

Judgment Sheet
IN THE HIGH COURT OF SINDH, HYDERABAD

Const. Petition No.D-288/1994

PRESENT:

Mr. Justice Nadeem Akhtar
 Mr. Justice Arshad Hussain Khan

Secretary Government Sindh
Communication Works Department Karachi and another

Versus

Haji Muhammad Hashim and another.

Petitioner	Through Mr. Allah Bachayo, Additional Advocate General Sindh.
Respondent No.1	Through Mr. Arbab Ali Hakro, Advocate.
Date of Hg.	09.03.2021

JUDGMENT

ARSHAD HUSSAIN KHAN-J. The petitioners through instant constitutional petition have called in question the two Orders, both passed by Respondent No.2, [Provincial Ombudsman (Mohtasib) For Sindh], viz. (i) order dated 30.09.1993 whereby the complaint of Respondent No.1 (Contractor) was disposed of in his favour and he was directed to be paid his remaining amount as per quantity of work done by him. And (ii) the order dated 12.02.1994, dismissing the Review Application preferred by the Communication & Works Department, Government of Sindh [The Agency] against the above order.

2. Briefly, the facts giving rise to the present petition are that the contract for construction of a Bye-Pass on Indus Highway at Khairpur Nathan Shah District Dadu over length of 0/0 to 2/4 Miles Metaled Road with estimated to cost of Rs.56,38,263/- was awarded to respondent No.1-Haji Muhammad Hashim Abro [the contractor] being the lowest bidder. On 20.04.1986, work order was issued and he started work on the same date and as per terms of the contract, it was to be completed within one year on or before 21.04.1987. Under the agreement, it was also stipulated that completion of the work would be appraised quarterly and in each quarter of 03 months at least 25% of the work would be completed by the contractor. It is stated that the first running bill was paid to the contractor on the basis of measurement recorded on 14.05.1986. It is further stated that total value of the work

done by the contractor till December, 1986, after a lapse of 08 months, was worth of Rs.3,74,750, which included the work covered by the first running bill. Although compared with estimated cost of the work of Rs.46,00,000/- the work done by the contractor was not even 10%, however, he started disputing the quantity recorded in the second running bill according to the entries and the M.Bs recorded on 5.12.1986, and demanded for more payment. Upon the said demand of the contractor his third running bill was also paid to him immediately. The contractor after receiving the third running bill in the month of December, 1986, had stopped further work on the project. It is further stated that the original period of contract was extended up to 21.10.1987, from the original date of completion i.e. 21.4.1987. However, the contractor was not ready to fulfil remaining part of the contract; he was only interested in the money and as such he started sending legal notices to the Department and extending claim only on two points; firstly, the quantity of earth work was more than the quantity recorded in the month of December, 1986, and that he would be paid the rate at higher level for compaction of 95% density as against the stipulated density of 85% compaction as per original terms of contract and secondly, the rate should be raised from Rs.361/- per 0% Cft to Rs.641/- per 0% Cft. It has been further stated that on the second point the whole thing was in a state of a proposal on which correspondence was going on between officers of C&W Department. The original estimated prescribed compaction of the first item to be 85% but when the work started on the SITE the officers at site felt that the road under construction was heavily water logged area. The Executive Engineer, therefore, proposed that the density of the compaction of the earth work on the first item should be raised to 95% to 100% as against original estimated 85%. During course of correspondence the superintending engineer also agreed with the Executive Engineer and recommended to the Chief Engineer that the density of the earth work at SITE should be raised by making the compaction up to 95% to 100% but the Chief Engineer did not accept the proposal and rejected the same. Consequently, the contractor was never asked to raise the density of the earth work in the first item from 85% to 95%-100%. In absence of any approval from competent authority and in the absence of any order given to the contractor to raise

