

C.P. No. D-2748 of 2009

Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Muhammad Humayon Khan

RESPONDENT NO.3 : Mr. Khurram Tufail (In person)

DATE OF JUDGMENT : 21.04.2017

Muhammad Humayon Khan, J: This is a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, whereby, the petitioner has challenged Order passed by the Governor of Sindh dismissing the review/appeal of the petitioner and maintaining decision dated 19.11.2008 of the learned Provincial Ombudsman (Sindh).

2. The relevant facts of the matter are that the petitioner is Development Authority working in the name of Malir Development Authority (**MDA**), established by Act 1993 as per bill passed by the Provincial Assembly of Sindh and assented by the Governor of Sindh on 02.04.1994 to make provision for the development of certain areas of Karachi Division and improvement of serious economic condition of

the people of such area. Open public auction of new Malir Housing Project, MDA Scheme No.1, was held on 07.03.2007, wherein, 34 plots of different categories were put to auction after vide publicity in leading newspapers and general public participated in open public auction. As per practice, the prospective bidders needed to prepare pay order equal to 10% of auction value (reserved price) of occupancy value (O.V.) of the Plot advertised and to submit pay order to M.D.A. and obtain token enabling the bidder to participate in the auction for which the terms and conditions were displayed in prominent location and also signed by the participant in auction. The successful bidder was required to pay 25% of the total bid money through pay order. The respondent No.3 through his father participated in the said auction and being the successful bidder, Plot No.CS-03, Sector No. 2-B, New Malir Housing Project-1 admeasuring 615.86 square yards was allotted in auction in his name, who through his father submitted 25% of the total bid money of occupancy value for the said plot in the sum of Rs.34,64,213/- through pay order on 08.03.2007. As per condition No.9 of terms and conditions of auction, if the successful bidder after depositing 25% of the bid money withdrew his bid or fails to complete other formalities within stipulated time, 10% of the total bid offer money shall be forfeited and plot shall be resumed and put for re-auction and the balance of the amount deposited by the successful bidder will be refunded by cross-cheque on making formal application accompanied with the original receipt of deposit duly supported by an affidavit of applicant. Subsequently, the respondent No.3 moved three applications dated 29.11.2007,

06.12.2007 and 10.01.2008 to the petitioner. The first two applications were not replied to by the petitioner, however, third application dated 10.01.2008 was replied to the respondent vide letter dated 30.01.2008. Later on, the respondent No.3 filed complaint before the respondent No.2, who issued letter dated 04.03.2008. The petitioner through its Deputy Director Commercial filed reply of complaint on 02.04.2008 and 05.06.2008. Later on, the Investigating Officer inspected the site alongwith the representative of the petitioner and respondent No.3. Thereafter, the petitioner submitted the details of infrastructure vide Letter dated 23.08.2008 to the respondent No.2, who then decided the complaint in favour of the respondent No.3 and directed the petitioner to refund full amount to him vide Decision dated 19.11.2008, against which, the petitioner preferred review/appeal before the Governor of Sindh, who dismissed the same being time-barred. Against both the said decisions, the petitioner preferred this petition, wherein, the petitioner prayed for the following reliefs:-

- a) To declare that the impugned Order passed by the Hon'able Governor of Sindh and communicated to Petitioner vide letter bearing No. GS/7/-5/2009 (SO-II)/449 dated 31-7-2009 and decision dated 19-11-2008 passed by the learned Ombudsman are against the facts and law, arbitrary, illegal, therefore, have no legal effect and may please set-aside by allowing the petition of Petitioner.
- b) To declare that the Respondent No.3 is not entitled for total amount paid to Petitioner but in fact is entitled for amount after deduction of 10% amount as per terms and conditions signed by his father at the time of auction of subject plot.

- c) To declare that Petitioner is entitled for deduction of 10% from total amount paid by the Respondent No.3.
- d) To suspend the operation of impugned Order passed by the Hon'able Governor of Sindh communicated to Petitioner vide letter No.GS/7/-5/2009 (SO-II)/449 dated 31-7-2009 and decision dated 19-11-2008 passed by the Provincial Ombudsman Sindh/Respondent No.2.
- e) Any other/better relief which this Hon'able Court may deem fit and proper in the circumstances of the case.

3. The respondent No.3 on 22.05.2010 filed his objections duly supported by his affidavit, wherein, he pleaded that the petitioner fully participated in the proceedings before the learned Ombudsman and submitted to his jurisdiction and further against his decision, the petitioner filed review/appeal before the Governor of Sindh but did not challenge the decision of the learned Ombudsman on the ground of jurisdiction and therefore the petitioner cannot take the plea of jurisdiction in the instant petition. He further pleaded that the petitioner has deliberately and intentionally concealed the true facts and pleaded false story in the petition. He further pleaded that the petitioner has concealed the fact that the Hon'able Ombudsman carried out physical inspection of the site and during inspection it was found that there was no work done and basic utilities i.e. water, electricity and gas were not available till August 2008. He further pleaded that the terms and conditions were neither signed by the respondent No.3 nor the respondent No.3 authorized his father to sign such terms and conditions and therefore the same are not

binding upon the respondent No.3. In the end, the respondent No.3 prayed for the dismissal of the instant petition.

