

(2007) 03 BOM CK 0088

In the Bombay High Court

Case No : Writ Petition No. 5384 of 2006

Yusuf Ali Khan Rashid Ali Khan and Another

APPELLANT

Vs

Nazema Begum and Others

RESPONDENT

Date of Decision : 15-03-2007

Acts Referred:

Bombay City Civil Court Act, 1948 — Section 5
Civil Procedure Code, 1908 (CPC) — Section 2(14), 39, 39(1), 39(2)
Constitution of India, 1950 — Article 227
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 11, 12, 13, 9

Citation : (2007) 5 ALLMR 751 : (2007) 6 BomCR 785 : (2007) 4 MhLj 141

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : M.S. Choudhari, for the Appellant; J.H. Deshmukh, for Respondent No. 1, A.S. Shinde, holding for V.D. Hon and D.R. Adhav, AGP, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Deshmukh, J.—Heard learned Counsel for the respective parties.

2. Resume of relevant facts may be summarised as follows:

(A). Respondent No. 1 Nazema Begum had filed Appeal No. 205 of 1996 ("appeal") u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("Act of 1977") and Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ("Rules of 1981") against Dr. Zakir Hussain Education Society, Ahmedpur, Dist. Latur ("the Society") through its President and Dr. Zakir Hussain Urdu Primary School, Ahmedpur ("the School") through its Head Master. This appeal was allowed by the School Tribunal, Aurangabad on 7-3-2003.

(B). Respondent No. 1 thereafter filed Misc. Application No. 65 of 2005 before the School Tribunal, Solapur. She also filed an application u/s 39 of the CPC ("CPC") for transfer of the decree/order passed by the School Tribunal. Said

application was granted on 1-10-2005 by the School Tribunal, Solapur.

(C). Thereafter, Special Darkhast No. 232 of 2005 on transfer is being entertained by the Court of learned Civil Judge (S.D.) Ahmedpur, District Latur against the judgment debtors. In the said proceeding various orders have been passed by the executing Court. In the said proceeding present petitioners had filed applications Exhibits 25 and 28, which, after hearing parties, came to be rejected by the common order on 3-7-2006. This order is subject-matter of the present writ petition.

(D). Respondent No. 1 had also filed an Application No. 20 of 2003, u/s 13 of the Act of 1977 before the School Tribunal, Solapur. Learned Counsel for respective parties agree that this application was, however, withdrawn by respondent No. 1.

(E). Respondent No. 1 thereafter filed R.C.C. No. 1027 of 2004 in the Court of learned Judicial Magistrate (F.C.) Ahmedpur for contempt of the order passed by the School Tribunal in the appeal. Filing of this case is subject-matter of challenge in two Criminal Writ Petitions, first being Criminal Writ Petition No. 200 of 2005 filed by the Education Officer (Primary), Zilla Parishad, Latur and second being Criminal Writ Petition No. 149 of 2006 filed by the Secretary and Head Master of the Society and School respectively. These two writ petitions are pending adjudication in this Court.

(F). Respondent No. 1 had also filed Writ Petition No. 1944 of 2005 seeking execution of the order passed by the School Tribunal in appeal. This writ petition was, however, withdrawn and order passed to that effect on 1-8-2005. Said order reads as under:

CORAM : R.M.S. KHANDEPARKAR AND S.P. KUKDAY, JJ.

The learned Counsel for the petitioner states that in order to enable the petitioner to pursue alternate efficacious remedy available for implementation of the order passed by the Tribunal, the petitioner craves leave to withdraw the writ petition.

2. The petition is accordingly allowed to be withdrawn and stands disposed of.

(G). The order of the School Tribunal in appeal is challenged by filing Writ Petition No. 4382 of 2003 in this Court (Single Judge). Rule was issued on 21-1-2004 but no interim relief was granted. Said order was challenged before the Division Bench of this Court in LPA No. 35 of 2004, in which following order came to be passed.

Heard learned Counsel for the parties.

2. We have found from the observations of the School Tribunal that the junior persons than the petitioner have been retained in the service and even if the argument of the appellants is accepted for a moment that there was reduction in strength of the employees, in that eventuality junior person than the respondent should have been removed from service by the institution. Therefore, we do not

find any substance in the L.P.A. and the L.P.A. is hereby rejected....

(H). Aggrieved petitioners (President and Secretary of the society and Head Master of the school), thereafter, filed SLP No. 19028/2004 in the Apex Court. Said SLP was also dismissed on 24-9-2004.