the density of the compaction under no circumstances the contractor was expected to raise the density and claim higher rate. It has been stated that when the contractor despite repeated notices had failed to fulfill his contractual obligations, the Department / Executive Engineer was left with no alternative but to rescind the contract and get the remaining work done through some other contractor after performing the codal formalities. The remaining work let out to another contractor incurred cost higher by about Rs.1.10 Million, which became liability on the contractor and a such the same is recoverable from his security deposit and other work with Government and for this action was initiated against him. The said action of the petitioner was made basis of conflict between him and the agency [C&W Department], which finally came in the shape of complaint before the Provincial Ombudsman. It is further stated that after recession of the contract, despite notices the contractor did not appear at the time of recording of final measurements in October 1987, which came to about 25 Lacs Cubic Ft. Subsequently, on 29.12.1987, the contractor accepted in writing the correctness of measurements recorded in M.B. It is further stated that before the Provincial Ombudsman, the contractor had not claimed more quantity than this. It is further stated that through political influence the contractor succeeded in getting the matter referred to Mr. Bashir Ahmed Shah, Superintending Engineer, Provincial Buildings Circle Police Works Karachi for enquiry. Mr. Syed Bashir Ahmed Shah, extended a wrongful benefit to the contractor. It has been stated that opinion of an enquiry officer is not binding on the Government and the opinion of Mr. Bashir Ahmed Shah was yet to be approved by the Secretary, who, vide his decision dated 15.06.1992, had rejected the recommendation of Mr. Bashir Ahmed Shah, which even otherwise were irrational un-justified and smelled of favour to the contractor. It has been further stated that despite apparent absence of any allegation of maladministration, respondent No.2 assumed jurisdiction, which did not vest in him under the law. It is further stated that respondent No.2 decided the complaint of the contractor, vide order dated 30.09.1993, which was challenged by the petitioners through a Review Application dated 10.11.1993, however, the same was dismissed by respondent No.2, vide order dated 12.02.1994, without hearing the Agency. It is further stated that the

original order dated 30.09.1993 of Respondent No.2 was only replication of the report of Mr. Bashir Ahmed Shah and whereas Respondent No.2 [Ombudsman] did not offer any findings of his own and as such the two orders passed by Respondent No.2 are patently without jurisdiction and of no legal effect. It has also been stated that the petitioners submitted appeal to the Governor of Sindh but the same was also dismissed. Lastly, the petitioners having no other legal remedy before any other forum or authority have constrained to invoke the constitutional jurisdiction of this Court. Hence, the present petition.

3. Upon notice of the present petition, the counsel for respondent No.1-Haji Muhammad Hashim Abro [the Contractor] filed power and contested the petition. The stance of the Contractor, from the record, it appears that the he filed complaint before learned Ombudsman [respondent No.2], stating therein that the subject contract was awarded to him by Executive Engineer Highway Divisional Dadu, vide his letter No.TC/G-55/1002 dated 20.04.1986. It has been stated that originally the detailed working estimate for the execution of aforesaid work was prepared and provided earth work for road embankment at 95% to 100% density, however, compaction of road embankment at 95% to 100% density was not approved by the Chief Engineer Highways, Hyderabad and instead he only approved compaction at 85% density. It has been further stated that the above named road passes through water logged area commanded by Rice Canal System of irrigation and mostly water stands by the sides of road in two to three feet in height. Besides, the road is also part of Indus Highway and heavy traffic plies on it throughout the day and night. Keeping the aforesaid aspects of the case the Assistant Engineer Highway Sub Division with the approval of Executive Engineer Highway Division Dadu asked the contractor to carry out compaction of the earth work for road embankment up to 95% to 100% density as per modified Specification and also ordered to raise the height of road embankment from 4 to 5 feet in order to save the road from sinking under the aforesaid circumstances. Contractor carried out the earth work for road embankment with compaction of 95% to 100% density. The Assistant Engineer under his letter No.575 dated 30.8.1986 reported the matter to Executive Engineer Highway Division Dadu who, vide his letter No.2380 dated 9.9.1986

recommended the same to the Superintending Engineer Highway Circle-I, Hyderabad. The Superintending Engineer Highways Circle under his letter No.3193 dated 14.9.1986 requested the Executive Engineer Research Laboratory Hyderabad for carrying out the compaction test. The Executive Engineer Research Lab. Hyderabad conducted the test and submitted the compaction test report. Thereafter, the Superintending Engineer Highways Circle-II, Hyderabad, vide his letter No.123 dated 8.1.1987 recommended his case to the Chief Engineer. The Superintending Engineer, vide his letter No.2410, dated 7.5.1987 asked the Executive Engineer to allow him compaction from 90% to 95% as per report given by the Research Laboratory. It has been stated that the decision of Superintending Engineer was final in view of clause 30 (c) of the Agreement and the stipulated date for completion of the work was 27.4.1987 and during the contracted period the progress of work maintained by contractor, which was in accordance with the schedule given in the contract but the department did not record in time the measurement of the work done by the contractor at Site and further his payment was withheld by the petitioners. It has been stated that the progress of the work was got slowed down by the petitioners as they were lacking funds, which eventually resulted non completion of the work within the stipulated period. It has been further stated that the contractor at no point in time ever asked for extension of the agreement. On the contrary, after expiry of the agreement, the contractor requested the Executive Engineer, Highways Division Dadu, to finalize his work under clause 15 of the agreement as due to the above reasons he did not want any extension of the agreement. It is submitted that during execution of work not a single notice was issued to him by the Department, which could justify the allegations of the Department. It was averred that the real fact is that the Assistant Engineer, Executive Engineer and Superintending Engineer of the Agency had demanded illegal gratification from the Contractor for finalizing the contract, which was refused by him, and resulted in their displeasure. Consequently, penal action under clause 3 (c) of the agreement had been taken against him. It was also averred that before expiry of the alleged extension the petitioner rescinded the contract and the measurement of the work done by the contractor was conducted. The contractor did not dispute the measurement, however,

