(1994) 03 BOM CK 0059

In the Bombay High Court

Case No : First Appeal No. 818 of 1989

The Municipal Council, Ahmednagar — APPELLANT

Vs

Bhaskar Pandurang Hivale — RESPONDENT

Date of Decision : 17-03-1994

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 2(13)
Civil Procedure Code, 1908 (CPC) — Section 9
Maharashtra Education and Employment Guarantee (cess) Act, 1962 — Section 7(1)
Maharashtra Municipalities Act, 1965 — Section 169, 354

Citation : (1995) 1 BomCR 328

Hon'ble Judges : A.D. Mane, J

Bench : Single Bench

Advocate : V.S. Bedre, for the Appellant; S.B. Pallod and R.T. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

A.D. Mane, J.—An interesting question of law that arises for consideration in this appeal is whether an ''educational institution'' registered under the Bombay Public Trusts Act, 1950, can claim exemption from payment of ''education cess'' by virtue of the provisions contained in Clause (e) of sub-section (1) of section 7 of the Maharashtra Education and Employment Guarantee (Cess) Act, 1962.

2. The respondent plaintiff is an educational institution and through its Secretary cum Treasurer filed the suit for a declaration that the properties mentioned in the Schedule attached to the plaint are not liable to pay the education cess, as same are exempted under the Maharashtra Education and Employment Guarantee (Cess), Act, 1962 (for short, the Act) with the consequential relief that the Appellant-defendant Municipal Council be restrained by permanent injunction not to levy the education cess with the further prayer for refund of Rs. 27,737/- which were recovered illegally and wrongfully by the Municipal Council with interest at the rate of 12% per annum from the date of the suit till realisation. The plaint averments are mainly these :

The plaintiff society is registered as a public trust under the Bombay Public Trusts Act, 1950. The buildings and the properties described in detail in Schedule I annexed to the plaint are owned by the society. The society conducts "Ahmednagar College" at Ahmednagar. The suit properties are used by the College for its educational activities. The plaintiff stated that the properties are used purely for educational purpose which is the charitable purpose and in none of the properties any trade or business is carried out. No rent is charged to the student or occupiers who use some of the buildings of the society. In case of the hostels for boys and girl students, the hostel fees are charged and no rent of any kind is being recovered from them. The plaintiff further stated that the levy and demand of the education cess by the Municipal Council was illegal and ultra vires. The Defendant Municipal Council had demanded the education cess for the suit properties for the year 1976-77 illegally.

3. The claim of the plaintiff society was resisted by the defendant Municipal Council by raising technical objections. In the first place it has been stated that the suit as framed was not proper in law and same is not tenable. It is bad as it was not filed within limitation as provided in section 304 of the Maharashtra Municipalities Act, 1965. The Municipal Council denied that the buildings were constructed for educational purposes or activities or that only fees are recovered from the students. It is stated that the society runs a canteen. It gives all for business on rent. Moreover, some of the portion of the buildings are given on rent or licence fees and the society derives income. It was, therefore, denied that the plaintiff society is a charitable institution. According to the defendant Municipal Council the plaintiff society carries the business and derives rent or licence fees in some portion of the buildings and hence, the plaintiff society was not exempted from payment of the education cess. The Municipal Council was only recovering the cess for the State Government and the suit was bad for non-joinder of the parties. Moreover, it has also been stated that the plaintiff society gets grant in full from the Government including the rent of the buildings and therefore, the plaintiff society was not entitled for exemption. Lastly the defendant Municipal Council has also challenged the jurisdiction of the Civil Court to entertain the suit.

4. The learned trial Judge framed the issues at Exhibit 15 and on going through the material evidence adduced by the parties has held that the Civil Court has jurisdiction to try and entertain the suit, that the suit was not barred by limitation, that the State Government was not a necessary party and that the plaintiff was not estopped from challenging the demand bill of the years 1976-77 and 1977-78. The plaintiff society has succeeded in proving that it was exempted from payment of the education cess and therefore, the learned trial Judge decreed the suit of the plaintiff.

