

(1994) 01 GUJ CK 0021
In the Gujarat High Court

Mehsana Municipality

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 27-01-1994

Acts Referred:

Bombay Primary Education Act, 1947 — Section 41(2), 41(2)
Constitution of India, 1950 — Article 12, 14, 226
Gujarat Municipalities Act, 1963 — Section 87B
Primary Education Act, 1947 — Section 41(2)

Citation : (1995) 1 GLR 5

Hon'ble Judges : D.G. Karia, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—The petitioner is a municipality constituted under the appropriate provisions of the Gujarat Municipalities Act, 1963. The petitioner challenges the constitutional validity of the provisions of Section 41(2) of the Bombay Primary Education Act, 1947. The petitioner also challenges the legality and validity of the following orders:

(1) Order dated 24th September, 1977 passed by the Collector, Mehsana by which power is given to the District Panchayat to recover amount of contribution payable by non-authorised municipality. In respect of petitioner-municipality such amount due was Rs. 5,42,853.89 ps (Rupees five lakhs forty-two thousand eight hundred fifty-three and paise eighty-nine only).

(2) Order dated April 24, 1978 passed by the Collector, Mehsana, by which an amount of Rs. 1,61,063.57 ps (Rupees one lakh sixty-one thousand sixtythree and paise fifty-seven only) has been deducted from the grant payable to the petitioner-municipality.

(3) Order dated February 21, 1979 by which it is stated that an amount of Rs. 3,81,790.25 ps. (Rupees three lakhs eighty-one thousand seven hundred ninety and paise twenty-five only) was still required to be recovered from the petitioner-municipality towards contribution of primary education fund.

(4) Order dated March 23, 1979 by which an amount of Rs. 87,957.74 ps. (Rupees eighty-seven thousand nine hundred fifty-seven and paise seventy-four only) has been deducted towards contribution of primary education fund from the grant payable to the petitioner-municipality.

(5) Order dated February 4, 1980 by which the entire balance amount of Rs. 3,02,610.43 ps. (Rupees three lakhs two thousand six hundred ten and paise forty-three only) payable towards contribution of primary education fund has been deducted from the amount of grant payable to the petitioner-municipality.

It may be noted that the aforesaid orders are passed by the appropriate authority in respect of different municipalities. But the petitioner-municipality alone has challenged the legality and validity of the order in so far as it pertains to the petitioner-municipality.

2. The petitioner is a municipality enjoined with duty to establish and maintain primary schools as provided u/s 87B of the Gujarat Municipalities Act, 1963 (for short "Municipalities Act"). The municipalities which do not perform the statutory obligation to establish and maintain primary schools are required to make contribution every year to the District School Board or to the authorised municipality, as the case may be, for the purposes of primary education. The contribution would be in such proportion of the rateable value of the property in the area as may from time to time be fixed in this behalf by the State Government. Over and above this amount, the income accruing from any funds (including trust funds) held, and all moneys received by the municipality for the said purposes, i.e., for the purposes of primary education, are required to be contributed in this fund. Since the coming into force of die "Municipalities Act", the petitioner-municipality did not pay the requisite amount of contribution towards primary education fund as provided u/s 41(2) of the Bombay Primary Education Act, 1947 (for short "Primary Education Act").

3. Details of the amounts which fell due and remained payable by the petitioner-municipality are disclosed in the letter dated August 20, 1979 written by the District Primary Education Officer to the District Education Committee, Mehsana. A copy of this letter is produced at Annexure-F to the petition. The particulars of the amount due as mentioned in the letter are as under:

No.	Year	Amount of contribution recovered	Amount remaining the year	Amount 1963-64	Amount to be re-covered from 1963-64 onwards	S. RS.
						1.
1.	1963-64	30,587.00	-	2. 1964-65	29,131.00	-
2.	1964-65	45,198.00	-	3. 1965-66	34,546.00	-
3.	1965-66	93,084.00	-	4. 1966-67	53,869.00	-
4.	1966-67	70,069.00	-	5. 1967-68	58,677.00	-
5.	1967-68	97,848.00	32.36	6. 1968-69	20,125.98	-
6.	1968-69	1,58,392.00	-	7. 1969-70	37,665.77	-
7.	1969-70	2,63,648.00	-	8. 1970-71	87,957.74	-
8.	1970-71	1,27,281.00	-	9. 1971-72		-
9.	1971-72	1,27,281.00	-	10. 1972-73		-
10.	1972-73	1,27,281.00	-	11. 1973-74		-
11.	1973-74	1,27,281.00	-	12. 1974-75		-
12.	1974-75	1,27,281.00	-	13. 1975-76		-
13.	1975-76	1,27,281.00	-	14. 1976-77		-
14.	1976-77	1,27,281.00	-	15. 1977-78		-
15.	1977-78	1,27,281.00	-	16. 1978-79		-