when the petitioners despite lapse of considerable time failed to release the payment, the contractor approached the Provincial Ombudsman (respondent No.2) for release of his due payment, which was allowed. The petitioners did not challenge the decision of Ombudsman before the worthy Governor Sindh, however, after expiry of period of representation/appeal, they filed review application before the Ombudsman, which was dismissed. Against the said order, the petitioners filed representation before the worthy Governor of Sindh, which was also dismissed. Thereafter, the petitioner filed present constitutional petition.

4. During the course of arguments, learned Additional Advocate General Sindh, appearing for the petitioners, while reiterating the contents of memo of the petition has contended that the claim of the respondent-contractor was stemmed out of contractual obligations for which the proper remedy available to him was to file a civil suit and not a complaint before the Ombudsman (respondent No.2) under Establishment of the Office of Ombudsmen for the Province of Sindh Act, 1999. It is also argued that jurisdiction of the Ombudsman is only attracted in the cases where maladministration is alleged whereas respondent-contractor in the entire case before respondent No.2, did not mention a single act / order or decision of the department, which could construe as an act of maladministration so as to confer jurisdiction on respondent No.2. So much so, in the complaint before respondent No.2 as well as in his rejoinder the contractor had never claimed any act of maladministration. He had claimed only delay in payment of his dues, which did not exist and further his claim was solely based on the report of Mr. Bashir Ahmed Shah, which contained totally illegal recommendation and had been rejected by petitioner No.1 in accordance with law. It is also contended that the complaint before respondent No.2 was motivated by ulterior object of evading liability of Rs.44,13,061/-. It is also contended that despite apparent absence of any allegation of maladministration, learned respondent No.2 assumed jurisdiction, which did not vest in him under the law and as such the impugned orders passed by learned respondent No.2 is nullity in the eyes of law and having no legal effect liable to be set aside. Learned AAG, in support of his stance in the case have relied upon the cases of

Board of Secondary Education through authorized officer v. Provincial Ombudsman of Sindh and 2 others [2019 CLC 1531] and Mst. Zamrad Begum and another v. Muhammad Rafiq Choudhary and 2 others [2017 CLC 1571]

5. Conversely, learned counsel for respondent No.1, while supporting the impugned orders has vehemently opposed the petition. It is, inter alia, argued that the present petition is not sustainable in law as the order dated 30.09.1993 passed by respondent No.2 has already attained the finality and as such the same cannot be called in question in the constitutional petition. It is urged that respondent No.1 [the contractor] rightly approached respondent No.2 and that the findings arrived at in the Ombudsman's decision were after due consideration of the cases presented by the respective parties. Further urged that the Agency never challenged the original decision of the Ombudsman before worthy Governor of Sindh, and instead after expiry of the period of representation/appeal, they preferred review before the Ombudsman, which though was not available under the law, yet the same was dismissed on merit. It is also argued that the Representation, filed by the Agency before the worthy Governor against the order passed on its review application was also dismissed, however, petitioner did not challenge the said order of the Governor in the present petition. Lastly, argued that the orders of the learned Ombudsman for all practical purposes have attained finality and as such the petitioners are not entitled to any of the reliefs claimed in the present petition and the petition is liable to be dismissed. Learned counsel in support of his contention has relied upon the case of Capital Development Authority through Chairman v. Raja Muhammad Zaman Khan and another [PLD 2007 SC 121].

6. We have heard learned counsel for the parties as well as perused the material available on the record, and have gone through the case-law cited by learned counsel for the parties.

