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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1803 OF 2013

Zakiya Mumtaz Khan alias Zakiya Abdul Malik …Petitioner
Versus
The Municipal Corporation of Greater Bombay (Education Department) & Ors …Respondents

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Mr Abdul R Shaikh *, for the Petitioner.*
Mr Ram Apte, Senior Advocate, *with RM Hajare i/b Sunil Sonawane for the Respondent-MCGM.*
Mr Nilesh Datar*, Clerk Education Department, Present.*

CORAM G.S. Patel &
Neela Gokhale, JJ.
DATED: 16th June 2023

PC:-

1. Unfortunately, the Petition has been pending since 2013, although we believe it can be disposed of with a very short order and a brief factual statement.

2. The Petitioner was employed with the Anjuman Riyazul Islam Primary School, Govandi, 400043 since 10th December 1981. That school was recognized by the MCGM from 1st June 1978.

3. There were internal disputes in the management of the Trust that ran the school and these resulted in a de-recognition by the MCGM of the school from 12th December 1991. For compactness we turn to page 61 which is an order of 5th November 1996 passed by A P Shah J (as he then was) sitting singly. He had before him a Writ Petition brought by several teachers of the school. The order contains an elaborate statement of the essential facts. But since the record is old and the order itself is of 1996, even at the cost of lengthening our order today, we reproduce the entire order:

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1949 OF 1996

Miss Shakeela Abdul Karim Mulla and Ors. … Petitioners
V/s
State of Maharashtra and Ors … Respondents
Mr M.P. Vashi for the Petitioners
Mrs. Phadke for Respondents 1 and 2
Mr P.V. Naik for Respondents No. 3
Mr N.M. Ganguli for Respondent No. 4
Mr L.J. Kadri for Respondent No. 5

CORAM : A. P. SHAH. J.

Date : 5th November, 1996.

P.C.

This petition under article 226 is filed by teachers of a primary school known as "Anjuman-Riyaz-ul-Islam Trust. Anjuman Riaz-ul-Islam School is an Urdu school having strength of 900 students from standards I to IV. The school was founded by the respondent No.4 Trust and was recognised by the BMC in 1978. However, it seems that the respondent No. 4 did not apply for granting aid for the school at any time. The BMC passed resolution No. 137 dated 12th December, 1991 de-recognising the school on account of certain breaches committed by the trustees of the respondent No. 4 Trust. The decision of the BMC was communicated to the respondent No. 4 under letter dated 21st January, 1992. It seems that the respondent No. 4 made representations to the BMC for withdrawing its decision to de-recognise the school. On 13th May, 1993, the Superintendent of Aided Schools, BMC, informed the respondent No. 4 that the School was rightly de-recognised on the following amongst other grounds:-

1. The school is not paying salaries through Bank.
2. Provident fund and professional tax is not deducted.
3. Society's Registration certificates is not submitted.
4. The school building is situated on three different places.
5. Audited report is not submitted
6. Furniture is not found in two classes.

After the de-recognition order, the respondent No. 4 conducted the school for some time. However, it is an admitted position that from 1993, the management of the school was taken over by the teachers themselves. According to them this step was necessary in order to ensure that the students in the school are not put to unnecessary hardship. The teachers made representations to the municipal authorities complaining against the malpractices committed by the trustees of the respondent No. 4. They prayed that the school should be re-recognised. Since there was no response from the Municipal authorities, the teachers

have filed the present petition for directing the respondent No. 4 Trust to comply with the requisitions stipulated by the BMC in its letter dated 13th May, 1993 and upon such compliance directed the BMC to re-recogniser the school. In the alternative, the petitioners have claimed for appointment of an Administrator of the school or for an order for transfer of the management as stipulated under the provisions of the Maharashtra Educational Institutions (Transfer of Management) Act, 1976. Pursuant to the notice of the petition, the respondents have appeared through their Advocates. Mr. Ganguli, learned Counsel for the respondent No. 4, states that the respondent No. 4 is willing to comply with the requisitions contained in the letter of the BMC dated 13th May, 1993. He has suggested the following scheme:-

(a) That the respondent No. 4 shall resume the management of the school with effect from 15th November, 1996.

(b) That the respondent No. 4 will pay the salaries of the teachers only by the cheque on or before fifth of every month.

(c) That the respondent No. 4 will implement the provisions of the Employees of the school. Mr. Ganguli also undertakes on behalf of his client to deposit the amount of PPF subscription with the authorities by the end of 31st March, 1997.

(d) That audited report upto 31st March 1993 shall be submitted to the BMC within four weeks and the audited accounts for the remaining period shall be submitted within six months.