Thus, as stated above, on August 20, 1979 an amount of Rs. 12,82,874.58 ps. (Rupees twelve lakhs eighty-two thousand eight hundred seventy-four and paise fifty-eight only) had fallen due and remained unpaid by the petitioner municipality towards primary education fund, under the provisions of Section 41(2) of the Primary Education Act.

4. The petitioner-municipality was not making payment inter alia on the ground that it was the duty of the State Government to make arrangement and provide for free primary education; that in the erstwhile State of Baroda such obligation of providing free primary education was undertaken and fulfilled by the State of Baroda; that in any case if the amount had fallen due the Government had no right to recover the same under the provisions of Section 145 of the Municipalities Act because the provisions of Section 145 of the Municipalities Act could be invoked only when the amount was due and payable to the Government. In such cases only, amount due from the municipality could be deducted from the grant payable to the municipality.

5. Since the municipality had fallen in arrear of payment of the amount of primary education contribution as stated above, the Government took actions for recovering the amount. By order dated September 24, 1977 passed by respondent No. 3, i.e., Collector, Mehsana, an amount of Rs. 1,61,063.57 ps. (Rupees one lakh sixty-one thousand sixty-three and paise fifty-seven only) was deducted from the grant payable to the municipality. By another order dated February 21, 1979 an amount of Rs. 87,957.74 ps (Rupees eighty-seven thousand nine hundred fifty-seven and paise seventy-four only) was deducted by the Government from the amount of grant payable to the municipality. By further order dated December 28, 1979 balance amount of Rs. 3,02,610.43 ps. (Rupees three lakhs two thousand six hundred ten and paise forty-three only) was deducted towards contribution payable by the municipality towards primary education fund. Thus, total amount of Rs. 5,51,631.74 ps. (Rupees five lakhs fifty-one thousand six hundred thirty-one and paise seventy-four only) has been deducted by different orders referred to hereinabove from the grant payable to the petitioner municipality. As disclosed in letter dated August 20, 1979 the municipality had not paid the amount of contribution payable towards primary education fund to the extent of Rs. 12,82,874.58 ps. (Rupees twelve lakhs eighty-two thousand eight hundred seventy-four and paise fifty-eight only). The contribution towards primary education fund which was required to be paid by the petitioner-municipality u/s 41(2) of the Primary Education Act has been deducted by the State Government. This action of the State Government and the order passed by respondent No. 3 - Collector Mehsana - as well as the Constitutional validity of Section 41(2) of the Primary Education Act has been challenged by the petitioner-municipality in this petition.

6. We may first examine the challenge to the constitutional validity of the

provisions of Section 41(2) of the Primary Education Act. The Bombay Primary Education Act, 1947 has been placed on the statute book with effect from January 29, 1948. It was adopted and modified by the State of Gujarat by the Gujarat Adoption of Laws (State and Concurrent Subjects) Order, 1980. As stated in the Preamble to the Act it is enacted in discharge of the duty of the Government to secure the development and expansion of primary education and for the purpose of implementing the declared policy of the Government for universal, free and compulsory primary education by a definite programme of progressive expansion and for making better provisions for the development, expansion, management and control of primary education. In other words, the objectives for which the Act has been enacted and placed on the statute book are sought to be achieved by imparting primary education through primary schools which can be classified into two broad categories, namely, public schools and private schools. Public schools comprise of those primary schools maintained by the State Government or by District School Board or by authorised municipality.

7. The powers which were exercised by the District School Boards constituted u/s 3 of the Primary Education Act have been devolved and conferred on Taluka Panchayats and District Panchayats functioning in that area within the jurisdiction of District School Board. This has been done in exercise of powers u/s 135 of the Gujarat Panchayats Act, 1961 (for short "Panchayats Act") by issuing proper notification by the State Government. With the coming into force of the Primary Education Act, public schools comprise of primary schools maintained by the State Government or by authorised municipality or by District Panchayat. On the other hand, private schools are those which do not fall within the category of public schools. However, in order to maintain uniform standards and norms in imparting primary education, these private schools should be recognised as approved schools.