From the record, it appears that respondent No.1 on 24.12.1991 had approached respondent No.2 (Provincial Ombudsman) for release of his long delayed stuck-up payments and for setting aside of the

penalty imposed upon him under clause 3 (c) of the contract, which clause for convenience's sake is reproduced as under:-

“Clause 3.—In any case in which under any clause or clauses of this contract shall have rendered himself liable to pay compensation amounting to the whole security deposit (whether paid in one sum or deducted by instalments) or in the case of abandonment of the work owing to serious illness or death of the contractor or any other cause. The Executive Engineer, on behalf of the Government of Sindh shall have power to adopt any of the following courses, as he may deem best suited to the interest of Government:-

(a).....

(b).....

(c) to measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands, and give it to another contractor to complete it, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him as to the amount of which excess expenses the certificate in writing of the Executive Engineer shall be final and conclusive shall be borne and paid by the original contractor and shall be deducted from any money due to him Government under the contract or otherwise or from his security deposit or the proceeds of sale thereof, or a sufficient part thereof.”

7. Record further reflects that the petitioner contested the matter before respondent No.2 without raising any objection with regard to its jurisdiction. Record also transpires that during pendency of the complaint before learned respondent No.2, the Secretary, Communication and Works Department, Government Sindh [petitioner No.1] vide its order No. H/5-62/68 dated 09.2.1992, [Annexure-B-1 to the Petition] appointed Mr. Bashir Ahmed Shah, Superintending Engineer, Police Works, Karachi, as inquiry officer in respect of the contractor's claim with the following terms of reference :-

- “ i) Whether any injustice has been done to the contractor with regard to release of payment of earth work, done by him.
- ii) Whether action under clause-3(c) of the agreement was taken against the contractor as per terms and condition of the agreement after observation of all codal formalities.
- iii) To scrutinize the claim of the contractor amounting to Rs. 20,49,740/- in light of the contract agreement.”

Pursuant to the above, the inquiry officer submitted his detailed report [Annexure-B-2 to the petition], wherein he while rejecting the claim of the contractor in respect of his payment of extra work held that the contractor was dealt with unjustly and further action taken under clause 3 (c) is unwarranted and not sustainable in law.

8. Record also reveals that on 15.06.1992, petitioner No.1, upon receiving report of Inquiry Officer, unilaterally passed his own decision [Annexure-I to the petition], whereby he [the petitioner] rejected the claim of the contractor and directed to take action against him under clause 3(c) of the agreement. The said decision was subsequently communicated to learned respondent No.2 [Annexure-J to the petition]. The said decision of petitioner No.1 appears to be untenable on various account firstly, the same had been passed on the contractor's letter 15.02.1992 addressed to the enquiry officer and not to the Secretary; Secondly, before passing the said decision, apparently no notice had been issued either to the contractor or to any one related to the case. Thirdly, the said decision was passed during pendency of the proceedings before respondent No.2 where the petitioners have already submitted to the jurisdiction. Fourthly, had the petitioner No.1 was of the opinion that the contractor's claim was unjustified he should have rejected the claim at the very first instance instead of referring to the matter to the independent inquiry officer.

9. Record further reveals that respondent No.2, after hearing the parties and taking into consideration the material available before him decided the complaint of the contractor [respondent No.1], on 30.09.1993 whereby while rejecting contractor's claim in respect of extra work carried out by the contractor due to change of specifications, he recommend as follows:

“15. Keeping in view the fact that the Contractor was asked by the Engineers of the agency to execute the work with improved specifications and payment also got held up due to paucity of funds, I consider action of the Agency taken under 3 (c) of the contract whereby remaining work has been got executed at the risk and cost of the Contractor a little too harsh.

16. Under the circumstances, I feel that penalty imposed by the Agency upon the complainant under Clause 3 (c) of the Contract need to be withdrawn. This will be in line with the recommendation made by the Enquiry Officer (Mr. Bashir Ahmed Shah) appointed in the case by the Agency. The complainant may be paid his remaining amount, as quantity of work done by him, under intimation to me. Loss if any accruing to the Agency may be recovered from its officers who exceeded their powers which led to confusion in the case.”

