

IN THE HIGH COURT OF SINDH AT KARACHI

C P D - 2011 of 2018

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

Energy Solution (Pvt.) Ltd.

vs.

The President of Pakistan and Others

For the Petitioner: Mr. Shaiq Usmani, Advocate
along with Ms. Amna, Advocate

For the Respondents: Mr. Liaquat Hussain Sheikh
Assistant Attorney General

Mr. Sattar Mohammad Awan
Advocate for Respondent No. 2

Date of Hearing: 29.10.2018

Date of Announcement: 24.12.2018

JUDGMENT

Agha Faisal, J: The crux of the present judgment is whether the President of Pakistan was competent to assume jurisdiction in respect of a challenge, in the nature of review proceedings, to an order rendered by the Federal Insurance Ombudsman.

2. Mr. Shaiq Usmani, Advocate, opened the case for the petitioner and sought a declaration that the impugned order delivered by the President of Pakistan, the respondent No.1 herein, dated 05.01.2018, ("**Impugned Order**") be declared as unlawful and without legal effect. The submissions of the learned counsel in regard thereof are encapsulated and presented herein below:

- i. It was submitted that a fire occurred on 23.06.2016 and a report in respect thereof was submitted by the petitioner

before the insurance company, respondent No.2 herein, on 24.06.2016. The petitioner then submitted a claim, in respect of the loss occasioned, to the respondent No.2 on 02.07.2016. The purported unwillingness of the respondent No.2 to honor the claim culminated in a legal notice, which was served by the petitioner upon the respondent No.2.

- ii. On account of the grievance not being redressed to its satisfaction, the petitioner filed a complaint before the Federal Insurance Ombudsman Pakistan, being Complaint No. 285 of 2017 ("**Complaint**"). The Complaint was determined vide order dated 10.10.2017 ("**Ombudsman Order**") and the operative part thereof is reproduced herein below:

"In the light of the above facts and discussion it is evident that Respondent Company has repudiated the claim of the complainant on perverse, arbitrary, unreasonable and irrelevant grounds and as such committed mal-administration as defined in Section 127 (2) of the Insurance Ordinance, 2000. Therefore, in exercise of powers vested under section 130 of the Insurance Ordinance, 2000, the Respondent Company is hereby directed to compensate the complainant to the extent of amount of losses assessed by the surveyors and recorded in the joint survey report in respect of three generator sets amounting to Rs.61,327,869/- (Rupees Sixty one million three hundred twenty seven thousand eight hundred and sixty nine only) within 30 days from the date of this Order.

30. However, any party aggrieved by this order, is at liberty to avail any remedy including applying for review of this order, by filing an application for review under Section 13 of the Federal Ombudsman Institutional Reforms Act, 2013 (Act No.XIV of 2013) within 30 days from the receipt of this order to seek alteration, modification, amendment or recalling of this order or file a representation before the Honourable President of Pakistan, under section 14 of the above said Reforms Act 2013 within 30 days of the receipt of this order, if so desired."

- iii. Respondent No.2 filed an appeal before the President of Pakistan and the same was determined vide the Impugned Order, which set aside the Ombudsman Order. The relevant constituent of the Impugned Order is reproduced herein below:

“In view of the aforementioned scenario, it has been established that the Insurance Company has made a good case for interference by the appellate forum. The particular issue involves the question of fact, question of law and mixed question of fact and law which can be settled after recording of evidence by a competent court/forum of law. Unfortunately, the impugned order of learned FIO is merely based on surmises and conjectures. There was no unimpeachable evidence to prove the particular case. In the light of oral assertion, it was a fit case for decision of the court/forum of competent jurisdiction.. rather, it was a case, which is based on factual controversies which can only be resolved/settled after recording evidence, which is prime function of the court/forum of competent jurisdiction, where both the parties have an equitable opportunity for examination, reexamination and cross-examination. Thus, it was not a fit case for decision in slipshod manner, as is decided by learned FIO. The factual controversies can only be resolved by Insurance Tribunal under Section 122 of the Insurance Ordinance 2000. Thus, the impugned order of learned FIO is required to be set aside by the appellate forum. The representation of M/s Alpha Insurance Company Ltd. Merits to be accepted. The impugned order being exceptional in nature is not maintainable in the eyes of law. Thus both the parties can equally approach the Insurance Tribunal under Section 122 of the Insurance Ordinance 2000, if so advised.