5. In support of the appeal Mr. Bedre, learned Counsel appearing for the appellant-Municipal Council reiterated the technical objections which have been raised by it before the trial Court. Mr. Bedre learned Counsel argued that the Civil

Court has no jurisdication to entertain and try the suit, when the plaintiff has remedy of appeal u/s 169 of the Maharashtra Municipalities Act, 1965, to challenge the levy of ''taxes'' or ''dues''. In this context, the learned Counsel pointed out that the constitutional validity of the Act was upheld as per the decision reported in 1957 Bom. L.R. 557 but the procedure which is contained in the Maharashtra Municipalities Act, 1965, mutatis Muntandis apply to ''education cess'' under the Act. Reference is also made to the decision reported in Namdeo Dattaji Dhakolkar v. State of Maharashtra, 1981 Mh. L.J. 26 to show that the objection in respect of legality of demand bills of education cess by the Municipal Council could be entertained only in appeal and not by the Civil Court in a separate suit. It has also been contended that unless all the trustees are parties to the suit, the suit filed through the Secretary was not tenable in view of the decision reported in Nagar Wachan Mandir, Pandharpur v. Akbarali Abdulhusen and Sons, 1994 Mh. L.J. 490. Lastly the learned Counsel invited my attention to the purshis filed on behalf of the Municipal Council calling upon the society to produce certain documents and the trial Court rejected the application. The learned Counsel, therefore, argued that for non-production of the material documents the trial Court ought to have drawn adverse inference that the plaintiff society failed to prove that there was charitable purpose in conducting the educational institutions. It was also sought to be contended that no specific issue in that behalf was also framed by the learned trial Judge in the suit. The learned Counsel further argued that the learned trial Judge has recorded inconsistent findings on issues Nos. 2 and 4. The issue No. 2 pertains to the jurisdiction of the trial Court whereas issue No. 4 pertains to the non-joinder of the parties. It is, therefore, argued that the decision rendered by the trial Court requires interference in the appeal.

6. Mr. Pallod, learned Counsel appearing for the respondent, on the other hand, while supporting the decision given by the trial Court submitted that the admissibility of the claim to exemption of the society from the Act must be determined by the language of the provisions made by the Act itself in that behalf. It has been contended that a question whether a particular object is of general public utility like the question whether the plaintiff society trust is a charitable trust is a question of law though doubtless it is for the Charity Commissioner to find out and state any facts bearing thereon. Referring to the certificates of registration of the plaintiff society as a public trust under the Bombay Public Trusts Act, 1950, produced at Exh. 45 and the Memorandum and the rules framed for the proper management of the public trust produced at Exhibit 40 it has been submitted that no further evidence was necessitated in proof of the fact that the plaintiff carries the very object of charitable purpose by running an educational institution. The learned Counsel for the respondent also referred to the auditor''s reports at Exhibits 102 to 108 to show the activities of the plaintiff society running the educational institution are for charitable purposes. The learned Counsel has pointed out that the learned trial Judge was correct in taking the view that the buildings meant for canteen or hostel for boys

and girl students have no distinct characteristic than the properties of the Trust. The buildings are constructed as per the requirements or directions of the University for the benefit of the students and in carrying out the charitable purposes of education. Therefore, the learned Counsel submitted that there is no ground to interfere with the decision of the trial Court in this appeal.

7. The first question is whether the plaintiff society which is a public trust is a charitable trust. For the question whether a particular object is of general public utility like the question whether the trust is a charitable is a question of law and useful reference may be made to the decision in the case of AIR 1939 208 (Privy Council) . Exhibit 44 is a certificate of registration of the plaintiff society under the Societies Registration Act, 1860. Exhibit 45 is the certificate of registration of the plaintiff under the Bombay Public Trusts, Act, 1950. The Trust is registered as on 29-7-1969. Exhibit 40 is the Memorandum of Association and the regulations for the proper management of the plaintiff society which contain inter alia the object for which the society was established. The main object is to promote education and culture in its Christian institutions which while primarily for those professing the Christian faith and also admit others irrespective of caste, class, creed or sex, to provide, establish endow, maintain, control and manage the Ahmednagar College and other educational institutions, schools and study or training centres and to do all acts and things necessary for or conducive to the promotion of secular and religious education in the said college at undergraduate and post-graduate level and in pre-primary, primary, secondary, Higher, Commercial, Technical and Industrial institutions at Ahmednagar or elsewhere, and for this purpose to start, establish, acquire, organize, conduct, maintain and manage branch colleges, Reading rooms, Laboratories, Gymnasiums, Workshops, Extension Projects, Publishing Houses, Hostels, Residential Quarters and the like, in order to train ideal citizens, and to take over the assets, properties, liabilities and managements of the existing institution known as Ahmednagar college from the Marathi Mission society registered under the Societies Registration Act at Bombay, Maharashtra State, and the United Church Board for World Ministries, a foreign corporation of the United States of America registered under the Indian Companies Act.

