

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.101 OF 2013

1. Diamond Jubilee High School
through its Principal, having its
office at 39/43 Diamond Complex
Nesbit Road Mazagaon, Mumbai-1

2. The Diamond Jubilee Trust,
a registered Charitable Trust, through
its Chairman/Secretary, having its
office at 39/43 Diamond Complex,
Nesbit Road Mazgaon, Mumbai-10

.. Petitioners

vs.

1. State of Maharashtra
through its School Education &
Sports Department, Secondary
Education – I, 4th Floor, Mantralaya,
Annexe, Madam Cama Road,
Mantralaya, Mumbai-32

2. The Principal Secretary,
Education Department, School
Education & Sports Department
Secondary Education – I, 4th Floor, Mantralaya,
Annexe, Madam Cama Road,
Mantralaya, Mumbai-32

3. Deputy Director of Education
Jawahar Bhavan, Marine Drive
Mumbai.

4. Ibrahim Abdul Kader Mansuri
32/34, Umer Khadi Cross, K.M.T.
II Building, 3rd Floor, Room No.22,
Mumbai-400 009.

5. Mohammed Yaseen Ladiwala
18, Rasida Manzil, 1st Floor,

Room No.11, Undriya Street,
Mumbai-400 008.

6. Salim Saeed Pathan,
30/32, Khandekar Street
Kamatipura 15 Lane,
Block No.1, Mumbai-400 008.

7. Idris Taiyeb Ladiswala
69/73, New Kazi Street, 5th Floor,
Room No.17, Near Pydhonie
Mumbai-400 003

.. Respondents

Mr.N.H. Seervai, Senior Counsel i/b. M & M Legal Ventures for the
Petitioners.

Ms. Sindha Sreedharan, AGP, for the Respondent Nos.1 to 3.

Mr. Ibrahim Abdul Kader Mansuri, Respondent No.4 – in person.

CORAM : S. J. VAZIFDAR &

M. S. SONAK, JJ.

DATE : 5TH JULY, 2013.

JUDGEMENT (PER M.S. SONAK,J.):-

1. Rule. Rule is made returnable with the consent of all the
parties forthwith. सत्यमेव जयते

2. The petitioners challenge the order dated 27th
November, 2012 passed by the Principal Secretary (S.E.A.S.D.)
directing the refund of fees from the academic year 2006-07 to
2011-12 to respondent Nos.4 to 7 and report compliance within a
period of one month.

3. The issue raised in this petition is covered in the petitioners' favour by a judgment of a Division Bench of this Court in the case of *Association of International Schools and Principal Foundation Vs. The State of Maharashtra and another in Writ Petition (L) No.1876 of 2010* decided on 1st September, 2010. We will however, refer to facts as they establish the petitioners bona-fide. There is nothing to indicate that the petitioners acted *mala-fide*. The facts set out in the petition have not been disputed by the respondents. In fact, no counter has been filed by any of the respondents. The facts, relevant for the purposes of the decision are referred to briefly hereinafter.

4. Petitioner No.1 is a private unaided school owned by petitioner No.2 trust. Petitioner No.1 is a minority educational institution. Upto the academic year 2006-07, petitioner No.1 school was affiliated to the Maharashtra State Board of Secondary and Higher Secondary Education (SSCE Board). Further upto the academic year 2006-07, petitioner No.1 School was receiving aid from respondent Nos.1, 2 and 3. From the academic year 2006-07, however, petitioner No.1 took a decision to decline aid and thereby convert itself into a private unaided school. Further, petitioner Nos.1 and 2 also resolved to convert affiliation from SSCE Board to

the ICSE, in respect of the secondary section of the school, i.e., from standard 'V' onwards. In this regard, necessary permissions were applied for and obtained. The conversion was to take place progressively, which means that each year one higher class would stop receiving aid.