8. As provided u/s 40A of the Primary Education Act, there is prohibition against imparting primary education by private primary schools without recognition. The Primary Education Act defines "authorised municipality" [Section 2(6)] to mean a municipality which is authorised by the State Government under Sub-section (1) of Section 16 to control all approved schools within its area. "Non-authorised municipality" is defined to mean a municipality other than an authorised municipality [Section 2(12)]. Section 16 authorises any municipality constituted under the Bombay District Municipal Act, 1901, to control all approved schools within its area. Sub-section (2) of Section 16 also provides for vesting in the properties of the primary schools which were formerly under the control of local authority as defined in the Bombay Primary Education Act, 1923. Section 17 provides for duties and functions of authorised municipalities. In respect of the area of non-authorised municipalities, obligation with regard to primary education is cast on the District School Board or the authorised municipality, as the case may be, as provided in Section 19 of the Primary Education Act.

9. As regards financial relations between the State Government and the local

bodies, provision is made in Chapter VIII of the Primary Education Act. Section 41(1) provides for payment to be made by district local boards and non-authorised municipalities. Since the constitutional validity of the provisions of Sub-section (2) of Section 41 has been challenged, it would be proper to reproduce the entire Section 41:

41. (1) Every district local board shall pay over annually to the district school board for the purposes of primary education such portion of its income from its revenue described in Clauses (b) and (c) of Section 75 of the Bombay Local Boards Act, 1923, as the State Government may from time to time fix in this behalf. (2) Every non-authorised municipality shall pay over annually to the district school board or the authorised municipality, as the case may be, for the purposes of primary education such proportion of the rateable value of properties in the area of the municipality as may from time to time be fixed in this behalf by the State Government and the income accruing from any funds (including trust funds) held, and all moneys received by it for the said purposes.

10. Section 44 of the Primary Education Act provides for primary education fund. Sub-section (1) of Section 44 provides that a fund called the primary education fund shall be maintained by every district school board and by every authorised municipality. As provided in Sub-section (2)(b), the contributions payable by non-authorised municipalities under Sub-section (2) of Section 41 shall also form part of, or be paid into, the primary education fund. The manner and method of application of primary education fund is provided in Section 45. The fund is to stand in the name of school board and, subject to the provisions of the Act, that has to be applied for the purposes specified in the Act and for such other purposes as may be prescribed. The fund is to be maintained, administered and used in the manner prescribed.

11. At this stage, reference may be made to some of the provisions of the Municipalities Act. Gujarat Municipalities Act, 1963 has been enacted with a view to consolidate and amend the law relating to municipalities in the State of Gujarat so as to give them wider powers in the management of municipal affairs. Prior to the enactment of the aforesaid Act, different municipalities were governed by the Bombay District Municipal Act, 1901, and the Bombay Municipal Boroughs Act, 1925. Both these Acts have been repealed by Section 279 of the Gujarat Municipalities Act, 1963. Chapter VI of the Municipalities Act provides for functions of municipalities. Section 87 of the Municipalities Act deals with duties of municipalities; while Section 91 deals with discretionary functions of municipalities. Relevant part of Section 87 reads as follows:

87. It shall be the duty of every municipality to make reasonable and adequate provision for the following matters within the limits of the municipal borough, namely:

A.

B. In the sphere of education--establishing and maintaining primary schools;

C.

D.

E.

F.

As far as the discretionary functions of municipalities are concerned, it is provided in Section 91 of the Municipalities Act that a municipality may, at its discretion, provide, either wholly or partly, out of the municipal property and fund for the matters mentioned therein within the limits of municipal borough. In the sphere of education it is inter alia stated as follows:

(a) establishing and maintaining pre-primary schools such as balwadies, balmandirs, etc.,

(b) undertaking cultural activities;

(c) making contribution by way of aid to pre-primary schools, secondary schools, institutions providing higher or technical education and institutions of educational societies;

(d) establishing and maintaining secondary schools and institutions for higher or technical education;

(e) making contribution to the funds of the Local Self-Government Institute; Rest of the provisions of Section 91 are not relevant for the purpose of deciding the question raised in this petition.

