

Bombay High Court

St. Mary'S High School (Ssc ... vs State Of Maharashtra on 6 May, 2013

Bench: S.J. Vazifdar, R.Y. Ganoo

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

WRIT PETITION NO. 764 OF 2012

1. St. Mary's High School (SSC Section)
Through its Head Master,
Fr. Baptist Pinto, Mazagaon,

Mumbai - 400 010.

2. The Bombay St. Mary's Society, a]
Society registered under the Societies]
Registration Act XXI Of 1860 and also a]

Public Charitable Trust under the Bombay
Public Trust Act, 1950, Through itsig]
Vice Chairman &Trustee, Fr. Baptist]
Pinto, having its office at Mazagaon,]

Mumbai - 400 010.]... Petitioners

Versus

1. State of Maharashtra, Through Principal

Secretary, School Education Department

Through the Office of the Court Pleader,
PWD Building, High Court, Fort,
Mumbai - 400 001.

2. Director of Education, Through the]
Deputy Director of Education, Mumbai]
Region, Bal Bhavan, Mumbai - 400004]
3. The Accountant General, Indian Audit

& Accounts Department, Principal
Accountant General (Audit) 1,
Maharashtra Having office at C.G.O.
101, Maharashi Karve Marg,
Mumbai - 400 020.

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Mr. Aspi Chinoy, senior counsel with Mr. S.C. Naidu and Mr. Saurabh Kulkarni i/b C.R. Naidu & Co. for the Petitioner.

Mr. Sindha Sreedharan, AGP, for the Respondent Nos.1 and 2 - State.

Mr. Vinod Joshi for the Respondent No.3.

CORAM : S.J. VAZIFDAR, &

MONDAY, 06TH MAY, 2013 ORAL JUDGMENT. : [Per S.J. Vazifdar, J.] Rule. Rule is made returnable forthwith.

By an order dated 7th March, 2013, the parties were put to notice that the matter would be heard finally at the admission stage. We, accordingly, proceed to hear the matter finally.

2. Respondent No.2 is the Director of Education. Respondent No.3 is the Accountant General. The petitioners have sought an order setting aside two directions in an order dated 28 th February, 2012, passed by respondent No.2 - Director of Education. The first direction is to refund a sum of Rs.145.71 crores. The second is to make available the required toilets within six months on all floors of SRP 2/31 OSWP764 the school building.

The petitioners had also challenged certain remarks in the third respondent's inspection report. This challenge, however, was on the presumption that the same were findings of the third respondent as contended by respondent Nos.1 and 2. Respondent No.3 - the Accountant General has filed an affidavit in this Court, clarifying that the same did not constitute the findings of the office of the Accountant General but were only a narration of the allegations of the authorities of the Education Department. In view thereof, it is not necessary for the petitioners to press prayer (b).

3. The petitioner, a well-known school, has two sections. The ICSE section started in the year 1864 and the SSC section, with which we are concerned in this petition, was established in the year 1932.

The SSC section runs a pre-primary school (kindergarten), a primary school (standards I to IV course) and a secondary (standards V to X) school. The kindergarten and pre-primary schools are run by the petitioner on an unaided basis. The secondary school is aided. The impugned order deals with the secondary school of the petitioner's SRP 3/31 OSWP764 SSC section.

The reference to the petitioner in this judgment is, therefore, to it's SSC section.

4. The case in a nutshell is this.

(A) In the years 2008 and 2009, a parent of the school and his associates made several complaints against the school which the petitioners alleged is on account of their not having passed the complainant's son for having fared badly in the standard IX examinations. Pursuant to the complaints, the Education Inspector conducted an enquiry during the course of which he alleged that it had been found that the petitioners had illegally collected an aggregate amount of about Rs.1,45,70,881/-.

The Education Inspector accordingly lodged a complaint with the Economic Offences Wing. However, the Senior Police Inspector of the Economic Offences Wing by a communication dated 18 th September, 2010 informed the Education Inspector that the petitioners had not committed any

fraud; there was no offence and that the enquiry pursuant to the Education Inspector's complaint stood SRP 4/31 OSWP764 concluded.

The Deputy Director of Education by a letter dated 20 th October, 2009 requested respondent No.3 - Accountant General "to thoroughly inspect" the issue. The Accountant General called upon the petitioners and respondent Nos.1 and 2 to submit their response to the audit report. The petitioners have submitted their response. Respondent Nos.1 and 2 have not done so. The issue is still pending before the Accountant General.