5. The petition sets out the enhanced and improved facilities provided by the petitioners from the academic year 2007-08 onwards. The strength of the teaching and non-teaching staff during the period from 2006 to 2012 was increased from 72 to 114. Three well resourced and spacious laboratories with amenities came to be provided. Three well equipped libraries with two Librarians and an Administrator came to be provided. Two I.T. Labs and Resource Centeres with more than 150 computers came to be provided in order to provide each student with one computer facility. Computer aided learning equipment came to be provided in each class room, which included 35 projectors and computer software for various subjects. Besides, facilities were provided by way of music room, yoga room, air-conditioned badminton-cum-basket ball court, squash court, table tennis room and outdoor volley ball-cum-basket ball court. A private house keeping agency came to be hired for the maintenance of the school building and campus. Eleven security

guards came to be hired for the purposes of safety and security measures. Three Academic Consultants were engaged to help teachers, design and implement curricular and extra-curricular activities at the school during the said period.

6. The petition also sets out that the improved and enhanced facilities involved investments without any aid either from the Government or the students/parents. An amount of approximately Rs.11.79 crores (net of Government grants) was expended from the year 2007 to 2012 towards the operating expenses excluding depreciation. The cumulative deficit incurred by the petitioners during the said period was approximately Rs.1.6 crores, in so far as, the secondary section is concerned.

7. The petition sets out that for the years 2000 to 2006, the average expenditure towards salaries of teaching and non-teaching staff of the secondary section including allowances was in the range of Rs.39.71 lacs per year. In contrast, the average expenditure for the same purpose for the period 2007 to 2012 was in the range of Rs.1.04 crores per year. The maintenance expenses, which averaged Rs.88,000/- per annum for the period 2000 to 2006 increased to about Rs.24.38 lacs per year for the period 2007 to

2012. The school was relocated in new building premises in the year 2007 and considerable expense was incurred for the said purpose as well. The petition sets out, that all these improved and enhanced facilities had no direct nexus with the proposed affiliation to the ICSE Board and that these enhanced and improved facilities were availed by the students independent of the affiliation with SSCE Board or ICSE Board.

8. On the aspect of affiliation to the ICSE Board, the petitioners have pleaded that by their letter dated 12th January, 2008, they applied to the Council for affiliation and that though all the formalities were complied with by them, affiliation could not be obtained for reasons beyond their control. Accordingly, for the period between 2007 to 2012, the school continued with its affiliation with the SSCE Board by seeking extensions from time to time, which extensions were granted by respondent Nos.1,2 and 3.

9. On account of the petitioners' inability to obtain affiliation with the ICSE Board between 19th May, 2011 and 1st July, 2011, the representative of the petitioners held several meetings with the parents and students of standard 'IX' to apprise them of the situation and the various options available to them. Out of 85

students of standard 'IX about 12 students opted for admission to some other schools affiliated to the ICSE Board and the petitioners even facilitated the transfer of such students and the remaining 73 students opted to continue with petitioner No.1 school, which continued to be affiliated to the SSCE Board.

10. Respondent Nos.4 to 7, the parents of some of the students, who opted to continue with petitioner No.1 school, however, made complaints with regard to the enhanced fee structure as the petitioners had not been able to secure affiliation with the ICSE Board. Such complaints were made not only to the petitioners, but also to the Education Inspector. The petitioners, by a letter dated 2nd April, 2012 responded to the complaints by submitting their version of the matter before the Education Inspector.

11. The Education Inspector, South Zone, in a communication, which is not very clear, directed the petitioners to refund the enhanced fees charged during the year 2006 to 2012 and report compliance.

12. The petitioners thereupon addressed a detailed representation to the Dy. Director of Education, Mumbai (Respondent No.3) on 7th April, 2012 stating inter alia that issue of affiliation to ICSE had no nexus with the increased fee structure and that all the students had benefited from the enhanced and improved facilities provided at the school during the relevant years.