8. Section 7 of the Cess Act, so far as it is relevant, reads as under :

7. Exemption of certain lands and buildings from payment of tax :- The following lands and buildings, that is to say

(a) .....

(b) .....

(c) .....

(d) .....

(e) lands and buildings or portions thereof belonging to a public trust registered under the Bombay Public Trusts Act, 1950 or a wakf registered under the

Bombay Public Trusts Act, 1950, and exclusively occupied for public worship or for charitable purposes :

(f) .....

(g) .....

Explanation :---For the purposes of this section-

(1) The following lands and buildings or portions thereof shall not be deemed to be exclusively occupied for public worship or for charitable purposes, namely;-

(a) those in which trade or business is carried out on; and

(b) those in respect of which rent is derived whether rent is or is not applied exclusively to religious or charitable purposes;

(2) Where any portion of land or building is exempt from the tax by reason of its being exclusively occupied for public worship or for charitable purposes, such portion shall be deemed to be a separate property;

(3) "Open land" means land which is not built upon or enclosed."

9. The expression "charitable purposes" as used in Clause (e) of sub-section (1) of section 7 of the Cess Act assumes importance. The learned Counsel for the appellant is right in his submission that the admissibility of a claim to exemption from education cess must be determined by the language of the special provisions made by the Act in that behalf. The object both of the Trust and the Society undoubtedly is to promote educational activities and the properties referred to in the suit are prima facie held under the trust wholly for advancement of an object of general public utility. The question whether an object is of general public utility like the question whether a particular object is charitable is a question of law as held by the Privy Council in the case of Trustees of Tribune Press, Lahore (cited supra). In the present case, the competent authority has granted the certificate of registration of the plaintiff trust under the Bombay Public Trusts Act, 1950. The certificate of registration is itself is a best piece of evidence to show that the Trust can be deemed to be a charitable trust. It is true that by the terms of ''trust it is clear that it is not to be carried for profit to any individual. There is, however, absolutely no material to show that any of the buildings owned by the plaintiff trust was used for profit to any individual. It is to be observed that under the Act, the test of general public utility is applicable not only to the trust registered under the Bombay Public Trusts Act, 1950 or a Wakf Board under the Wakf Act but is also to be applied to the property held under the trust or other legal obligations. Even if the object of the plaintiff society is taken into account there could not be any doubt that the plaintiff society can be called ''charitable trust'' for a charitable purpose. In the case of Shanti Sarup Vs. Radhaswami Satsang Sabha, Dayalbagh Agra and Others, , it was observed that :

"Societies Registration Act permits registration of societies for charitable purposes. A religious society can also be called a charitable society, for a religious purpose may also be a charitable purpose and the religious society might legally be registered under the provisions of the Act."

In the present case also the plaintiff society has been registered under the Societies Registration Act and also under the Bombay Public Trusts Act and its dominant object is charitable purpose to advance education. The meaning of the word "institution" as observed by the Supreme Court in Kamaraju Venkata Krishna Rao Vs. Sub-Collector, Ongole and Another, , will cover every use of it depends on the context in which it is found. It may by emphasised that it is well settled by now that an object beneficial to a section of the people is an object of general public utility to serve a charitable purpose. It is not necessary that the object should be an object to the whole of mankind or all persons in particular country or State. It is sufficient if the intention was to benefit a section of the public as distinguished from a specified individual is present. A reference may be made to the decision of the Supreme Court in Ahmedabad Rana Caste Association Vs. The Commissioner of Income Tax, Gujarat, . Moreover, section 2(13) of the Bombay Public Trusts Act provides that unless there is anything repugnant to the context of the public trust, ''public trust means an express or constructive trust for either public religious or charitable purpose or both. The very fact that the plaintiff society is also registered under the Bombay Public Trusts Act, its object is for a charitable purpose. There is absolutely no merit in the contention that because certain documents which were called from the plaintiff by the defendant were not produced, an adverse inference should have been drawn in regard to the purpose for which the trust was registered. The documents to which I have made a reference earlier are sufficient to come to the definite conclusion that the plaintiff society is a public trust registered under the Bombay Public Trusts Act with the main object of charitable purpose to run educational institution. Thus, applying the test of general public utility in the facts and circumstances of the case there is no doubt that the plaintiff trust or the property held by it clearly comes within the purview of Clause (e) of sub-section (1) of section 7 of the Act. If the plaintiff''s case falls under the category as described in section 7 of the Act, undoubtedly the lands or buildings possessed by the plaintiff are exempted from payment of tax under the express provisions contained in section 7 of the Act.