In the meantime, without even responding to the Accountant General's directions or waiting for the Accountant General's findings, the Deputy Director of Education telephonically instructed the Education Inspector to submit a proposal for de-recognition of the petitioners' school. The Education Inspector accordingly submitted his report to the Deputy Director of Education based on which the Deputy Director of Education issued a notice dated 31st March, 2011 calling upon the petitioners to show case why the petitioners' aided secondary school should not be de-recognized from the academic year 2010-2011. The petitioners replied to the same placing voluminous evidence on record.

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The Deputy Director of Education passed an order dated 24th May, 2011 de-recognizing the petitioners' school. Respondent No.2 by the impugned order passed in the petitioners appeal however, accorded the approval to continue further the secondary school.

However, by the said order, he also directed that the amount of Rs.145.71 lacs should be refunded by the petitioners "to the concerned persons" within one month and also directed the petitioners to make available the required toilets within six months on all the floors of the school building.

(B) The report of the Education Inspector, the order of the Deputy Director de-recognizing the petitioners' school and the impugned order suffer from two fundamental infirmities. Firstly, they all proceed on the erroneous basis that the communication / report of respondent No.3 - Accountant General has found that the petitioners illegally collected the said amount of Rs.145.71 lacs. The Accountant General has filed an affidavit stating that the report only quotes the allegations of the Education Department in this regard and that the same are not findings of the Accountant General and that the inquiry initiated by the authorities of the Education Department is pending before the SRP 6/31 OSWP764 Accountant General. This stand was reiterated by the advocate appearing on behalf of respondent No.3 during the hearing. Despite the same, strenuous efforts were made by respondent Nos.1 and 2 to contend to the contrary. Secondly, the impugned order not only does not contain any reasons but does not even attempt at furnishing reasons.

5. Till the year 2009, inspection reports rated the petitioner's school as "very good" and "excellent" in all respects. The school had a 100% record in the SSC Board Exams for the past ten years.

6. The petitioner's case is that the present difficulties commenced on account of complaints made in the year 2008-2009 by one Nana Kurte Patil and his associates who initiated a campaign against the school as his son was not promoted as he had fared badly in standard IX. The said N.K. Patil is the President of an organization called the "Bulund Chava and Marathi Yuva Parishad". The said Patil and his associates addressed a number of complaints against the school to the Deputy Director of Education, Mumbai Division.

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On 27th August, 2009, the Education Inspector conducted a financial audit. As we noted earlier, only the secondary school is aided. Despite the same, the Education Inspector inspected the accounts and other records of the kindergarten/pre-primary and primary schools although he was not concerned with the same. He also inspected the records of the St. Mary's Parents-Teachers Association which is a Public Trust which has been functioning since the year 1950 and of petitioner No.2 - The Bombay St. Mary's Society, a trust registered under the Societies Registration Act, 1860 and a Public Charitable Trust registered under the Bombay Public Trusts Act, 1950.

By a letter dated 11th September, 2009, the Education Department alleged that pursuant to the complaints received, an enquiry had been conducted and that during the course of inspection, certain irregularities were found. The letter alleged that the petitioners had illegally collected an aggregate amount of Rs.1,45,70,881/-

towards registration fees during the academic years 2001-2002 to 2008-2009, activity fees for the years 2001 to 2008, donations for admission to the pre-primary section during the years 2000 to 2009 SRP 8/31 OSWP764 and collections from students without following the due process of law for the academic year 2001-2002 to 2008-2009. Certain other irregularities were also alleged, inter-alia, regarding the formation of the Parents-Teachers' Association.

7(A). On the basis of the above report, the Education Inspector lodged a complaint with the Economic Offences Wing (EOW), Crime Branch, Mumbai Police, alleging that during the said enquiry, it was found that the said amount of about Rs.1.45 crores had been misappropriated by the petitioners.

(B) Between September, 2009 and August, 2010, the EOW with the aid of Chartered Accountants, took into custody and investigated / scrutinized the petitioner's records, including their books of accounts, vouchers, bank accounts of the petitioners pre-primary, primary and secondary schools

and of the Parents-Teachers Association.

(C) (i).