12. Chapter X of the Municipalities Act (Sections 143 to 145) deals with financial assistance to municipalities. Section 144 inter alia provides for making grant by the State Government, after considering the recommendations of the Gujarat Municipal Finance Board. The Government is required to determine the amount of grant for augmenting the finances of a municipality for any of the purposes of the Municipal Act. This is required to be done by the Government if it thinks necessary to make any grant to the municipality every year. But it may be revised after a period of every five years having regard to the recommendations of the Gujarat Municipal Finance Board. Section 145 lays down the condition of grant. It reads as follows:

The payment of a grant to a municipality shall be subject to the condition that if there be any amount due from the municipality to the State Government, it shall be lawful for the State Government to recover the amount from the municipality by making the deduction from the amount of the grant payable to the municipality under Sub-section (2) of Section 144.

Section 262 of the Municipalities Act confers powers on the State Government to provide for performance of duties on default by municipality.

13. It is contended that the provision of Section 41(2) of Primary Education Act

is unconstitutional inasmuch as it discriminates between local authorities constituted under the provisions of the Panchayats Act and the Municipalities Act. Though this contention is not raised in the petition we have permitted the learned Counsel for the petitioner to make submission on this point. Learned Counsel for the petitioner has submitted that as provided u/s 88 of the Panchayats Act, it is the duty of the gram and nagar panchayats to make provision for education. Reference is made to Sub-clause (f) of Clause 3 of Schedule I to the Panchayats Act which inter alia provides that in the sphere of education and culture, gram and nagar panchayats are required to assist introduction of compulsory education as planned by the State. On the basis of this provision, it is submitted that it is also the statutory duty of gram and nagar panchayats to make provision for primary education. It is further submitted that no obligation is cast on gram and nagar panchayat to make contribution towards primary education fund, while such obligation is cast on municipalities. Therefore, it is submitted that hostile discrimination is made in respect of municipalities and particularly non-authorised municipalities.

14. There is implicit falacy in the argument. Petitioner tries to compare two uncomparables. Gram and nagar panchayats cannot be compared with municipalities. The statutory obligation cast upon gram and nagar panchayats is also differently worded. Section 88 of the Panchayats Act deals with administrative powers of panchayats, and particularly gram and nagar panchayats. It reads as follows:

88. Subject to the provisions of this Act, it shall be the duty of each panchayat to make in the area within its jurisdiction, and so far as the fund at its disposal will allow, reasonable provision in regard to all or any of the matters specified in Schedule I.

Thus, the duty cast on gram and nagar panchayats is not absolute. If the funds of the panchayats do not permit, making of the provision for primary education, the panchayat concerned may not provide for the same. Again, if there be fund available, it is not obligatory on the panchayat concerned to make provision with regard to all the matters specified in Schedule I. It is required to make reasonable provision in regard to all or any of the matters specified in Schedule I. Therefore, the statutory obligation cast upon gram and nagar panchayats is not similar to the statutory obligation cast upon municipality as provided u/s 87 of Municipalities Act. Section 87 of the Municipalities Act enjoins duty upon municipalities, by stating that "it shall be the duty of every municipality to make reasonable and adequate provision", for "establishing and maintaining primary schools". The obligation cast upon the municipality is not subject to any qualification as it is in the case of panchayats. Municipality is bound to make reasonable and adequate provision for establishing and maintaining primary schools. This is the distinguishing feature between municipalities and gram and nagar panchayats. On this point alone, it can be said that there is reasonable classification as far as gram and nagar panchayats on the one hand and

municipalities constituted under the Municipalities Act on the other hand are concerned.

15. Again, the powers of gram and nagar panchayats for imposing tax are limited. The sources of revenue of gram and nagar panchayats are also limited. On the other hand, the powers of taxation and sources of revenue of municipalities are different. These powers are provided for in the Municipalities Act. Simply because both the bodies are empowered to impose levy and collect octroi, it cannot be said that both stand on the same footing. In view of this salient, distinguishing features, the attempt on the part of the learned Counsel for the petitioner to compare gram and nagar panchayats with municipalities constituted under the Municipalities Act has no merits and the same cannot be accepted.

