(2014) 02 BOM CK 0164

Bombay High Court

Case No: Writ Petition No. 222 of 1997

The Borivali Education Society and Shantibai Maganlal Shah of Mumbai		APPELLANT
	Vs	
The Municipal Corporation of Greater Bombay and The Education Officer, Office of the Superintendent of Private Primary Schools		RESPONDENT

Date of Decision: Feb. 10, 2014

Acts Referred:

- Constitution of India, 1950 - Article 14 19 21 226 30

Citation: (2014) 3 ABR 120 : (2014) 5 ALLMR 219 : (2014) 6 BomCR 571 : (2014) 2 MhLj 769

Hon'ble Judges: V.M. Kanade, J; M.S. Sonak, J

Bench: Division Bench

Advocate: G.K. Vora and Mr. T.G. Vora, for the Appellant; Vinod Mahadik, for the Respondent

Final Decision: Dismissed

Judgement

M.S. Sonak, J.

The Petitioner No. 1, i.e., Borivali Education Society, a society registered under the Societies Registration Act, 1860 has established and administers inter alia the following three primary schools:

i) Sheth Jadhavji Jethabai Primary School,-Gujarati Medium.

ii) Borivali Education Society Primary School, Borivali (W)-Gujarati Medium

iii) R.G. Bajoria English Medium Primary School, Borivali (E), initially known as Borivali Education English Primary School.

The aforesaid three schools are recognized by the Municipal Corporation of Greater Mumbai (MCGM), i.e., Respondent No. 1 and eligible to receive grants in terms of the Grant-in-Aid Code as applicable to approved private primary schools in Greater Bombay.

2. By the present petition under Article 226 of the Constitution of India, Petitioner No. 1 which claims to be a minority institution seeks to recover grants totaling to Rs. 47,21,007/- together with interest alongwith rate of 18% per annum for the year 1994-95, which according to the Petitioners have not been paid by the Respondent No. 1-MCGM. The break-up of grants as claimed by the Petitioners, in respect of aforesaid three schools, is as follows:-

3. The Petitioners admit receipt of grants upto the year 1993-1994. There is no dispute that from the year 1995-1996, in terms of Circular dated 18.4.1995 grants became payable by way of deposit of salaries in the bank accounts of the approved staff of the private primary aided schools in Greater Bombay. There is serious dispute, however, with regard to the position of grants for the year 1994-1995. Hence, the petition.

4. The Petitioners contend that upto the year 1993-1994, Respondent No. 1 would pay the grant amount in respect of the previous year in the following year. Accordingly, it is the case of the Petitioners that the grant amount paid in the year 1993-1994 pertains to the grant for the year 1992-1993. The Petitioners contend that the payment of grants was thus in the nature of reimbursement towards salary and non-salary components already incurred by the Petitioners in the previous year. According to the Petitioners, therefore, grant in amount of Rs. 47,21,007/- as per the aforesaid break-up was due and payable by Respondent No. 1 to the Petitioners for the year 1994-1995. This was not paid and instead Respondent No. 1, in purported compliance with Circular dated 18.4.1995, proceeded to release grant by way of payment of salaries to the approved staff by way of direct deposit in their respective bank accounts. In the bargain, there was no reimbursement of salary and non-salary grants, even though, the Petitioners had already incurred expenditure towards the same in the year 1994-1995. The Petitioners addressed representations. However, as there was neither any satisfactory response nor payment, the Petitioners have preferred the present petition under Articles 226 of the Constitution of India for reliefs as aforesaid.

5. On the other hand, it is the case of Respondent No. 1 that very consistently, grants are paid in advance by way of two installments and there is no question of reimbursement as claimed by the Petitioners. Accordingly, Respondent No. 1 contends that the grants paid in the year 1994-1995 relate to the year 1994-1995 and not to the previous year, i.e., 1993-1994 as alleged by the Petitioners.

6. Respondent No. 1 contends that in respect of three Schools in question, grants for the year 1994-1995 have been paid by Respondent No. 1 in the following manner:

Borivali Education Society Primary school:

(i) Rs. 6,07,029/- under intimation dated 5.7.1994 (1st installment);

(ii) Rs. 5,15,979/- under intimation dated 8.12.1994 (2nd installment)

Shet J.J. Primary School

(i) Rs. 5,39,900/- under intimation dated 5.7.1994 (1st installment);

(ii) Rs. 4,54,087/- under intimation dated 8.12.1994 (2nd installment)

Shri. R.G. Bajaria English Medium Primary School

(i) Rs. 4,69,400/- under intimation dated 7.8.1994 (1st installment);

(ii) Rs. 3,62,680/- under intimation dated 2.1.1995 (2nd installment)

7. By judgment and order dated 17.4.1997, this Court had allowed the petition and made Rule absolute in terms of prayer clause (a). Respondent No. 1, however, carried the matter by way of Civil Appeal No. 5498 of 1997 before the Supreme Court of India. By order dated 11.8.1997, the appeal was allowed and the judgment and order dated 17.4.1997 was set aside on the ground that it contains no reason and the case was remanded to this Court for fresh decision in accordance with law.