(e) That the respondent No. 4 will provide necessary furniture in two class room within aforesaid period of six months.

(f) That from 15th November, 1996, the Primary school with is conducted in two different buildings, will be bifurcated as School I and School II.

(g) That from 15th November, 1996, petitioner No. 1 will act as Head-Mistress of the second school.

(h) That the teaching and non-teaching staff will be divided amongst the two schools according to seniority as per the statement submitted by the respondent No. 4.

(i) That the respondent No. 4 will make two separate applications to the BMC for recognition of the two schools as well as the grant in aid from 15th November, 1996.

Mr Vashi appearing for the petitioners states that the scheme suggested by Mr Ganguli is acceptable to the petitioners. Mr. Vashi states that his clients will hand over all the records of the school to the respondent No.4 within one week from today. Mr. Vashi also makes a statement on behalf of the petitioners and other members of the staff that they shall not claim the arrears of salary and other dues for the period when the petitioners have been conducting this School. Mr Vashi states that the petitioners will cooperate with the respondent No. 4 for obtaining necessary sanction and permission from the BMC.

In my opinion, the stand taken by the petitioners as well as the respondent No. 4 is reasonable. The respondent No. 4 has agreed to comply with the conditions mentioned by the BMC in its letter dated 13th May, 1993. **In view of this, the BMC should not have any objection in re-recognising the school and release the grant in accordance with the law. Mr. Naik for the BMC submitted that a primary school becomes eligible for grant only after completion of five years after the grant of recognition and, therefore, there will be some difficulty in releasing the grant in favour of the**

petitioners. The objection raised by Mr. Naik is without any foundation. Admittedly, the school was recognised in 1978. In that view of the matter, the school is clearly entitled to grant in aid. The municipal authorities are directed to pass appropriate orders on the application of the respondent No. 4 for recognition as well as grant in aid expeditiously and in any event on or before 15th December, 1996.

Put up for further orders on 23rd December, 1996.

(*Emphasis added*)

4. As it turns out, a Notice of Motion No. 467 of 1996 came to be filed in that very Writ Petition and Shah J (as he then was) took up that Motion on 14th February 1997. The order of that date from pages 68 to 71 reads as follows:-

High Court

O.O.C.J.

NOTICE OF MOTION NO. 467 OF 1996
IN
WRIT PETITION NO. 1946 OF 1996

Miss Shakeela Abdul Karim Mulla & Ors.	.... Petitioners Vs.
State of Maharashtra & Ors.	.... Respondents
And	
Mohammad Irfan Azmi	.... Opponent

Shri M. M. Vashi i/b M/s. Vashi & Associates for the Petitioners.
Ms Madhubala Kajare for Respondent Nos. 1 and 2.
Shri P. V. Naik for Respondent No. 3.
Shri N.M. Ganguli for Respondent No. 4.

Coram: A.P. SHAH J.
Dated: FEBRUARY 14, 1997

PC:

This is in continuation of order dated 6th November, 1996.

The facts have been elaborately noted in the above order and, therefore, it is not necessary to repeat … … … … something missing here check quotation is an Urdu medium primary school having strength of 900 students. The school was recognised by the Bombay Municipal Corporation (BMC) in 1978. However, by order mainly on account of the lapses committed by the respondent-Trust who was managing the school. It seems and the teachers virtually took over the management. **By order dated 5th November, 1996 the school was again put in the management of the respondent-Trust and the BMC was directed to consider the Trust's application for re-recognising the school. This order came to be passed on the solemn promise given by the trustees represented by Mr Ganguli that they would make all efforts to secure the necessary re-recognition from the BMC. However, I am constrained to observe that the trustees failed to take necessary steps for revival of the recognition. On the other hand, the record shows that the trustees refused to co-operate with the municipal authorities. It is clearly seen that they are not interested in the revival of the permission. On this background the teachers filed Notice of Motion No. 467 of 1996 for appointing the committee of teachers as administrators for running the school and also to pursue the matter for obtaining the re-recognition from the BMC. By order dated 21st January, 1997 the trustees were directed to handover the school, record to the Head Mistress of the school. The application for re-recognition was thereafter pursued by the teachers**