16. Learned Counsel for the petitioner submitted that there is unreasonable classification between authorised municipalities and non-authorised municipalities. As indicated hereinabove, authorised municipality is defined in Section 2(6) of the Primary Education Act as one which is authorised by the State Government under Sub-section (1) of Section 16 to control all approved schools within its area. By making provision u/s 16 of the Primary Education Act, the legislature has seen to it that the statutory obligation cast on every municipality u/s 87B of the Municipalities Act of establishing and maintaining primary schools is fulfilled. On the other hand, non-authorised municipalities are not required to control and administer primary schools situated within its area. Authorised municipalities are undertaking obligation to control and maintain primary schools situated within its area. Thus, authorised municipalities are fulfilling their duty cast upon them u/s 87B of the Municipalities Act. This duty is not being performed by non-authorised municipalities. Therefore, they are obliged to make contribution towards primary education fund as provided u/s 41(2) of the Primary Education Act. By no stretch of reasoning, it could be said that the classification is unreasonable.

17. Municipalities governed by the provisions of the Municipalities Act have been divided into two classes by the legislature as provided in Primary Education Act - Authorised Municipalities and Non-Authorised Municipalities. Authorised municipality is one which is authorised by State Government u/s 16 of the Primary Education Act to control all approved schools within its area. It is defined u/s 2(6) of the Primary Education Act. Non-authorised municipality means a municipality other than an authorised municipality as defined u/s 2(12) of the Primary Education Act. Authorised municipality fulfils its statutory obligation cast upon it u/s 87-B of the Municipalities Act. It is authorised u/s 16 of the Primary Education Act to control and administer the primary schools situated within its local area. On the other hand, there is another class of non-authorised municipalities which are not fulfilling their statutory obligation imposed upon them u/s 87B of the Municipalities Act. These Municipalities are not empowered to control and administer primary schools situated within their area u/s 16 of the

Primary Education Act. Municipalities which are not fulfilling the statutory obligations are required to make contribution for the purpose of primary education "such proportion of the rateable value of properties in the area of the municipality as may from time to time be fixed in this behalf by the State Government". Thus, the classification of municipalities constituted under the Municipalities Act made by the legislature in the Primary Education Act as authorised municipalities and non-authorised municipalities is reasonable. It is based on intelligible criterion, namely, a municipality which fulfils its statutory obligation cast upon it u/s 87B of the Municipalities Act is put in one class. Another which does not fulfil this obligation is placed in other class. This classification has also nexus with the object sought to be achieved. The object sought to be achieved is to see that the declared policy of the Government that universal, free and compulsory primary education reaches by a definite programme of progressive expansion to the entire area of the State. This is the reason why municipalities have been cast with the obligation to establish and maintain primary schools.

18. This classification is consistent with the provisions of the Constitution. Article 45 contained in Part IV of the Constitution, pertaining to Directive Principles of State Policy, inter alia provides that the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years. Be it noted that municipality being a "local authority" is "State" within the meaning of the definition of "State, contained in Article 12 of the Constitution. As provided in Article 36 contained in Part IV of the Constitution, definition of "State" in Article 12, equally applies to Part IV of the Constitution which provides for Directive Principles of State Policy. Thus, municipality is enjoined with constitutional obligation to provide for free and compulsory education for all children (Article 45).

19. Thus, it is evident that the classification and distinction made in the Primary Education Act between authorised municipality and non-authorised municipality is just and reasonable. It is based on intelligible criterion. The object sought to be achieved by the classification is to see that the purpose for which the Primary Education Act is enacted is fulfilled. Moreover, the object is also to see that the constitutional obligation cast upon every municipality which is "State" within the meaning of Article 12 of the Constitution of India is fulfilled and constitutional object is achieved. In order to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) the classification must be founded on an intelligible differentiation which distinguishes persons or things that are to be put together from others left out of the group, and (2) that the differentia must have a rational relationship to the object sought to be achieved by the statute in question. This is the law laid down by the Hon"ble Supreme Court in the case of State of Rajasthan Vs. Mukanchand and Others, , para 8. As far as the provision of Section 41(2) of the Primary Education Act is concerned, both the aforesaid conditions are fulfilled. Therefore, the challenge of the constitutional validity of

the provisions of Section 41(2) of the Bombay Primary Education Act cannot be sustained.

20. Learned Counsel for the petitioner has referred to and relied upon the following decisions of the Hon'ble Supreme Court in support of his submission that the provision of Section 41(2) of the Bombay Primary Education Act is arbitrary and, therefore, violative of Article 14 of the Constitution:

- (1) Karimbil Kunhikoman Vs. State of Kerala, .
- (2) A.P. Krishnasami Naidu etc. Vs. State of Madras, .
- (3) State of Rajasthan Vs. Mukanchand and Others, .
- (4) Miss. Nishi Maghu and Others Vs. State of Jammu and Kashmir and Others, .
- (5) Suneel Jatley and Others Vs. State of Haryana and Others, .
- (6) M.K. Salpekar Vs. Sunil Kumar Shamsunder Chaudhari and Others, .