It is of vital importance to note that the Senior P

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Inspector (EOW) by a letter dated 18th September, 2010, addressed to the Education Inspector, stated as under :-

"With reference to the above subject you are hereby informed that a detailed investigation has been done in connection with the economic irregularities mentioned in your complaint in the office of EOW Branch, Mumbai.

From the enquiry it is revealed that there is no mis-

appropriation of monies and any cognizable offence and hence your above complaint is closed."

[emphasis supplied]

(ii) It is equally important to note that the Education Inspector, in a letter dated 20th March, 2011, addressed to the Deputy Director of Education, quoted the remarks from a letter also dated 18 th September, 2010, addressed by the senior Police Inspector of the EOW which disposed of the matter at their level. The Education Inspector, in the said letter dated 20th March, 2011, stated as under :-

"However, the office of the Sr. Police Inspector, Economic Offences Wing disposed of the matter at their level with the following remarks vide their letter No.3459/EOW-3/(135/09)/10 dated 18.09.2010. "On receipt of the complaint regarding the financial irregularities indulged in St. Mary High School, Mazgaon, Mumbai 400 010, the detailed enquiry was conducted by Economic Offences Wing, Mumbai.

During the enquiry it was revealed that no commission of fraud nor was there any cognizable offence. The enquiry in pursuance of your complaint stands concluded." [emphasis supplied] SRP 10/31 OSWP764 8(A). Probably dissatisfied or even disappointed with the report of the EOW, the Deputy Director of Education by a letter dated 20 th October, 2009, stated that during the said inspection carried out on 27 th August, 2009, it had been found that the petitioners had misappropriated the said sum of Rs.1.45 crores and requested the Accountant General to "thoroughly inspect the same".

(B) Between 24th May, 2010 and 29th May, 2010, the Accountant General conducted an audit. Under cover of a letter dated 18th June, 2010, the senior Audit Officer forwarded the petitioners the audit report for the period 2002-2003 to 2008-2009 in respect of their accounts and requested the petitioners comments in respect thereof alongwith supporting documents within one month. The inspection report, inter-alia, sets out the details of the salary grant and non-salary grant received by the petitioners and that the assessment of the grants had been completed upto 2001-2002 by the Deputy Director of Education. The report expressly stated that there were no paras outstanding from the previous inspection report and that there were SRP 11/31 OSWP764 "NIL" persistent irregularities or major irregularities.

Part-II-B of the report pertained to "Other Irregularities". Para-

1 thereof had the caption "Financial Irregularities". The same is prefaced : "On being (sic) complaints received against the school on the following irregularities (subjects) pertaining to the year 2000-

2001 to 2008-2009". Thereafter, the report recorded that the petitioners had stated that they would furnish their response to the complaints including that the said amount had not been accounted for in the books of accounts of the school.

9. Respondent Nos.1 and 2 have proceeded on the erroneous basis that these references to the complaints in the report made by them to the Accountant General constitute the findings of the Accountant General. The impugned actions and decision proceeded solely on this basis. The error in the same is clear from a plain reading of the report submitted by respondent No.3. There is no such finding. The report of respondent No.3 merely narrates the complaints. It, in fact, also notes that the petitioners stated that they would respond to the same in due course. The doubt, if any, is set at rest by the affidavit in reply of SRP 12/31 OSWP764 respondent No.3. Mr. Chinoy, the learned senior counsel appearing on behalf of the petitioners relied upon paragraph 8 of the said affidavit. .

It is, however, necessary to note paragraphs 3 and 5 to 8 thereof, which read as under :

"3. I say that during the course of audit preliminary audit observation (half margin) was issued to the auditee and as no specific compliance was given the preliminary audit observations were incorporated in inspection report which was issued to the St. Mary's School (auditee) and concerned government department. Thereafter in

response to the first compliance of the inspection report, received from St. Mary's School on 26.7.2010, comments of the higher authorities were called for vide this office letter dated 24.1.2011 in order to enable this office to take appropriate action. As no reply was received from higher authorities the matter is kept pending.

5. I say that in the light of the complaint received from the Dy. Director of Education, Mumbai, point raised in the complaint were brought to the notice of the school for compliance in the form our preliminary audit query. As no reply was given by the unit during the local audit, the point was incorporated in IR.

6. I say that it may be mentioned here that in the IR para reasons for not reflecting the amount in the A/c statements and also the break up of the portion of the amount collected relating to secondary school was called for. In absence of response from the auditee observation regarding want of bifurcation of amount for secondary was incorporated in IR.