3. Shri Choudhari, learned Counsel appearing for the petitioners submits that the Civil Court cannot execute the order passed by the School Tribunal. According to him, the Civil Court does not have power and jurisdiction for execution of such order passed by the School Tribunal. He, in support of this contention, placed reliance on the decision of this Court in the case of Ramchandra Multani Vs. Chander Sharma, . In the said case, decree was passed by the learned Civil Judge (S.D.), Ahmedpur, for an amount of Rs. 17,91,154/-. It was transferred u/s 39(2) of the CPC for execution to the City Civil Court, Bombay. This Court held such transfer invalid. This Court noticed Section 5 of the Bombay City Civil Court Act, 1948, which lays down that the City Civil Court is subordinate to High Court only. The facts in the reported judgment are altogether different than the case at hand. In the present case, an application was filed by present respondent No. 1, before the School Tribunal, for transfer of the decree/order for execution to the Civil Court and the said application was allowed. u/s 39 of CPC transfer was effected and accordingly certificate was issued. It is apposite to refer Section 39(1) of CPC which reads as under:

39. Transfer of decree. -- (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction,

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(2)...

Bare perusal of Sub-section (1) of Section 39 shows that the Court which has passed the decree may on the application of the decree holder send it for execution to another Court of competent jurisdiction or to any subordinate Court of competent jurisdiction. Here, in the case at hand, the society in question is registered and having its activities carried on and properties at Ahmedpur town, within the limits of Latur district. Thus, the School Tribunal, on the motion made

by present respondent No. 1, passed an order u/s 39(1) of CPC and transferred the order in appeal for execution/implementation to the Court of the competent jurisdiction i.e. learned Civil Judge (S.D.) Ahmedpur. I see no illegality in the said order.

4. This issue, along with other issues, was considered, on reference, by the Full Bench of this Court in the case of St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad, . The Full Bench referred to the various judgments and concurred with the view taken in the case of Mohammad Salam Anamul Haque v. S.A. Azmi 2001 (1) Mh.L.J. 249 and observed as under:

Therefore, when the School Tribunal makes an order for reinstatement and for payment of backwages, the Appellant in whose favour such an order is made can definitely approach the School Tribunal, which made the order for execution of that order in the same manner in which the decree under the provisions of the CPC is to be executed. In such situation either the tribunal may itself execute the decree or it may transfer the decree for execution to another Court in accordance with the provisions contained in the Civil Procedure Code. It is thus clear to my mind that an order made by the School Tribunal is an order which is executable under the provisions of the Civil Procedure Code.

We affirm the correctness of these observations.

Considering the facts obtaining in the case at hand and law laid down by the Full Bench of this Court in the matter of St. Ulai (supra), in my view, the contention raised on behalf of the petitioners regarding jurisdiction of the executing Court is devoid of substance.

5. It is also contended on behalf of the petitioners that the order passed in the appeal is obtained by respondent No. 1 by practicing fraud. Learned Counsel for the petitioners also referred to the fact of transfer of some Clerk from the office of School Tribunal on this count. According to him, therefore, this order is not executable. It is not possible to accede to the submission made by learned Counsel for the petitioners in this respect. Shri Choudhari, however, fairly admits that no finding is recorded by any competent authority or the Court on obtaining such a fraudulent order by the respondent No. 1. However, he points out that the decision in the appeal is subject matter of writ petition pending in this Court. In my view, this cannot be a reason for creating any impediment in executing order passed by the Tribunal in appeal.

6. It is also contended by learned Counsel for the petitioners that Shri Sattar Khan, President of the Society had expired and his legal heirs were not brought on record. On my query, learned Counsel for the petitioners admits that the said society is a trust registered under the provisions of the Bombay Public Trusts Act, 1950 so also Societies Registration Act, 1860. In this view of the matter, there is no question of bringing legal heirs of deceased office bearer of the society/trust on record in a proceeding pending in the Court. Said proceeding was not in the

personal capacity of Sattar Khan. On this ground, execution of the order passed by the School Tribunal cannot be stayed.

Shri Choudhari, in support of his submission on the point of death of President and not bringing his legal heirs on record, has relied upon the decision in the case of Madhukar Sagun Karpe v. Institute of Public Assistance 1998 (2) Mh.L.J. 232 : AIR 1998 Bom. 201. Shri Choudhari, however, submits that the office bearer of the registered trust under the Bombay Public Trusts Act was not judgment debtor in the said matter. Facts of the cited judgment are distinguishable. Ratio of this judgment is not applicable to the facts of the present case.

7. Shri Choudhari, learned Advocate tried to submit that post of an Assistant Teacher is not vacant in the school and therefore, according to him, the implementation of the order passed by the School Tribunal in appeal is not possible. This submission cannot be accepted. Respondent No. 1 cannot be directed to wait till creation of vacancy in the school run by the society.

8. Further, according to learned Counsel for the petitioners, an action for contempt was initiated by respondent No. 1 but the said action was withdrawn. I have referred to this proceeding u/s 13 of the Act of 1977 and two criminal writ petitions. Section 13 provides a penalty to the management for failure to comply with the Tribunal's direction. From the scheme of Section 13, it cannot be said that the order passed by the Tribunal which squarely falls u/s 2(14) of CPC cannot be executed by the decree holder. Penal provision is enlisted u/s 13 of the Act of 1977. Execution of the order passed by the School Tribunal, irrespective of pendency of such application/criminal case u/s 13, in the facts and circumstances of the present case, is permissible.