All the aforesaid decisions are in relation to different statutes and the question involved therein turned on the facts of each case. While adjudging the constitutional validity of the statutory provision, the aforesaid tests are to be applied. On this point, there is no contrary decision or any distinguishing observation made by the Hon'ble Supreme Court in any of these decisions. Therefore, we do not propose to discuss any of these authorities in detail.

21. Learned Counsel for the petitioner submitted that the provisions of Section 41(2) of the Primary Education Act do not contain any guidelines for exercising powers by the Government, while fixing the proportion of rateable value of the properties in the local area. Therefore, it is submitted that the provision is unreasonable and arbitrary and hence violative of Article 14 of the Constitution of India. The argument cannot be accepted. There is always presumption that a validly enacted statute is in conformity with the constitutional provisions. This presumption cannot be replaced merely because there is no guideline contained in the statute itself. In such a situation, the action taken under the provision may be struck down by the Court if the legality and validity of such action is challenged on the ground that it is unreasonable and arbitrary. But the statutory provision itself cannot be challenged on the ground that there is no sufficient guideline. Again, it may be noted that the power is conferred on the State Government itself. It is to be presumed that the power conferred shall be exercised for the purpose for which it has been conferred and shall be exercised reasonably. Absence of guidelines in the statute itself is no ground to hold that the provision is constitutionally invalid.

22. Learned Counsel for the petitioner submitted that the town of Mehsana formed part of erstwhile State of Baroda. In the State of Baroda it was the obligation of the State itself to provide for free primary education. Therefore, it is submitted that such obligation of making contribution towards primary education fund could not be imposed upon the petitioner-municipality. The contention

cannot be accepted. The petitioner-municipality is a creature of the statute, namely, the Gujarat Municipalities Act, 1963. Its powers and duties are as defined under the Municipalities Act. It cannot claim any benefit on the alleged historical fact that in the erstwhile State of Baroda the State had undertaken the obligation to provide free primary education to all its citizens. After the enactment of the Constitution and after the Municipalities Act came into force under which the petitioner-municipality has been constituted, the powers and duties of the petitioner-municipality are to be determined by reference to the provisions of the Constitution and by reference to the provisions of the Municipalities Act. The alleged historical fact as regards erstwhile State of Baroda providing free primary education to its citizens is not at all relevant.

23. This brings us to the question of legality and validity of the impugned orders passed by the respondents by which different amounts of grant payable to the municipality have been recovered by the Government. Section 145 of the Municipalities Act which has been reproduced hereinabove empowers the State Government to recover the amount due to the Government from the amount payable to the municipality. It is not possible to accept the contention raised by the learned Counsel for the respondents that the amount of contribution towards primary education fund payable u/s 41(2) of the Primary Education Act is an amount due to the Government. This amount is due to the taluka panchayat or district panchayat concerned. Therefore, the contention that the power to deduct the amount of grant has been exercised u/s 145 of the Municipalities Act has no merits.

24. Learned Counsel for the respondents submitted that the Government has power u/s 262 of the Municipalities Act to direct defaulting municipality to perform the duties imposed upon it under the Act. It is true that Section 262 of the Municipalities Act empowers the Government to issue necessary directions to the defaulting municipality and require it to perform its statutory obligation. However, this could be done by the Government after due inquiry as to whether the alleged default has been made by it, and after being satisfied on this aspect. In the instant case no such inquiry as provided u/s 262 of the Municipalities Act has been made. No opportunity of being heard to the municipality has been given. On the contrary, it was the stand of the respondents that the powers have been exercised u/s 145 of the Municipalities Act. As the Court came to the conclusion that the power of deducting the amount of grant could not be exercised u/s 145 of the Municipalities Act, learned Counsel for the respondents has resorted to the provisions of Section 262 of the Municipalities Act. But in view of the undisputed and proved facts it is evident that no inquiry is made and no opportunity of being heard is afforded to the petitioner u/s 262 of the Municipalities Act. Faced with this situation, it is submitted that in view of the Government Resolution dated February 25, 1977 the Government could exercise powers under Government Resolution dated April 16, 1965 by which the Government has sanctioned the rules regarding compensatory grant to the municipalities. As provided in Government Resolution dated February 25, 1977

the Collector of the District concerned has been empowered to deduct from the amount of grant payable to the municipalities, the amount of contribution to be made towards primary education fund.