> **themselves. They have complied with all the necessary formalities.** Mr Naik for the BMC stated that the teachers have complied with all the requirements as per letter dated 30th December, 1996 expecting item Nos. 13 and 21. Under item No. 13 the management was asked to deposit six months' salary of the teachers. This provision is made for protecting the interest of the teachers. Now the teachers themselves will be managing the school and, therefore, BMC is directed to waive condition no. 13. As regards item no. 21, it was noted by the municipal authorities that the relation between the school management and the teachers of the school are not cordial and it might affect the interest of the students. This objection does not survive as the teachers will be running the school and the Trust will have o say in the administration of the school, at least for the time being. Mr. Naik has stated that in principle the Corporation has no objection in granting re-recognition but initially it will be on provisional basis for a period of one year. **Accordingly, the Corporation is directed to issue necessary re-recognition within four weeks from today in favour of the committee of the Petitioner Nos. 1 to 4. The committee of the teachers is appointed as administrator upto the end of the academic year 1997-98. <u>The Corporation is also directed to release the grant-in-aid accordance with the rules with effect from 1st March 1997 as per the order dated 5th November, 1996.</u> Hearing of the petition is adjourned to 8th June, 1998.**
>
> Notice of motion stands disposed of accordingly. No costs.

(*Emphasis added*)

5. The grant-in-aid started for the first time with effect from 1st March 1997.

6. What emerges from this compact statement of the history of the matter is that there was an intervening period when the recognition of the school was discontinued by the MCGM. Its management was ultimately substituted by some sort of collaborative or cooperative of the teachers themselves as the extract above shows. The MCGM agreed to re-recognize the school, though initially on a provisional basis for one year. The Corporation was under a direction to re-recognize the school within four weeks of the 14th February 1997 order, which takes us to roughly March 1997. Neither of those orders have been challenged at any point. It is not contentious that the MCGM did in fact, re-recognize the school within the time provided.

7. It is also not in dispute that the Petitioner has received her pension counting her service from 1997 onwards.

8. Two points remain. The first is that the MCGM purported to make certain recoveries, roughly Rs. 4,70,531 from the Petitioner's salary/pension. It seems clear to us that this is unsustainable because the Petitioner had already retired. We have reference in this regard to the decision of the Supreme Court in *State of Punjab & Ors. v. Rafiq Masih (White Washer) and Ors.*[1] in which the Supreme Court held that ordinarily there ought not to be recoveries from those who had retired from service. The Supreme Court observed in paragraph 18 that it was impossible to conceive in advance of all hardship situations. Sometimes there may be cases of mistaken over-payment in excess of entitlement. The Supreme Court then

1 (2015) 4 SCC 334.

summarized the few situations in which recoveries would be impermissible and the second of these is recovery from retired employees or employees about to retire within one year of the order of recovery. Paragraph 18 of the Supreme Court decision reads thus:

> **18.** It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
>
> **(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.**
>
> (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

(*Emphasis added*)

9. We have no hesitation in applying this to the case of the Petitioner. That will mean a direction to the MCGM to repay to the Petitioner the entire amount of the deduction of Rs. 4,70,531/-.

10. In this regard there is a submission made for payment of interest. It is difficult to compute this exactly because the recovery is not made at one time but is made in several tranches and one would have to compute how much was recovered from which salary or pension payment and reckon forward. There is also no statutory right to it. The recovery becomes impermissible because of the decision of the Supreme Court, which is of 18th December 2014. Without sufficient and specific particulars, it is not possible for us to accede to this request.

11. Another difficult area is the submission of the Petitioner that the re-recognition of the school following the order of this Court must result in continuity of the Petitioner's service from the date of her appointment on 10th December 1981. Ex-facie this argument does not appeal to us. It would effectively mean that the de-recognition by the MCGM in the intervening period will count for nothing and is effectively wiped out. That can never be. Even the two orders of A P Shah J do not indicate that the re-recognition was to take effect from a previous date. The grant in aid was specifically directed to be from 1st March 1997 by the order dated 14th February 1997 as already noted above. Nobody has assailed that order, and we do not see how we can do that today. Indeed, we would venture to suggest that no such order of retrospective grant in aid and recognition from December 1981 was even possible given the facts of that case.

12. Thus, in our view, the Petition can simply be disposed of by directing the MCGM to continue payment of pension to the Petitioner and by ordering a refund of the amount deducted or recovered within a period of eight weeks from today. We believe this will sufficiently serve the interests of justice. No further orders are required.

13. As between the Petitioner and the previous management or its trustees, all contentions are kept open, and the Petitioner is at liberty to adopt such proceedings as the Petitioner is advised. We make this observation and grant this latitude because the submission of the Petitioner seems to be that it is the MCGM that is responsible for all payments irrespective of the intervening de-recognition. That, as we said, is unsustainable.

14. The Petition is disposed of in these terms. There will be no order as to costs.

(Neela Gokhale, J) **(G. S. Patel, J)**