13. Respondent Nos.4 to 7, thereafter preferred Writ Petition No.1166 of 2012 before this Court, questioning the in-action on the part of respondent Nos.1,2 and 3 in regard to the complaints made by them. This petition was disposed of by an order and judgment dated 14th June, 2012 of the Division Bench, which is transcribed below for ready reference:

"The Petitioners had submitted representations dated 23 May 2011 and 26 September 2011 inter alia to the Deputy Director of Education, Mumbai and to the Secretary in the State Education Department. Since a copy of the representation was marked to the Hon'ble the Chief Justice of this Court, the representations were forwarded by the Registrar (Legal and Research) to the Secretary of the Education Department under cover of a letter dated 4 October 2011 followed by reminders dated 9 December 2011 and 7 January 2012. Since the grievance of the Petitioners has not been attended to, we are of the view that without this Court expressing any view on the merits or the tenability of the contentions of the Petitioners, it would be appropriate and proper to direct the Secretary in the Education Department, to look into the representations and after furnishing an opportunity of

being heard to the petitioners and to the Respondent management to take an appropriate decision as may be warranted in accordance with law. We clarify that we have had no occasion in this matter to express any opinion on merits which are kept open. The Petition is accordingly disposed of.

There shall be no order as to costs.”

14. In compliance with the directions contained in the order dated 14th June, 2012 and upon hearing the representatives of the petitioners and respondent Nos.4 to 7, the impugned order dated 27th November, 2012 came to be passed upholding the order of the Education Inspector to refund the fees to the parents.

15. Mr. N.H. Seervai, the learned senior advocate appearing for the petitioners attacked the impugned order primarily on the following grounds:

(a) The Principal Secretary Education Department, i.e., respondent No.2 had no authority to make the impugned order and unless the source of power or authority to make orders of such kind is traced to some statutory provisions, the impugned order is *ultravires*;

(b) Petitioner No.1 is a private unaided minority institution and consequently entitled to protection under

Article 30 of the Constitution of India. Any attempt to interfere with the fee structure of such an institution would fall foul of Article 30 of the Constitution of India as interpreted by the Supreme Court in the case of *T.M.A. Pai Foundation & others Vs. State of Karnataka – (2002) 8 SCC 481*, as also some decisions of this Court;

(c) The right to establish and administer a private school is a right to carry on an occupation as guaranteed by Article 19(g) of the Constitution of India. Although Article 19(6) of the Constitution of India permits placing of reasonable restrictions, such reasonable restrictions can be placed only by law enacted by legislature and not by a Circular or a Government Resolution issued under Article 162 of the Constitution of India. Thus, even if the impugned order is in pursuance of a Circular or Government Resolution, the same would abridge the right guaranteed by Article 19(1) (g) of the Constitution of India;

(d) The impugned order is vitiated by non-application of mind, inasmuch as most of the contentions raised on behalf of the petitioners were either not at all considered or

rejected without assigning any reasons. The objections of the petitioners to the *locus-standi* of respondent Nos.4 to 7 or the contentions that the enhanced fees had no nexus with the issue of affiliation with the ICSE Board has not at all been considered while passing the impugned order.

16. The learned Asst. Government Pleader (AGP) Ms. Sreedharan defended the impugned order, *inter-alia* by placing heavy reliance upon G.R. No.2103/(50/03)/SE-2 dated 27th May, 2003 issued by the Government of Maharashtra, which according to her, permitted respondent Nos.1,2 and 3 to exercise authority in the matter of fee structure even in so far as private unaided minority institutions are concerned. She relied upon the following provisions of the G.R. dated 27th May, 2003:

3) Education fee:

(a) This aspect will be decided by the concerned school management of recognized non-aided and permanent non-aided, Secondary and Higher Secondary Schools and Junior Colleges.

(b) While fixing such fees the necessary and approved expenditure will be taken into consideration as per the prescribed syllabus.

(c) In addition to above, for adding necessary facilities in future and further plans of development /

extension the management shall take into account the additional 5% expenditure in this regard.