10. Now coming to the question whether the suit was maintainable or whether the Civil Court has jurisdiction to entertain and try the suit, it may be stated that the answer to this question may be found if regard be had to the decision of the Supreme Court in the case of Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, . The Supreme Court observed that:

"Moreover where the question merely is whether the assessment had been made according to law, the Assessing Officer of the Municipality having jurisdiction on the subject matter and over the assessee, the provisions of section 84(3) may be a bar to a suit. But where the question is as to the jurisdiction of the Assessing

Officer to proceed against the assessee and levy on or collect from him an amount in excess of that permitted by the Constitution, the matter would be entirely out of the bar of that provision. Where the Assessing Officer had no authority to levy a tax beyond what section 142-A of the Government of India Act, 1935, permitted or what Article 276 of the Constitution permits, his proceedings would be void and the assessment order would be no answer to the suit for the recovery of the excess amount. To this extent, even the order of the assessment will not obtain the protection of section 84(3) of the Act and, the suit would be maintainable."

In view of the finding that the plaintiff society is entitled to the exemption from payment of education cess by virtue of provisions contained in section 7(1)(e) of the Act, the demand of education cess was undoubtedly without any authority. The levy of education cess or demand thereof under the bill was beyond the power or jurisdiction of the Municipal Council. The plaintiff was therefore, justified in seeking the declaration to that effect and in such a situation it cannot be said that the suit was not maintainable or there was bar by virtue of the provisions contained in section 354 of the Maharashtra Municipalities Act. It is true that in the case of assessment made according to law, the tax payer has to challenge the assessment in appeal before the Magistrate by virtue of the provisions contained in section 169 of the Act but it cannot be said that in the present case the assessment made by the Municipal Council was in accordance with law. It is true that the plaintiff has filed appeal before the Magistrate and it is pending. But that cannot be a bar to challenge the assessment made by the defendant on the ground that it has no jurisdiction to demand education cess from the plaintiff. For these reasons I find that the decisions upon which reliance is placed by Mr. Bedre, learned Counsel for the appellant are of no assistance.

11. I do not find any merit in the contention that the State Government was a necessary party when the demand made by the Municipal Council was the subject matter of challenge and especially when the Municipal Council is competent authority to collect the tax under the Act.

12. Before ending it may be stated that Mr. Bedre, learned Counsel for the appellant submits that the amount which was already recovered towards education cess from the plaintiff has been transferred to the Government by the Municipal Council and therefore, the decree directing refund of that amount may be modified, as the plaintiff has not joined the State Government as a party to the suit. Mr. Pallod, learned Counsel for the plaintiff fairly concedes that the amount has already been recovered from the plaintiff and it is not lying with the Municipal Council and it is with the Government. In that view of the matter, I am inclined to accept the request on behalf of the appellant that part of the decree requires modification.

13. In conclusion I find no merit in the appeal but while confirming the judgment and decree passed by the trial Court the order regarding refund of the amount of Rs. 27,737/- by the Municipal Council is required to be modified. The following

order is, therefore, passed :

The Judgment and decree passed by the trial Court is hereby confirmed save and except that the order directing refund of Rs. 27,737/- by the Municipal Council to the plaintiff is quashed and set-aside. The appeal is accordingly dismissed except with the aforesaid modification to the decision of the trial Court. There shall be no order as to costs and the parties are directed to bear their own costs.