25. It is pertinent to note that the legality and validity of the Government Resolution dated April 16, 1965 and Government Resolution dated February 25, 1977 has not been challenged. Further affidavit-in-reply dated October 3, 1991 with which the aforesaid Government resolutions have been produced has been served upon the learned Counsel for the petitioner on October 3, 1991. Even so, till the date of hearing of the petition, i.e., January 25, 1994 the legality and validity of the aforesaid resolutions have not been challenged. Therefore, we proceed on the footing that as per the aforesaid resolutions the Government has power to deduct from the amount of grant payable to the municipality, the amount of contribution to be made by concerned municipality towards primary education fund as provided u/s 41 of the Primary Education Act.

26. Learned Counsel for the petitioner submitted that the Government has not taken action by referring to the aforesaid resolutions and the stand of the Government as disclosed in the affidavit-in-reply is that it has exercised power u/s 145 of the Municipalities Act. Therefore, it is submitted that the impugned action of the Government should be struck down. The submission cannot be accepted. Once it is shown that the exercise of power could be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question see *J.K. Steel Ltd. Vs. Union of India (UOI)*, , reiterated in *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, . In view of this settled legal position, simply because erroneous provision of law is referred to in the affidavit-in-reply it cannot be said that the Government has no power to issue the impugned orders.

27. Even the learned Counsel for the petitioner has not denied the powers of the Government to take action u/s 262 of the Municipalities Act. However, it is argued that the procedure of exercising powers u/s 262 of the Act has not been followed and therefore, the impugned orders should be struck down. In view of our conclusion that the Government has power to deduct amount of contribution to be made towards primary education fund under the Government Resolutions dated April 16, 1965 and February 25, 1977 referred to hereinabove, it is not necessary to consider this submission. However, this contention may also be examined on the assumption that the Government has no power under the aforesaid resolution to deduct the amount of contribution towards primary education fund. On this assumption, if the contention is to be examined, we would like to consider the conduct of the petitioner-municipalities. Here is a petitioner which is a statutory, autonomous body. It is constituted under the appropriate provisions of the Municipalities Act. It is constituted for performing certain obligatory duties. One of the duties cast upon it, is to establish and maintain primary schools. This is, as indicated hereinabove, constitutional

obligation also. Admittedly, the petitioner-municipality has not fulfilled its constitutional and statutory obligation. The municipality failed to make its contribution towards primary education fund right from the year 1963-64 onwards. It had fallen in arrear of Rs. 12,82,874.58 ps. (Rupees twelve lakhs eighty-two thousand eight hundred seventy-four and paise fifty-eight only). In such a situation the State Government has no other option, but to resort to direct action of deducting the amount of contribution towards primary education fund from the amount of grant payable to the municipality.

28. Even if it is assumed for a moment that the action taken by the Government is not strictly in accordance with the provisions of the Act or the Government Resolutions passed in this connection, we would have refrained from exercising our powers under Article 226 of the Constitution. Here is a petitioner who comes before the Court stating that it has not performed its constitutional obligation. It has disregarded its statutory obligation. And yet, it wants this Court to exercise its extraordinary powers under Article 226 of the Constitution on the technical ground that the Government has not fulfilled certain procedural requirements as laid down u/s 262 of the Municipalities Act. It must be realised that the powers under Article 226 of the Constitution of India are discretionary powers. Writs are not to be issued by the Court as a matter of course. As laid down by the Supreme Court in the case of *A.M. Allison Vs. B.L. Sen*, , the High Court has power to refuse writ under Article 226 of the Constitution if it is satisfied that there is no failure of justice.

29. In the instant case, it is an undisputed position that the municipality has not paid its contribution towards primary education fund. Therefore, in view of the observation made by the Supreme Court in the case of *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, , no useful purpose will be served by issuing writ as prayed for. In para 51 of the aforesaid decision the Supreme Court has referred to its earlier decision in the case of *S.L. Kapoor Vs. Jagmohan and Others*, , and observed as follows:

...where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs.

In the instant case also, in view of undisputed position that the municipality has failed to perform its statutory duty and has failed to make payment towards primary education fund, it would be futile to strike down the orders passed by the Government and ask the Government to complete the formality of complying with the principles of natural justice.

30. No other contention is raised. There is no substance in the petition. In the result the petition is rejected. Rule discharged.