(d) If there are complaints relating to the enhanced fee structure of management by the Parent teachers Associations to the Dy. Director of Education, the said Authority shall conduct necessary inquiries and verification and shall direction to the management as to what should be the fee structure and this will be the binding upon the management.

4)

5) Educational Facilities:

In the state the free Education is for the boys upto 10th Standard and for the girls upto 12th Std. The policy relating to the fee structure and its quantum and criteria will, be decided by the Social Welfare Department and the Schedule Tribe Department relating to the backward classes students.

There is no any change relating to the admission method, reservations, orders relating to Education and other fees, reservation relating to recruitment of staff, rights of minority schools and Educational facilities.

Further the learned AGP placed reliance upon the order made by this court on 14th June, 2012 in W.P. No.1166 of 2012, which according to her invested respondent No.3 with authority to pass the impugned order. The learned AGP further placed reliance upon the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987 and urged that the impugned order is referable to the provisions of the said Act and consequently respondent No.3 was justified in making the impugned order. The

learned AGP further contended that enhanced fees were paid by the students/parents on the basis that the school would be affiliated to the ICSE Board and this having not materialized, the impugned order requiring refund of fees was legal, valid and justified.

17. Mr. Ibrahim Abdul Kader Mansuri - respondent No.4, who appeared in person, whilst adopting the submissions of the learned AGP also made a similar plea that the petitioners were bound to refund the fees, in as much as the school had failed to secure the affiliation with the ICSE Board.

18. In our opinion, the petition can be disposed of by reference to the decision of the Division Bench of this Court in the case of *Association of International Schools and Principal Foundation Vs. The State of Maharashtra and another in Writ Petition (L) No.1876 of 2010* decided on 1st September, 2010, particularly as the said decision in terms, holds that the Government Resolution of the type dated 27th May, 2003 are not referable to the provisions of the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act 1987 and that in any case the right to establish an Educational Institution is a right guaranteed by Article 19(1)(g) of the Constitution of India and as such any restrictions

upon such right can be placed only by law enacted by the legislature and not by a Circular or a Resolution issued under Article 162 of the Constitution of India.

Incidentally, the challenge in that case was directed against the Government Resolutions dated 22nd July, 1999 and 15th July, 2010 by which the State Government in purported exercise of the powers conferred upon it by the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987 issued instructions in relation to the fees that could be charged by unaided secondary schools affiliated to the SSCE Board as well as other educational boards. The two Resolutions, came to be struck down by the Division Bench of this Court.

The Division Bench upon quoting paragraph Nos.48,50,53,54, 56 and 61 of the judgment of Supreme Court in the case of *T.M.A. Pai Foundation & others Vs. State of Karnataka* – (2002) 8 SCC 481, ruled that the decision on the fees to be charged must necessarily be left to the private educational Institutions, that do not seek aid or are not dependent upon any funds from the Government.

In so far as the challenge based upon Article 19(1)(g) of Constitution of India was concerned, the Division Bench relying upon the decision of the supreme Court in the case of *State of Bihar*

and others Vs. Project Uchcha Vidya, Sikshak Sangh and others - in (2006) 2 SCC 545, ruled that the right to establish an Educational Institution is protected under Article 19(1)(g) of the Constitution of India and that restrictions upon such right can be placed only by law enacted by the Legislature and not by Circular or Resolution issued under Article 162 of the Constitution of India.

The Division Bench also ruled that the G.Rs. or Circulars were not referable to the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act 1987 and that reliance upon Section 4 of the said Act was misplaced.