4. Later on, after the delay of about 6 years, the petitioner filed counter affidavit against the objections of the respondent No.3, wherein, the petitioner has merely denied the objections raised by the respondent No.3 but the petitioner has totally failed to make specific denial of the facts stated in the said objections by the respondent No.3.

5. We have heard the learned counsel for the petitioner and respondent No.3 in person and also perused the material available on the record.

6. The learned counsel for the petitioner has contended that both the impugned decisions of the learned Ombudsmen and the Governor of Sindh are without jurisdiction and liable to be set-aside in the instant petition. He further contended that the terms and conditions signed by the father of the respondent No.3 on his behalf are binding upon the respondent No.3. He further contended that the respondent No.3 in view of the terms and conditions is not entitled for the refund of the full amount and the petitioner is justified to deduct 10% from the total payment. However, the learned counsel for the petitioner has not cited any case-law in support of his arguments.

7. On the other hand, the respondent No.3 appeared in person and contended that the petitioner did not challenge the jurisdiction of the learned Ombudsmen before him and participated in the

proceedings. He further contended that the petitioner itself filed appeal/review before the Governor of Sindh, wherein, he did not challenge the decision of the learned Ombudsmen on the ground of jurisdiction. He lastly contended that the petitioner has no case but the only intention of the petitioner is to delay the payment.

8. After hearing the learned counsel for the petitioner and the respondent No.3 in person and after going through the entire material available on the record, we came to the conclusion that the only point which requires consideration in this petition is that whether the learned Ombudsmen had jurisdiction to entertain the complaint of the respondent No.3 and to give decision upon the said complaint.

9. We consider it necessary to first refer to the Preamble of the Establishment of the Office of Ombudsman for the Province of Sindh Act, 1991(hereinafter referred to as "the said Act"), which reads as under:-

"Where it is expedient to provide for the appointment of the Provincial Ombudsman to diagnose, investigate, redress and rectify any injustice done to a person through mal-administration."

From the Preamble of the said Act, it cannot be assumed that the intention of legislature was to restrict or limit the jurisdiction of the learned Ombudsman to diagnose, investigate, redress and rectify any injustice done to a person through mal-administration only in establishments or organizations controlled or managed by the Provincial Government.

10. Words “Agency” and “Mal-administration” have been defined in Section 2 (1) and (2) of the said Act, which read as under:-

“2(1) “Agency” means a Department Commission or office of the Provincial Government or statutory corporation or other institution established or controlled by the Provincial Government but does not include the High Court;

2 (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 discharged of duties and responsibilities.”**

There is no dispute that the petitioner falls within the definition of “Agency” and hence, any action of the agency if appearing to be unreasonable, unjust, oppressive and arbitrary shall amount to “mal-administration”.

11. Jurisdiction, functions and power of the learned Ombudsman have been provided in Section 9 of the said Act, which reads as under:-

“(1) The Ombudsman may, **on a complaint by any aggrieved person**, on a reference by the Governor, or the Provincial Assembly, or on a motion of the Supreme Court or the High Court made during the course of any proceedings before it or of his own motion, **undertake any investigation into any allegation of mal-administration on the part of any Agency or any of its officers or employees.**

Provided that the Ombudsman shall not have any jurisdiction to investigate or inquire into any matters which:

- (a) are sub-judice before a court of competent jurisdiction or tribunal or board in Pakistan on the date of receipt of a complaint, reference or motion by him; or
 - (b) relate to the external affairs of Pakistan or the relations or dealing of Pakistan with any foreign state or government; or
 - (c) relate to, or are connected with, the defence of Pakistan or any part thereof, the military, naval and air forces of Pakistan, or the matters covered by the laws relating to those forces.
- (2) Notwithstanding anything contained in sub-section (1), the Ombudsman shall not accept for investigation any complaint by or on behalf of a public servant or functionary concerning any matters relating to the Agency in which he is, or has been, working in

respect of any personal grievance relating to his service therein.

- (3) For carrying out the objectives of this act and, in particular for ascertaining the root causes of corrupt practices and injustice, the Ombudsman may arrange for studies to be made or research to be conducted and may recommend appropriate steps for their eradication.
- (4) The Ombudsman may set up regional offices as, when and where required.”

In order to ascertain whether the conduct of the petitioner comes within the ambit of “mal-administration”, it is necessary to reproduce the findings recorded by the learned Ombudsman, which reads as:-

“FINDINGS:

- 6. Based on the foregoing facts, I have arrived at the following conclusion:
 - a) That the complainant was attracted to give the highest bid of Rs.22,500/- per square yard for a plot admeasuring 615.86 square yards to cost him Rs.1,38,56,625/- **on the claim made by MDA in the advertisements in the newspapers about the completion of more than 80% development work of roads, sewerage lines, storm water drainage system and tree plantation and water supply etc. in the Scheme.**
 - b) That the complainant readily paid Rs.34,60,000/- which, presumably, he must have taken out from his running business.
 - c) That in the advertisement, the forfeiture of the Security Deposit has been specifically mentioned whereas under

term No.8 of terms and conditions signed by the father of the complainant and not by the complainant himself, it is provided that in the event of failure to pay all occupancy value within the stipulated time, the possession of the plot shall be resumed by the Agency and 10% of the total occupancy value shall be forfeited and the balance shall be refunded.