54. Accordingly, the Honourable President of Pakistan has been pleased to accept the instant representation of the Agency – M/s Alpha Insurance Company Limited and to set aside the impugned orders of learned Federal Insurance Ombudsman. The parties may, if so desire, approach the Insurance Tribunal for decision/settlement of their issues.”

- iv. It was contended by the learned counsel for the petitioner that respondent No.2 was required to file an appeal against the Ombudsman Order, if so aggrieved, and that non-filing of the same had rendered the Ombudsman Order as final. It

was further contended that the President of Pakistan had no jurisdiction to entertain a review against the Ombudsman Order and hence Impugned Order was wholly without jurisdiction, hence, void in law. The learned counsel relied upon the judgments in the cases of Assistant Collector Customs and Others vs. Messrs Khyber Electric Lamps and Others reported as 2001 SCMR 838 ("**Khyber Electric**") and Mir Dost Muhammad vs. Government of Balochistan and Others reported as PLD 1980 Quetta 1 ("**Mir Dost Muhammad**") to drive home the point that when something was prescribed to be done in a certain manner then it was required to be done in that manner and since the Insurance Ordinance 2000 ("**Ordinance**") prescribed the provision of an appeal against the Ombudsman Order, therefore, the proceedings before the President were wholly without jurisdiction. It was thus prayed that the Impugned Order be quashed forthwith.

3. Mr. Liaquat Hussain Sheikh, Assistant Attorney General appearing on behalf of the President of Pakistan, respondent No.1, supported the Impugned Order and drew the Court's attention to the following passage from the comments filed on behalf of the said respondent:

"It stood established that the respondent No.2 had made a good case for interference by the respondent No.1. The particular issue involved the question of fact, question of law and mixed questions of fact and law which could be settled after recording of evidence by a competent court/forum of law. The Order of FIO was merely based on surmises and conjectures. There was no unimpeachable evidence to prove the particular case. It was a case, which was based on factual controversies which could only be resolved/settled after recording of evidence, which is prime function of the court/forum of competent jurisdiction, where

both the parties have an equitable opportunity for examination, re-examination and cross-examination. Thus, it was not a fit case for decision in slipshod manner, as was decided by FIO. The factual controversies could only be resolved by an Insurance Tribunal under Section 122 of the Insurance Ordinance 2000.”

4. Mr. Abdul Sattar Awan, learned counsel for respondent No.2, also supported the Impugned Order and stated that it was delivered in due consonance of the law. It was argued that the provisions of the Ordinance were expressly overridden by the Federal Ombudsmen Institutional Reforms Act, 2013 (“**Act**”) and therefore the proceedings before the President were the appropriate proceedings for determination of the issue.

5. We have heard the respective learned counsel at length and have perused the record filed before us. The primary issue for us to determine is whether the respondent No.1 was the forum of appropriate jurisdiction to entertain a challenge to the Ombudsman Order.

6. The petitioner’s argument, that the Ombudsman Order could only have been appealed before the Commission (Securities & Exchange Commission of Pakistan), was entirely predicated upon the sections 127 and 130 of the Ordinance respectively, which read as follows:

“127. Jurisdiction, functions and powers of Insurance Ombudsman.---(l) the Insurance Ombudsman may on a complaint by any aggrieved person undertake any investigation into any allegation of mal administration on the part of any insurance company;

- (a) Are within the jurisdiction of the Office of the Wafaqi Mohtasib under the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 (P.O. 1 of 1983); or
- (b) Are sub-judice before a court of competent jurisdiction or tribunal or board in Pakistan on the date of the receipt of a complaint, reference or motion by him

(2) For the purposes of this section “mal-administration” includes---

- (a) A decision, process, recommendation, act of omission or commission which:
 - (i) Is contrary to law, rules, or regulations or is a departure from established practice or procedure, unless it is bona fide and for valid reasons; or
 - (ii) Is perverse, arbitrary or unreasonable, unjust, biased, oppressive, or discriminatory; or
 - (iii) Is based on irrelevant grounds; or
 - (iv) Involves the exercise of powers, or the failure or refusal to do so, for corrupt or improper motives, such as, bribery, jobbery, favoritism, nepotism and administrative excesses; and
- (b) Corruption, nepotism, neglect, inattention, inordinate delay, incompetence, inefficiency and ineptitude in the administration or discharge of duties and responsibilities.