9. It is also apposite to refer here itself to the order passed by the Division Bench of this Court in Writ Petition No. 1944 of 2005. Shri Choudhari, learned Advocate has pointed out that this writ petition was filed by respondent No. 1 for implementation of the order passed in the appeal. From the said order of the Division Bench it appears that respondent No. 1 herein was allowed to withdraw the said writ petition, in view of the alternate efficacious remedy available for implementation of the order passed by the Tribunal. Thus, the right of respondent No. 1 to file an appropriate proceeding seeking implementation of the order passed by the Tribunal in the appeal was protected by the Division Bench of this Court as noted above. For this reason also, in my view, this order in the appeal cannot be said to be not executable order.

10. Shri Choudhari, learned Advocate submits that the order passed by the School Tribunal cannot be executed against Head Master. It is to be noted that the Head Master was party in the appeal. In my view, the order passed in a proceeding against all the parties to the proceeding is binding on all the parties. It can be executed in accordance with the provisions of law. Shri Choudhari, Advocate has referred to the judgment of the learned Single Judge of this Court

in the case of Venkat Dattatraya Nandvate Vs. Dattatraya Rambhau Ambad, . It is to be noted that the facts obtaining in the case of Venkat (supra) are altogether different. Therefore, the ratio laid down therein is not applicable to the present case.

11. Shri Choudhari, learned Advocate has also invited my attention to the judgment of the learned Single Judge of this Court in the matter of Vilas Shankarrao Deshmukh v. S.A. Ghode 2001 (1) Mh.L.J. 261 : 2001 (2) Bom.C.R. 116. At the outset it is to be observed that this matter was arising out of the Contempt of Courts Act, 1971 and more specifically u/s 12 of the said Act as well as under Sections 11 and 13 of the Act of 1977. The facts of reported case are altogether different than the case at hand. I am not dealing with any contempt petition or proceeding and therefore, ratio of this case is not helpful to the petitioners.

12. I have noticed from the proceeding that on 20-7-2006, this Court had granted ad-interim relief in favour of the petitioners and notices were issued. This ad-interim relief was operative till then. After hearing learned Counsel for the parties, on 13-10-2006 this Court has passed a detailed order. In paragraph No. 5 of this order, this Court has modified the earlier order granting ad-interim relief in following words:

5. In my opinion, the impugned order in the execution petition cannot be stayed in entirety. Still, however, the direction issued to the Education Officer to withhold the grants is not, prima facie, proper and that part of the impugned order will have to be stayed. For, it would adversely affect the other teachers etc. The remaining execution shall, however, proceed and if detention of the petitioners in civil prison is to be stayed, then 50% of the arrears shall be deposited, if so considered by the Executing Court. The petitioners are at liberty to make appropriate representation before the Executing Court.

On my pointed query Shri Choudhari, Advocate for the petitioners replied that this order is not complied with by the petitioners till today. I have also put a query to him whether the petitioners are willing to seek time and comply with this order. On this query, he submitted that the petitioners are not present in the Court and he is unable to reply the query. Be that as it may, however, this shows recalcitrant attitude of the petitioners towards order passed by this Court on 13-10-2006.

13. Shri Choudhari, learned Advocate has submitted that the President of the society had not received the notice of appeal. The Executing Court cannot go beyond the decree. This issue cannot be dealt with in an execution filed on behalf of respondent No. 1.

14. This petition is filed invoking supervisory jurisdiction of this Court under Article 227 of the Constitution of India. On scrutiny, I do not find jurisdictional error or perversity committed by the learned Civil Judge (S.D.) Ahmedpur while rejecting the application filed by the petitioners. However, looking to the facts

and circumstances of the present case and noticing the fact that despite passing order by the School Tribunal in appeal, said order could not be implemented, I am inclined to impose costs on the petitioners. I have also heard learned Counsel for the respective parties on this point.

15. In the result, writ petition stands dismissed, in limine. The petitioners are saddled with costs of Rs. 1,000/- (Rs. One thousand). The petitioners shall deposit the same in Special Darkhast No. 232 of 2005 pending before Civil Judge (S.D.), Ahmedpur, within four weeks from today. In case of failure on the part of the petitioners to deposit the said costs, within time stipulated above, it shall be recovered by the Executing Court before hearing any application/objection on behalf of the petitioners.

Shri Choudhari, learned Advocate appearing for the petitioners states that the order be stayed for the period of four weeks. Taking into consideration the fact that the respondent No. 1 is refrained from getting fruits of the decision in her favour by the School Tribunal for a considerable period, Shri Deshmukh, learned Advocate for the respondent No. 1 is justified in opposing such a grant of time, which ordinarily this Court would have considered favourably. In the peculiar facts and circumstances of this case, I am, therefore, not inclined to grant oral request for stay made by the learned Advocate for the petitioners. Request rejected.