7. I say that on receipt of the detailed reply dated 26.7.2010 received from the school it was referred back for comments of the higher authorities. The comments SRP 13/31 OSWP764 were pending.

8. I say that though para is titled "Financial Irregularities", the irregularities were quoted from the complaints against the school/report of Education Inspector. I say that audit only sought details as mentioned above and no where Audit concluded that irregularities happened." [emphasis supplied] It is, therefore, clear beyond doubt that the report of respondent No.3 merely noted the alleged financial irregularities on the part of the petitioners and that respondent No.3 had not come to any finding of financial irregularities on the petitioners part. It is also important to note that the affidavit confirms the petitioners case that they had submitted a detailed reply to respondent No.3 with all supporting documents. Paragraph 3 of the affidavit confirms that the petitioners had, on 26th July, 2010, submitted its response. Respondent No.3 sought the comments from the higher authorities but : "As no reason was received from the higher authorities, the matter is kept pending".

Thus, respondent Nos.1 and 2 are yet to respond to the petitioners reply to the Accountant General - respondent No.3.

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10. What happened thereafter is indeed curious.

responding to the petitioners response to the Accountant General, on 29th March, 2011, the Deputy Director of Education instructed the Education Inspector on the telephone to submit a proposal

regarding the de-recognition of the petitioners school. This is clear from the reference to the Education Inspector's letter dated 30 th March, 2011, to the Deputy Director of Education, which reads as under :-

"Ref. : 1. Your letter No.DDE/SEC-8/2010-11/1240, dated 29.01.2011

2. Proposal regarding derecognition of St.Mary High School as per your instructions over the phone on 29.03.2011."

We will, for the purpose of this judgment, not consider whether the Deputy Director of Education was entitled to instruct the Education Inspector on the telephone to submit a proposal for the de-

recognition of the petitioners school and whether the Education Inspector was entitled to initiate the impugned action on this basis.

We will presume that they are entitled to do so. Their haste in initiating the action despite the report of the EOW and without even responding to the Accountant General's inquiry initiated at their SRP 15/31 OSWP764 instance, leave alone awaiting the result of the Accountant General's decision is however another matter altogether and we will comment upon the same later.

11. The Education Inspector, accordingly, made a report dated 30 th March, 2011, to the Deputy Director of Education. The report refers to the said complaints regarding the said sum of Rs.1.45 crores. It also refers to the said letter dated 18th September, 2010, addressed by the senior police inspector of the EOW stating that the enquiry revealed that there was no commission of fraud by the petitioners; that there was no cognizable offence committed by the petitioners and that the enquiry, pursuant to the complaints of respondent Nos. 1 and 2, stood concluded.

This report proceeds on the erroneous basis that the Accountant General informed the petitioners about the alleged irregularities noticed during the audit. As noted earlier, the Accountant General's office has confirmed that their report only notes the allegations. For the purpose of this petition, it is not necessary to consider the reference to the other alleged irregularities for the impugned action, SRP 16/31 OSWP764 which we will refer to later, is based only on the allegation regarding the alleged misappropriation of the said sum of Rs.1.45 crores. The report refers to another enquiry conducted on 5th October, 2010, which found that the irregularities still subsisted in the functioning of the school.

12. Pursuant to this report, the Deputy Director of Education issued a notice dated 31st March, 2011, calling upon the petitioners to show cause why the petitioners aided secondary school should not be de-

recognized from the academic year 2010-2011 as per the provisions of Rule 7.2 of the Secondary School Code.

On 18th April, 2011, the petitioners filed a reply. As stated in paragraph 6 of the affidavit of the Deputy Education Inspector ".....the said reply runs in compilation of three box files sent by the Management to the said show-cause notice".

13. The Deputy Director of Education passed an order dated 24th May, 2011, de-recognizing the petitioners school.

The order is passed predominantly on the erroneous SRP 17/31 OSWP764 presumption that the Accountant General's inspection revealed that the petitioners had misappropriated the said sum of Rs.1.45 crores. This is evident from the following observations :

"This matter is pending for the last three years between the School and the Education Inspector and it has been revealed during the inspection by the Accountant General, Mumbai that the sum of Rs.1,45,70,881/- has been amassed unauthorizably from the students by the School and the Sanstha. There is no action on the part of the School and the Sanstha in refunding the amount unauthorizably collected to parents who are available or to deposit the said amount with the Government."