8. The Deputy Education Officer of MCGM has filed return on behalf of Respondent No. 1 asserting the practice of payment of grant in advance by way of two installments and has denied that there was any practice of reimbursement in the following year as stated by the Petitioners. The return makes reference to the payment pattern for the previous years and attempts to compare the same with the payment pattern with effect from 1.4.1995 in the wake of changed policy introduced vide Circular dated 18.4.1995. The return also adverts to the scheme of the Grant-in-Aid Code, including in particular, Rules 38 to 51 to assert that even the rules contemplate advance payments and not reimbursement. Finally, return states that the petition raises disputed questions of fact and therefore the petition be not entertained.

9. We have heard Shri. Vora, learned counsel appearing for the Petitioners and Shri. Mahadik, learned counsel appearing for the Respondents at great length. We have also perused the record as presented by both the parties before us. With the assistance of learned counsels appearing for the parties, we have also examined the scheme of Grant-in-Aid Code as applicable to approved private primary schools in Greater Bombay.

10. Upon consideration of the aforesaid, we are of the opinion that the petition, as filed, indeed raises disputed questions of fact, which despite our efforts, present no resolution in a summary jurisdiction under Article 226 of the Constitution of India.

11. The jurisdiction of writ court under Article 226 of the Constitution of India is discretionary. One of the ground against the exercise of discretion would be that the right claimed by the Petitioners is not capable of being established in summary proceedings under Article 226, because it requires detailed examination of evidence as may be had in a suit. This principle has even been extended to mixed question of fact and law.

12. Perusal of the petition would indicate that the Petitioners apart from the reference to Article 14, 19 and 21 in the title to the petition, have nowhere in the actual petition made out any case of the infringement of Article 14, 19 and 21 of the Constitution of India. There are no allegations in the petition complaining of any discrimination vis-a-vis other schools, which may have been placed in similar position. In any case, neither there is any material in this regard, nor did the learned counsel for the Petitioners make any submissions with regard to breach of Article 14, 19, and 21 of the Constitution of India. In the petition, the Petitioner has pleaded that it is a minority institution. However, in the context of the issues raised in the petition, this circumstance is quite irrelevant. It is not the case of the Petitioners that any of its rights as may be guaranteed by Article 30 of the Constitution of India have in any manner been breached. We state this despite the legal position that the High Court would be justified in dismissing the application under Article 226 of the Constitution of India, where the determination of constitutional question depended upon investigation on question of fact on taking evidence.

13. In the case of Indu Bhushan Gupta Vs. State of U.P. and Others, , the Supreme Court disapproved the High Court scrutinizing accounts in exercise of its jurisdiction under Article 226 of the Constitution of India, by observing thus:

23. It was faintly argued by learned Counsel for the appellant that the Government was bound to render an account of the rents and profits realised from the letting of plots of Mukundapur Farm, but he did not pursue the argument any further and rightly so. The High Court has observed that it had scrutinized the accounts maintained by the Government and the same have been maintained as required by the taccavi rules as per Appendix "A" to Form VII. It was certainly not open to the High Court to grant any such relief under Article 226 of the Constitution particularly when it involved consideration of disputed question of fact.

14. In the case of D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, , the Supreme Court ruled that where basic facts are disputed and complicated questions of law and facts depending on evidence are involved, the writ court is not the proper forum for seeking relief. Paragraph (20) of the judgment reads thus:

20. In our opinion, in a case where the basic facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ court is not the proper forum for seeking relief. The right course for the High Court to follow was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may, if so advised, seek their remedy by a regular suit.

15. In the case of Moti Das Vs. S.P. Sahi, The Special Officer In Charge of Hindu Religious Trusts and Others, , the Supreme Court approved the view taken by the High Court that the questions whether the trusts are public or private trusts or the properties are private or trust properties are questions which involve investigation of complicated facts requiring the recording of evidence and such investigation could not be done in writ proceedings.