(3) Notwithstanding anything contained in sub-section (1), the Insurance Ombudsman shall not accept for investigation any complaint which is brought by or on behalf of an insurance company and which relates to a contract of reinsurance.

(4) Notwithstanding anything contained in sub-section (1), the Insurance Ombudsman shall not accept for investigation any complaint by or on behalf of an employee of an insurance company concerning any matters relating to the insurance company in respect of any personal grievance relating to his service therein.

(5) For carrying out the objectives of this Ordinance and, in particular for ascertaining the root cause of corrupt practices and injustice, the Insurance Ombudsman may arrange for studies to be made or research to be conducted and may recommend appropriate steps for their eradication.....

130. Recommendations for implementation.--- (1) In the event the Insurance Ombudsman comes to the conclusion that the complaint is justified, in part or in whole, he shall try and facilitate an amicable resolution or settlement by resort to mediation and failing that communicate his findings to the concerned insurance company with the direction---

- (a) to reconsider the matter;
- (b) to modify or cancel the earlier decision, action or failure to take appropriate action;
- (c) to pay reasonable compensation to the complainant as fixed by the Insurance Ombudsman;

- (d) to take the requisite steps to improve the functioning or efficiency of the insurance company; or
- (e) to take such other remedial steps or actions as may be specified by the Insurance Ombudsman.

(2) Any insurance company, or official of a insurance company or a complainant aggrieved by an order passed by the Insurance Ombudsman may file an appeal with the commission within thirty days which shall pass any order hereon it deems fit.

(Underline added for emphasis.)

(3) Any order passed by the Insurance Ombudsman which has not been appealed against, or any order passed by the Commission in appeal, as the case may be, shall become final and operative and if not implemented shall render the insurance company concerned liable to such actin including the imposition of a fine or penalty as the Commission may deem fit, and in relation to an insurance company officer, to the appropriate disciplinary or other proceedings....”

7. However, the Act contains a divergent prescription as to the forum at which an order of an ombudsman is to be assailed. The relevant constituent is section 14 thereof, which states as follows:

“14. Representation (1) Any person or party aggrieved by a decision, order, findings or recommendations of an Ombudsman may file representation to the President within thirty days of the decision, order, findings or recommendations.

(Underline added for emphasis.)

(2) The operation of the impugned order, decision, findings or recommendation shall remain suspended for period of sixty days, if the representation is made as per sub-section (1).

(3) The representation shall be addressed directly to the President and not through any Ministry, Division or Department.

(4) The representation shall be processed the office of the President by a person who had seen or is qualified to be a judge of the Supreme Court or has been Wafaqi Mohtasib or Federal Tax Ombudsman.

(5) The representation shall be decided within ninety days.”

8. Section 24 of the Act gives the said enactment primacy over competing provisions of the law and the overriding effect is enunciated as follows:

“24. Overriding effect.---(1) The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.

(2) In case there is a conflict between the provisions of this Act and the relevant legislation, the provisions of this Act to the extent of the inconsistency, shall prevail.”

9. The term “relevant legislation”, employed in the verbiage of section 24(2) supra, is defined in section 2(c) of the Act, as follows:

“relevant legislation” means, the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 (P.O. No.1 of 1983), the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000 (XXXV of 2000), the Insurance Ordinance, 2000 (Ordinance No.XXXIX of 2000), the Banking Companies Ordinance, 1962 (LVII of 1962), and the Protection against Harassment of Women at the Workplace act, 2010 (IV of 2010).”

(Underline added for emphasis.)

10. It is thus apparent that the provisions of the Act, in so far as inconsistent with any provisions of the Ordinance, shall have primacy over the Ordinance. The forum delineated vide the Act for maintaining a challenge to an ombudsman’s order was the President of Pakistan and this statutory prescription was recognized by a Division bench of the Peshawar High Court in the case of *Peshawar Electric Supply Corporation Limited vs. Wafaqi Mohtasib* reported as *PLD 2016 Peshawar 185*.

11. The petitioner’s reliance upon the overridden provisions of the Ordinance is misconceived and the citing of *Khyber Electric* and *Mir Dost Muhammad* does not augment the petitioner’s case as the manner prescribed in law to assail an order of an ombudsman is precisely that

which was employed by the respondent No. 2 and the same culminated in the Impugned Order.

12. In view of the reasoning and rationale contained herein, we are of the considered view that the Impugned Order does not suffer from any defect in jurisdiction. The present petition, being devoid of merit, along with pending application, is hereby dismissed with no order as to costs.

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