- d) **The MDA allowed the father of the complainant to participate in bidding on receipt of pay order for Rs.300,000/- as Security Deposit and issued Token without obtaining Authority Letter or Power of Attorney which the Agency must have done as the terms and conditions signed by a person other than by the buyer cannot be legally enforced.**
- e) On the fall of hammer, the MDA officials took his father's signatures on different papers including terms and conditions. The complainant submitted the original Authority on stamp paper duly attested by Notary Public, during hearing on 18.08.2008, copy of the same is now on our record which must have been obtained by the Agency at the time of allowing him to participate in the bidding.
- f) **The factual position is that the complainant had not authorized his father to sign any document on his behalf. As such, the terms and conditions signed by his father are not binding on him. The MDA officials failed to get the terms and conditions countersigned by the complainant even later on at the time of issuing Bid Confirmation Letter. Therefore, the MDA cannot enforce on the complainant their terms and conditions which were signed by an authorized person.**

- g) **The Investigating Officer inspected the site alongwith the representative of the Agency and the complainant. He found that even now, the basic utilities such as water, electricity and gas were not available on the subject plot.**
- h) **From the letter of the Agency No. MDA/LM/COM/2008/37 dated 23.08.2008, it is also confirmed that the basic facilities are not available even after one year six months and nothing can be said when colonization will start in the Scheme and the facilities would be made available. As such, it may not be feasible for a small investor, like the complainant, to block his investment for an indefinite period as appears in paras 1 to 3 of letter of MDA dated 23.08.2008.”**

In view of the above-referred findings, it is established that the conduct of the petitioner comes within the ambit of “mal-administration” and hence the learned Ombudsman had/has jurisdiction under Section 9 of the said Act to investigate into the matter upon the complaint of the respondent No.3.

12. In view of the above discussion, the learned Ombudsman was justified to exercise powers vested in him under Section 11 of the said Act by directing the petitioner to refund to the respondent No.3 the total amount paid by him without any deduction whatsoever.

13. Against the decision of the learned Ombudsman, the petitioner filed appeal/review before the Hon’able Governor of Sindh under Section 32 of the said Act, which provides that:-

“Any person aggrieved by a decision or order of the Ombudsman may, **within thirty days of the decision or order**, make a representation to the Governor, who may pass such order thereon as he may deem fit.”

Since the said appeal/review was hopelessly time-barred, it was rightly rejected by the Governor of Sindh in the following words:-

“That the **representation is hopelessly time barred and also no plausible and cogent reasons for delay in respect of filing the same have been mentioned**. Besides, it does not have any valid grounds thus representation is not maintainable under the said provisions of Ombudsman Act 1991.”

14. It is relevant to mention here that the petitioner had never raised any objection regarding jurisdiction of the learned Ombudsman but on the contrary contested the matter before him who gave his findings with cogent reasons. The conduct of the petitioner shows that they were negligent to pursue further remedy by filing time-barred appeal/review before the Governor of Sindh, wherein, the petitioner also not challenged the jurisdiction of the learned Ombudsman but only raised factual points. Accordingly, the petitioner is estopped by its own conduct to challenge the jurisdiction of the learned Ombudsman for the first time in the instant petition, which plea is, even otherwise, misconceived and no force in law.

15. The conduct of the petitioner even otherwise does not warrant any interference by this Court under its Constitutional Jurisdiction for the reason that the Petitioner never challenged the decision of respondent No.2 within the period of limitation, and subsequently filed

a belated representation before the Governor who had dismissed the same as being time barred. The petitioner ought to have been vigilant, whereas, no plausible reasons were assigned in the said representation before the Governor for delay and its condonation. Therefore, even on this ground also no case for exercising the discretionary relief is otherwise made out.

16. Apart from this, the instant case has been dealt with within the four corners of the provisions of the said Act and hence this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is not inclined to interfere in the well-reasoned findings of the learned Ombudsman. **Our this considered view is supported by the cases of (i) PIA Corporation Vs. Wafaqi Mohtasib (Ombudsman) and 2 others (PLD 1994 Karachi 32), (ii) Habib Bank Ltd., Karachi Vs. Messrs Pakistan Industrial Promoters (Pvt.) Ltd., Karachi and 2 others (PLD 1996 Karachi 218) and (iii) Almas Khanum Vs. Federation of Pakistan and others (1994 MLD (Lahore) 6).**

17. For the aforesaid reasons, this petition is dismissed. The Nazir of this Court is directed to refund the amount deposited by the petitioner alongwith the profits to respondent No.3 after proper verification.

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