In paragraph 2, the Deputy Director of Education dealt with three items which he prefaced stating : "The details of the Show Cause Notice issued to Sanstha and the contents of the explanation submitted by the Sanstha in reply thereto are briefly as under :-" Item-2 dealt, inter-alia, with the financial transactions of the petitioners school relating to the said Rs.1.45 crores. After noting the allegation against the petitioner and the petitioners explanation thereto, this is all that is said :

"The explanation submitted by the School is wrong and that the School and Sanstha have illegally amassed the total amount of Rs.1,45,70,881/- from parents and students as noticed during inspection by this office.

Accountant General, Mumbai has also confirmed vide the letter dated 18.06.2010 that there were financial SRP 18/31 OSWP764 irregularities." (emphasis supplied) After dealing with the said nine items, the Deputy Director of Education recorded his "findings". Paragraph 2 of the findings reads as under :

"2. There are complaints that donations have been recovered at the time of admissions to KG classes, fine has been recovered from students and also sums have been amassed through illegal means from students as well as parents towards Teachers Benefit Fund. Primary Teachers Gratuity Fund etc. Thus the financial transactions of the Sanstha are not as per rules. The total of sums illegally amassed by Sanstha and the Head Master from students and parents during the period from 2002 to 2009 stands at Rs.1,45,70,881/-. The Accountant General has emphasized upon the irregular transactions but the said sums have neither been refunded to parents nor have been deposited with the Government. Accordingly the provision contained in Rule 3.2 (3)(4) of SS Code has been violated."

(emphasis supplied) We will not deal with this order in detail for it stands merged in the appellate order which is dealt with by us later. Suffice it to state that the order suffers from two infirmities. Firstly, it does not consider the petitioners case at all. Admittedly, the petitioners had submitted an extensive response running into three box files. There is no analysis of the petitioners case. Secondly and equally important is the fact that the order proceeds on the erroneous basis that the Accountant General SRP 19/31 OSWP764 had found the receipt of the said sum of Rs.1.45 crores to be irregular.

We have already demonstrated the fallacy of this conclusion. The Accountant General's office itself has confirmed that the matter is pending before it and that there was no such finding.

14. We do not consider it necessary to refer to the proceedings before the Minorities Commission and the Commission for Protection of Child Rights in detail. Suffice it to note at this stage that both the Commissions held the order of the Deputy Director of Education to be unreasonable and illegal.

15. The petitioners filed an appeal against the order of the Deputy Director of Education dated 24th April, 2011.

By an interim order dated 31st October, 2011, petitioner No.1 was directed to refund the said amount of Rs.1,45,70,881/- and the secondary school was permitted to continue till the end of the academic year 2011-2012. The petitioners challenged this order by filing Writ Petition No.164 of 2012. This order was quashed by an order and judgment of a Division Bench of this Court dated 25th SRP 20/31 OSWP764 January, 2012.

16. The petitioners appeal was disposed of by the impugned order dated 28th September, 2012, of the Director of Education (Secondary & Higher Secondary).

The order does not even attempt to give reasons. It does not even set out the petitioners case. Nor does it refer to the extensive documentation furnished by the petitioners. It is an order of four and half pages. Pages 1 to 4 and a part of page 5 note the appearances, refer to the proceedings before the Maharashtra State Minorities Commission and the Maharashtra State Protection of Childrens' Rights Commissions, the nature of the appeal and the reliefs claimed and the petitioners objection to the complainant remaining present for the hearing, and the status of the matter, including the filing of the appeal. The remaining part of page 5 contains the order, without any discussion whatsoever regarding the matter. The order reads as under :-

" ORDER

1) In paragraph 1 of the report of Hon'ble Accountant General, Mumbai there is an objection that SRP 21/31 OSWP764 Head Master of the school has collected an amount of Rs.145.71 Lakhs and the said amount should be refunded to concerned persons within one month in the presence of Education Inspector, South Zone, Mumbai.

- 2) School should make available required toilets within six months on all floors of the school building.
- 3) Computer fee should be charged as per rules.
- 4) Approval is being accorded to continue further the secondary school St. Mary's High School, Nesbit Road, Mazgaon, Mumbai.
- 5) Appeal is being disposed of."