10. Admittedly, the abovesaid order of the Ombudsman was not challenged by the Agency before the worthy Governor of Sindh as provided under the law and instead after the lapse of stipulated period

for filing representation/appeal, chosen to file a review petition before the Ombudsman. There is no provision under the Establishment of Office of Ombudsman for the Province of Sindh Act, 1991, which provides power to the Ombudsman to review its own order. It is well settled by now that 'right of review' is a substantive right and is always a creation of the relevant Statute on the subject. Reliance is placed on the case of *Muzaffar Ali v. Muhammad Shafi [PLD 1981 SC 94]*. The learned Additional Advocate General for the petitioner when asked as to why the initial order dated 30.09.1993 was never challenged he could not furnish any plausible justification.

11. Record also shows that the review petition preferred by the Agency was dismissed on 12.02.1994 by respondent No.2 [annexure-O to the petition], relevant portion whereof for convenience's sake is reproduced as under:-

“2. Under section 32 of the Establishment of Office of Ombudsman for the Province of Sindh Act, 1991, representation to the Governor Sindh could have been made, against the above decision within 30 days by anyone aggrieved by the decision. No such representation was made by anyone.

3. However, after expiry of the stipulated 30 days, XEN Highways Division, Dadu submitted a review petition dated 10.11.1993 with the request that the contractor's complaint be rejected in the interest of justice.

4. The XEN has not been able to bring any new fact to light. He has merely stated that decision is one-sided. The charge of one-sidedness of the decision has been based mainly on the alleged fact that Secretary, C&W Department's report had been totally ignored by me while deciding the complaint. A plain reading of even the operative part of my decision (reproduced above) would reveal that it contains repeated references to the contents of Secretary's report. Using the words "the Agency has disowned this report by its Enquiry Officer", para 14 of the above decision directly refers to secretary's report. In fact, the said report has remained before me right from the beginning as the Agency started its defence by sending only a copy of the said report. In face of all this overwhelming evidence, it is extremely mortifying to note that the XEN has alleged that the decision is one-sided as secretary's said report has been ignored.

5. I do not find any special ground to review my earlier decision. The review petition is accordingly rejected.”

12. The Agency against the above order, passed in the review petition, filed belated representation to the worthy Governor of Sindh on 17.03.1994, which ought to have been filed on or before 14.03.1994. The said representation was also rejected being time barred on

26.06.1994. Interestingly, the petitioner in instant petition did not challenge the last order passed by the worthy Governor of Sindh on 26.06.1994. Although from the record, it appears that the petitioner on 05.10.2006 filed an application seeking amended title of the Petition to implead the Governor of Sindh as Respondent No.3 as well as proposed an amended Para No.28 and prayer clause (a) of the Petition, however, neither any notice was issued on the said application nor the said application was disposed of.

13. The arguments advanced by learned AAG, appearing for the petitioner, mainly were two folds; firstly, that the claim of the contractor was emanated from contractual obligations for which the proper remedy available to him was to file a civil suit and not a complaint before the Ombudsman and secondly, the jurisdiction of the Ombudsman is only attracted in the cases where maladministration is alleged whereas the contractor in the entire case before Ombudsman, did not mention a single act / order or decision of the department, which could construe as an act of maladministration so as to confer jurisdiction on Ombudsman [respondent No.2].

Insofar as ground No.1 is concerned, record of the present case reflects that the claim of the contractor had remained pending with the petitioner for a long period of time till he approached to the Ombudsman. Had the same was rejected by the petitioner earlier, the contractor would have approached the court of law at the relevant time. Furthermore, now, it is well settled that every contractual obligation cannot be ousted from the jurisdictional domain of the Ombudsman just because a complained matter emanates from any contractual dispute. As, apparently, the object of establishing the office of the "Ombudsman" was, in fact, to diagnose, investigate, and rectify any injustice done to a person through maladministration on the part of any agency. The purpose, thus, was to undo the administrative excess from and within the administration so that justice could be made available to the aggrieved persons without such person being forced to knock at the doors of the courts of law. Hence, the arguments of learned AAG regarding jurisdiction of the Ombudsman that the claim of the contractor was emanated from contractual obligations for which the proper remedy available to him was to file a civil suit and not a

complaint before the Ombudsman, in our view, is based on misconception and have no substance. In this regard, reliance is placed upon the case of Capital Development Authority through Chairman v. Raja Muhammad Zaman Khan [PLD 2007 SC 121], where the Honorable Supreme Court of Pakistan while dealing with somewhat, identical issue in the said case, inter alia, has held under:

“8. We are not persuaded to agree with the learned Advocate Supreme Court on behalf of appellant that matter pertaining to contractual obligations does not fall within jurisdictional domain of the learned Wafaqi Mohtasib as an identical proposition was discussed by this Court in case C.D.A. v. Zahid Iqbal PLD 2004 SC 99 wherein it was held that "the action of the President in setting aside the findings and the declaration of the learned Wafaqi Mohtasib could also not be sustained in law for more than one reason. According to Article 9 of the Establishment of the Office of the learned Wafaqi Mohtasib (Ombudsman) Order being President's Order No.1 of 1983 it is an obligation of the Mohtasib to undertake an investigation into an allegation of maladministration on the part of any Agency or any of its officers or employees. According to Article 2(2) of the said Order maladministration include an act which was contrary to law rules or regulations. Article 11 of the said Order enjoined upon the Mohtasib to find out whether the complained act did or did not amount to maladministration and then to communicate his findings to the concerned Agency. No provision either of the said President's Order No.1 of 1983 or of any other law for the time being in force took a matter out of the jurisdiction of the Mohtasib only because the same related to a contractual obligation. If as a result of the investigation conducted by the Mohtasib he came to the conclusion that the complained act was offensive of any law, rules or regulations then the Ombudsman was well within his powers to deal with the said matter in accordance with the provisions of the said Order 1 of 1983. The action of the President in setting aside the findings and recommendations of the Mohtasib only because the matter related to a contractual dispute was thus no reason or ground justifying interference with the findings and the recommendations of the Ombudsman. (Emphasis provided). As has been noticed above the learned Ombudsman had found the act of the cancellation of the sale of the plot in question to be illegal and void not on account of any matter arising out of the terms and conditions of the contract of sale or of the auction which had preceded the said sale but on the ground that the Authority which had cancelled the said sale was not authorized in law to do so. Needless to add here that object of establishing the office of the learned Wafaqi Mohtasib was to diagnose, investigate, redress and rectify any injustice done to a person through maladministration on the part of any Agency. The purpose thus was to undo the administrative excesses from within the administration so that justice could be made available to the wronged persons without such persons being forced to knock at the doors of the Courts of law. Therefore, wide powers had been conferred on the Ombudsman through section 9 of President's Order No.1 of 1983 and the only matters which were kept out of his jurisdiction were the matters which were sub judice before some Court or Tribunal etc. of competent jurisdiction; matter which related to the external affairs of Pakistan or matters which related to or were connected with the defence of Pakistan. All other matters irrespective of the fact whether they stemmed out of contractual obligations or otherwise were well within

the powers of the Ombudsman and a complaint consequently could not be thrown out only because a complained matter emanated from contractual dispute." (Emphasis provided)."

Insofar as the second ground is concerned, before going into further discussion, it would be advantageous to reproduce the definition of maladministration provided in the Act, Section 2(2) whereof states as follows:

"(2) "Maladministration" 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.

14. Keeping in view the above definition when we examined the record of the case, it is manifestly appeared that the contractor, through his various correspondences with the Agency [Annexures F-1, F-2, F-4 and G-4, to the petition], prior to approaching the office of learned Ombudsman, and in his complaint before the learned Ombudsman, agitated maladministration on the part of Agency and as such we are of the view that the contractor's complaint before the Ombudsman was maintainable.

15. In such view of the matter, we are of the opinion that the Agency after having contested the matter before the Ombudsman, and having opted not to challenge its decision under the law, at this stage, cannot be allowed to seek setting-aside of the said decision, passed against them, on the misconceived ground that the Ombudsman having no jurisdiction. There is no cavil to the proposition that when a decision is given in any legal proceedings, which emanates from a special statute, against a party, which was

duly served, then the remedy for unsuccessful party is to challenge the same under the special statute providing remedy of appeal; once a contesting party gives up its remedy provided under a special statute, then the decision attains finality and that remains no more open to be challenged by an aggrieved party and, thus the arguments of learned AAG for the petitioner that the Agency was not afforded a fair opportunity of hearing by the Ombudsman while passing the order dated 12.02.1994 on the petitioners' review petition, being misconceived, is rejected. The case law cited by learned counsel for the petitioners have been perused and considered with due care and caution but are found distinguishable from the facts of the present case and hence the same are not applicable to the present case.

16. In view of what has been discussed above, we are of the considered opinion that there is no illegality or infirmity or jurisdictional defect in the impugned orders and learned AAG for the petitioners has also not been able to point out any illegality or irregularity in the said two orders attracting the exercise of constitutional jurisdiction of this Court. Consequently, the petition is dismissed with no order as to cost.

JUDGE

JUDGE

Hyderabad
Dated:

Jamil***