of guarantee and the respondents Nos.4 to 5 contract was not terminated. The argument of learned counsel for respondent No.4 is that respondent No.4’s case falls under section 127(2)(i) as the words used are “act of omission”. The dictionary meaning of “omission” are a failure to do something a neglect of duty something that is left out, under, and if we read the dictionary meaning of word mal-administration, element of dishonesty is necessary, so where the omission is under some bona fide act it will not fall within the definition of mal-administration.”

11. The quantum payable by the petitioner to the respondent No. 2 was a matter requiring interpretation of the contract after leading of



evidence. The petitioner has already made substantial payments under the contract so it would be inappropriate to ascribe any dishonesty (or maladministration) thereto simply on account of the petitioner's computation having been incongruent to that of the respondent No. 2. The claim of the respondent No. 2 pertained to a rental period, which in itself had been waived in writing by the said respondent. The respondent No. 2 admitted having made the offer but claimed to have subsequently withdrawn the same. It is thus opined that while the parties remained at liberty to agitate the veracity of their claims *inter se* the irreconcilability of their calculations could not be deemed to qualify within the parameters of maladministration.

12. It is trite law that the question of jurisdiction is the primary issue to be considered by any forum prior to undertaking any further proceedings, notwithstanding the fact whether such an issue was raised by any of the parties. Reliance is placed in regard hereof upon the Supreme Court pronouncement in the case of *Izhar Alam Farooqi vs. Abdul Sattar Lasi & Others* reported as 2008 SCMR 240. It is imperative for this Court to consider whether the Ombudsman's Decision suffered from any defect in jurisdiction and if the same is determined to be the case then such a defect cannot be ignored. It was observed by the Honorable Supreme Court in the case of *Karachi Dock Labour Board vs. Messrs Quality Builders Limited* (reported as *PLD 2016 Supreme Court 121*) that the issue of jurisdiction was a legal issue and could be raised at any stage and that lack of jurisdiction was an inherent defect which could not be cured on the rules of consent, waiver, estoppel or acquiesce. It was further maintained that any decision made by a Court or forum performing judicial functions (or even quasi-judicial functions) having no jurisdiction was a nullity in the eyes of the law.

13. It is apparent that for the Ombudsman to have assumed jurisdiction in this matter the complaint had to have qualified upon the anvil of the term maladministration and it is the considered view of this Court that the dispute *inter se* does not succeed in such regard. Therefore, the assumption of jurisdiction by the Ombudsman was erroneous and cannot be sustained. The error of jurisdiction was maintained by the Governor's Order and hence the fate of the same follows the Ombudsman Decision.

14. In view of the reasoning and rationale contained herein the Ombudsman Decision and the Governor's Order are hereby determined to have been rendered in erroneous assumption of jurisdiction, hence, set aside. This petition is allowed in terms herein.

15. It is pertinent to record that the observations made hereinabove shall cause no prejudice and shall not influence the adjudication of any proceedings, between the parties for the determination of any rights and obligations with respect to the contractual dispute considered herein, before the forum of competent jurisdiction.

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