Ms. Sreedharan, the learned Assistant Government Pleader appearing on behalf of Respondent Nos.1 and 2 raised a preliminary objection to the effect that the petitioners have an alternate remedy by way of a Review before the Government. This provision was introduced by a Government Resolution dated 17 th May, 2003, which amended Rule 7.5 of the Secondary Schools Code, 2002. The Government Resolution, as translated by the parties, reads as under :

" Government of Maharashtra School Education Department Government Decision No.MSV/2001/[316/2001] MS-3 Mantralaya (Extension), Building, Mumbai - 400 032.

Date : 17 May, 2003 Government Decision : In case of withdrawal of recognition of a school under Rule 7.5 of Secondary SRP 22/31 OSWP764 School Code. The provisions for filing and hearing of an Appeal have been prescribed. According to the said provision the decision of the Director of Education is final and binding on the management. In that provision following addition was sanctioned vide government decision no. MSV / [316/2001] MS-3 dated 7 November, 2001.

7.5 : The Director of Education will be the sole Authority to hear the Appeal filed by the Management impugning the decision / order in respect of withdrawal of recognition of School. However, if found necessary (deemed XI) the Government may order the Director of Education to review the order".

2. Following partial changes have been made in the above provision and the said provision will be as under :-

3. The Government may review an Order of withdrawal of approval passed by the Director of Education in an Appeal by the Management. Upon receipt of an Appeal from the Management and if reasonable grounds are found then the Appeal will heard at the level of the Government and give a decision thereon. The said decision shall be final and binding on all concerned parties.

All Education Officers and Education Inspectors (Greater Mumbai) should bring this order to the notice of the Management of all Educational Institutions.

By the order and in the name of Governor of Maharashtra.

Sd/- xxx (R.N. Musale) Executive Officer, Govt. of Maharashtra"

18. The plain language of the amendment indicates the right to seek SRP 23/31 OSWP764 a review only against an order of withdrawal of approval passed by the Director of Education in an appeal by the Management. In the present case, the impugned order of the Director of Education does not withdraw the approval granted to the petitioners. We have set out the order earlier. By clause 4 thereof, the approval was accorded to continue further the petitioners' Secondary School at Mumbai. The petitioners have obviously no grievance against the same for that is an order in their favour. The petitioners grievance is against clauses 1 and 2 of the said order which require them to refund the amount of Rs.1,45,70,881/- to the concerned persons within one month and to make available the toilets within six months on all the floors of the school building. The operation of clause 4 of the order is not dependent upon the petitioners complying with clauses 1 and 2 thereof. Had that been the case, the petitioners would have the alternative remedy under the Government Resolution dated 17 th May, 2003.

19. Clause 4 of the order does not cease to operate in the event of the petitioners not complying with the other clauses of the order.

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Ms. Sreedharan's contention to the contrary is not well founded.

Her contention that this would make the order inoperative is also not well founded. Even assuming that clauses 1 and 2 of the impugned order are valid in law, which we find they are not, it would make no difference. The respondents would then have to recover the said amount from the petitioners by adopting appropriate proceedings. We hasten to add that this is assuming that the Director of Education had the jurisdiction to pass such orders viz. the orders in clauses 1 and 2.

We have not decided this issue for we find that the order calling upon the petitioners to refund the amount of Rs.1,45,70,881/- is in any case unsustainable.

20. Firstly, as we mentioned earlier, the order contains no reasons.

It does not even attempt to furnish any reasons. We have analyzed the order in detail earlier. It only issues directions.

21. Secondly, clause 1 of the order which requires the petitioners to refund the said amount of Rs.1,45,70,881/- is based only on the report of the Accountant General. There is not a whisper in the order SRP 25/31 OSWP764 regarding the extensive and voluminous evidence placed by the petitioners before the authorities. As we mentioned earlier, the Accountant General's report does not object to anything done by the petitioners. The matter is still pending before the Accountant

General.

The authorities have not bothered to respond to the Accountant General's directions. It is the authorities of the Education Department who approached the Accountant General for an order. We will presume that there was a bona fide error on the part of respondent Nos.1 and 2 in construing the Accountant General's report. The Accountant General, however, has filed an affidavit in this Court and has reiterated during the hearing before us that the report does not find the petitioners guilty of anything and that the matter is still pending before the Accountant General. Despite the same, respondent Nos.1 and 2 for some reason insist upon this totally erroneous construction of the Accountant General's report. Their vehemence in this regard despite the stand taken by the Accountant General on affidavit as well as before this Court is , to say the least, curious.