The following observations of the Division Bench are important:

“So far as unaided institutions are concerned, the State Government has two kinds of power, one to specify items of expenditure which are to be excluded from usual expenditure which is to be taken into consideration while determining the amount of fees to be charged and secondly the power which is vested in the State Government is to approve the fees that may be fixed by the unaided institutions. The perusal of the G.R. Shows that it enumerates the items that are to be taken into consideration while fixing the amount of fee. So far as G.R. of 2010 is concerned, it merely reiterates what is stated in 1999 resolution in that regard. None of these resolutions provide for the State Government approving fees fixed by the institutions on the contrary, they contemplate the constitution of committee of which State Government is not part for that purpose. The Act confers power on the State Government to approve the fees fixed and there is no provision in the Act which empower the State Government to delegate its power of approving fees. Therefore, the provisions of 2010 G.R. in so far as

it constitutes committee for approving the fees is concerned it is clearly contrary to the provisions of the Act and therefore, in our opinion, the State Government could not have issued G.R. constituting committee for approving the fees. The Supreme Court in the Judgment in T.M.A. Pai Foundation Case has clearly held that the right to establish educational institution is a fundamental right guaranteed by Article 19(1)(g) of the Constitution of India.”

19. Accordingly, the decision of the Division Bench in the case of the *Association of International Schools and Principal Foundation* (supra) is a clear answer to the contentions raised by the learned AGP and the respondent No.4 appearing in person.

20. The Government Resolution dated 27th May, 2003, is in fact, one from a series of G.Rs. issued by the Government of Maharashtra, *inter-alia* for purposes of resolution of fees structure beginning with a G.R. dated 22nd July 1999 and ending with a G.R. dated 15th July, 2010. A perusal of the G.R. dated 15th July 2010 would indicate that the same refers to five Government Resolutions beginning from the G.R. dated 22nd July, 1999 and ending with the G.R. dated 21st May, 2010. The Government Resolution dated 27th May, 2003, upon which much reliance was placed by the learned AGP is referred to at sr.no.2 in the G.R. dated 15th July, 2010. The G.R. dated 22nd July 1999, and 15th July, 2010 having been struck down by the Division Bench of this Court in the case of *Association*

of International Schools and Principal Foundation (supra) , in our view no reliance can be placed upon the Government Resolution dated 27th May, 2003 for the purposes of justifying the impugned order.

21. The judgment and order dated 14th June 2012 in Writ Petition No.1166 of 2012, merely directed the Secretary of the Education Department, to look into the representation and after furnishing an opportunity to the parties of being heard and to take an appropriate decision as may be warranted in accordance with law. Further, the Division Bench clarified that they had no occasion in that matter to express any opinion on merits, which accordingly were kept open.

22. In the aforesaid circumstances, the submission of the learned AGP to the effect that the judgment and order dated 14th June, 2012 in Writ Petition No.1166 of 2012 invested respondent No.3 with the authority to make the impugned order, cannot be accepted. In fact, no statutory provision was brought to our notice, which would invest the respondent No.3 with statutory authority to make the impugned order. No doubt, an attempt was made to refer to the Maharashtra Educational Institutions (Prohibition of

Capitation Fee) Act 1987 and the decision of the Division Bench in the case of *Association of International Schools and Principal Foundation* (surpa) was sought to be distinguished on the ground that the challenge to the vires of the said Act of 1987 has been kept open by the Division Bench. However, the Division Bench in the very same judgment has ruled that the Government Resolutions in question were neither referable to the Act of 1987, nor could the rights guaranteed by the Article 19(1)(g) be interfered with by issuing Government Resolutions or Circulars referable to Article 162 of Constitution of India. The very same reasoning will apply in so far as the G.R. dated 27th May, 2003 is concerned, particularly since the same is one amongst the series of Government Resolutions referred to in the Government Resolution dated 15th July, 2010, which was ultimately struck down by the Division Bench in the case of *Association of International Schools and Principal Foundation* (supra)

23. In view of the aforesaid, we do not propose to decide the other issues raised on behalf of the petitioners.

24. The impugned order dated 27th November 2012, is quashed and set aside. There shall however be no order as to

costs. The writ petition is, accordingly, disposed of.

(M. S. SONAK, J.)

(S. J. VAZIFDAR, J.)

DSS