16. In the back ground of the aforesaid legal position, adverting to the facts of the present case, it is seen that although the issue pertains to alleged non-payment of salary grant for the year 1994-1995, the resolution of such issue depends upon the existence or otherwise of the practice as to the manner of payment of grants. The Petitioners contend that grants were released by way of reimbursement, i.e., grant for the year 1993-1994 was invariably paid in the following year, i.e., 1994-1995. On basis of such practice, the Petitioners contend that the payments made in the year 1994-1995 relate to the grant for the year 1993-1994. On the other hand, the Respondents contend that there has been consistent practice to pay grants in advance or at least in respect of particular year in which it is due. Relying upon such practice, the Respondents submit that the grant paid in the year 1994-1995 relates to the same year, i.e., 1994-1995 itself and not to any previous year or years. In support of their respective submissions, both parties have placed on record statement of payments, calculations, charts and in some cases even audit information. None of such material is however conclusive to rule one way or the other. Essentially, this is an issue of fact which will require evidence in regular proceedings for the return of findings of fact. In these circumstances, we are of the opinion that it is not reasonably possible to resolve such contentious and disputed questions of fact in a summary jurisdiction under Article 226 of the Constitution of India.

17. On behalf of Respondent No. 1, considerable emphasis was laid upon Rules 43 and 44 of the Grant-in-Aid Code which concerns "payment of grants" and "procedure for payment of grants", which read as follows:-

Rule 43-Payment of Grant

(i) Normally, the grant paid to a school in any year is the grant for that year and is calculated on the receipts and expenditure of the preceding year.

(ii) If a school has been established to meet an urgent demand or started under peculiar difficulties a temporary grant may be awarded to the school assessed upon the receipts and expenditure of the current year. Such a grant shall not exceed the maximum allowable under the rules and may be payable quarterly or half yearly, as may be deemed necessary, for one year only. From the following year, the payment will be subject to the ordinary rules. Application for such temporary grants shall be made to the Education Officer within one month after the grant of recognition to the School.

(iii) Normally, no grant-in-aid will be paid to a school if the average daily attendance of pupils is less than 40 in the preceding year, unless it is a school for handicapped children.

Rule 44-Procedure for payment of grants.

The Department will intimate to the Manager of the School the amount of grant sanctioned and the Manager will then forward a bill for the amount to the Department. The amount will be paid before the 31st March of the year in which the grant is due. The grant will be liable to lapse if not claimed within two months from the date of the intimation from the Department. Note:-

(1) No portion of a Grant-in-Aid shall be paid to Registered School if it ceases to exist or to be a Registered school before it is inspected.

(2) The amount of grant payable to a Registered school shall be reduced in proportion to the number of months in the year during which the Registered school ceases to exist or to be registered school.

18. In the context of Rule 43, learned counsel for Respondent No. 1 naturally emphasizes upon sub-rule (i) which provides that the grant paid to a school in any year is the grant for that year and is calculated on the receipts and expenditure of the previous year. The learned counsel for the Petitioners however would urge that sub-rule (i) begins with the word "normally". The use of this word admits of a position that in a given case grants may be paid by way of reimbursement for expenses incurred in the previous year. Learned counsel for the Petitioners further urged that in the present case, as a matter of fact such practice of reimbursement has been in vogue for a number of years prior to 1994-1995. Thus, even if this court were to proceed with this case on the basis of interpretation of the rules, the issue of fact, would still need to be resolved. Based upon the material on record and taking into consideration the constraints upon discretion in the matter of exercise of jurisdiction under Article 226 of the Constitution of India, it would indeed be difficult to return any finding of fact upon such disputed and contentious issue of fact. The material placed on record by either parties, to a great extent is unverifiable in summary proceedings. It bears repetition to state that the material on record, though voluminous, is nevertheless insufficient to enable us to conclude the issue of fact one way or the other. The Petitioners have relied upon certificates and statements from their accountants with some riders in an attempt to establish practice of reimbursement. On the other hand

Respondent No. 1 has also placed material on record, on basis of which it is urged that the grant paid in any year is grant for that year. Learned counsel for Respondent No. 1, as observed earlier, placed considerable emphasis upon Rule 43(i) and was at pains to submit that the stray references to previous years in some of the documents relied upon by the Petitioners, was only in the context of calculation based upon the receipts and expenditure of the preceding year. In short, based upon unverifiable material, we were drawn into thicket of highly disputatious questions of fact. In the aforesaid circumstances, and keeping in mind self imposed restrictions applicable to exercise of writ jurisdiction, we are constrained to dismiss this petition, on the ground that it involves disputed questions of fact incapable of being resolved in summary proceedings under Article 226 of the Constitution of India. The petition is accordingly dismissed and the Rule is discharged. There shall be no order as to costs.