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22. As far as clause 2 of the impugned order is concerned, Mr. Chinoy stated that the petitioners had already made an application along with the requisite plans for the construction of toilets to the BMC. The same have still not been processed by the BMC. This is probably in view of the issue regarding the renewal of the lease not having been resolved as yet. The petitioners cannot construct the toilets unless they receive permission for the same. The petitioners cannot be faulted for the same. It would be inequitable and indeed against public interest to close down an institution which has been in existence for almost a century on a ground for which they cannot be faulted.

23. It is also pertinent to note the Maharashtra State Minorities Commissions report in this regard. The members visited the school and found that the toilet facilities were "more than required". The Commission further recorded :-

" Hon'ble Chairman, Maharashtra State Minorities Commission, Mumbai personally visited the school on 29.6.2011 during Short Recess and had a discussion with students and it was revealed that the toilets are not getting crowded in any way and students are not facing any inconvenience. Therefore it is seen that the point SRP 27/31 OSWP764 about toilets raised by the Regional Deputy Director of Education, Mumbai is very weak and that this point is raised only to harass the management of the school. It is revealed that conduct of officers in Education Department is not understandable and it is seen that the said point is raised only with a view to harass school management. At the time of visit of the Chairman, school management has agreed to construct 6 urinals and 3 lavatories on each floor temporarily in the space available near the corridor. Therefore it is necessary to realise that this matter could have been settled amicably."

25. Even regarding this direction, the impugned order contains no reasons whatsoever and is liable, therefore, to be quashed on that ground alone. That, however, would not be in the interest of justice.

We would direct the petitioners to remind the BMC regarding the same once again with a request to expedite the issue. The BMC would be at liberty to consider the application without prejudice to the rights and contentions of the lessor and all other concerned parties.

Mr. Chinoy stated that the petitioners will, without prejudice to their rights and contentions, upon receipt of permission from the authorities, construct the toilets in accordance therewith. The statement is accepted.

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26. Respondent No.2 has rightly, therefore, not reversed the order of the Education Inspector de-recognizing the petitioners' school. The respondent No.2 has also rightly not made this part of the order subject to the compliance of the other directions even assuming that the same were sustainable.

27. Ms. Sreedharan stated that although the impugned order is based only on the report of the Accountant General, she was willing to analyze the evidence in support of the impugned order. We see no justification to permit the respondent Nos.1 and 2 to support the impugned order by arguing on the extensive facts from the voluminous record for the first time in this writ petition. There is every possibility of several disputed questions of fact arising from the record which respondent Nos.1 and 2 themselves state runs into three box files. Respondent No.2 has chosen to base his order only upon the Accountant General's report. He ought not to be permitted in the writ petition to support his order on a basis which he did not consider. This is more so as we do not intend precluding the respondents from adopting proceedings for recovery of the amount of Rs.147.71 lacs SRP 29/31 OSWP764 allegedly wrongly received by the petitioners.

28. Having said that, we, however, do not wish that the petitioners derive any advantage in the event of it being found in properly constituted proceedings and in a fair hearing that they had misappropriated the said amount. The proceedings are pending before the Accountant General. Respondent Nos.1 and 2 are yet to reply to the petitioners response before the Accountant General.

29. In the circumstances :-

(i) Rule is made absolute in terms of prayer (a) subject to what is stated herein regarding clause 2 of the impugned order. It is clarified that the question of jurisdiction of the authorities to decide the issue regarding refund of the said sum of Rs.1,45,70,881/- or not is kept open. Respondent Nos.1

and 2 are at liberty to adopt appropriate proceedings for recovery of the same.

(ii) The petitioners shall, within four weeks from today, address a

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letter to the BMC requesting them to expedite processing their application for the construction of the said toilets. By the said letter, the petitioners shall also inform the BMC that by this order, it is provided that the BMC would be at liberty to process the application without prejudice to the rights and contentions of the lessors and all other concerned parties, including regarding the issue of renewal of the lease. The petitioners undertaking without prejudice to their rights and contentions to construct the toilets upon receipt of the permission from the concerned authorities is accepted.

(iii) There shall be no order as to costs.

R.Y. GANOO, J.

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