

(2010) 12 DEL CK 0391

In the Delhi High Court

Case No : Writ Petition (C) No. 4707 of 2010

Srishti Solkar and Another

APPELLANT

Vs

Mahavir Sr. Model School and Others

RESPONDENT

Date of Decision : 06-12-2010

Acts Referred:

Delhi School Education Act, 1973 — Section 28
Limitation Act, 1963 — Article 113

Citation : (2011) 1 AD 319

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : U.M. Tripathi, for the Appellant; Rakesh K. Khanna Pramod Gupta, Manish Kumar and Seema Rao for Respondent Nos. 1 and 2 and Somdutt Kaushik and Saket Srivastava for Respondent Nos. 3 and 4, for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Sahai Endlaw, J.—The Petitioner No. 1 (of whom Petitioner No. 2 is the father) is a student of the Respondent No. 1 School; a recognized unaided School. When the Petitioner No. 1, in the year 2009, was in the I Xth standard (having been studying in the said School from Nursery class since the year 1999), the Respondent No. 1 School demanded Rs. 59,574/- from the Petitioners as dues of fee from the period commencing from the year 2004-05 to the year 2008-09; upon non payment thereof, the name of the Petitioner No. 1 was struck off from the rolls of the School. Aggrieved there from, the Petitioners then filed WP(C) No. 12775/2009 in this Court. This Court vide order dated 30th October, 2009 while issuing notice of the said petition directed that the Petitioner No. 1 will continue to attend the classes. The pleadings in the said earlier writ petition were completed. Even though the Petitioners in the said earlier writ petition had sought a direction for declaration of the Petitioner No. 1 being entitled to entire fee concession for the academic session 2009-10 as well as for the future academic sessions till the Petitioner No. 1 continues in the Respondent No. 1 School and also a restraint against the School from raising any demand of dues

of fee from the Petitioner No. 1, but when that petition was listed before the Court on 29th January, 2010, it was recorded that the Petitioners were seeking fee concession only for the academic year 2009-10; the Respondent No. 1 School on that date informed that the Petitioners had already been granted 50% concession under Rule 158 of the Delhi School Education Rules, 1973 for that year; the Petitioners being satisfied with the 50% concession, binding the Respondent No. 1 School to the said statement, the said earlier writ petition was disposed of giving time of six weeks to the Petitioners to pay the balance fee.

2. Review was sought by the Petitioners of the order disposing of the said earlier writ petition on the ground that the Respondent No. 1 School was demanding Rs. 73,660/- as balance fee and disputing the same. Another application was also filed for clarifying the order disposing of the said earlier writ petition, as to from what period the balance fee was to be paid. From the order dated 23rd April, 2010 in the Review Petition, it appears that the Respondent No. 1 School was claiming arrears of fee from the year 2004 onwards. Though no replies to the said applications were filed by the Respondent No. 1 School but the counsel for the Respondent No. 1 School on 7th May, 2010 stated that he had no objection if the order disposing of the writ petition was clarified that the same pertains to the then current year only i.e. 2009-10. This Court accordingly vide order dated 7th May, 2010 clarified that the balance fee required to be deposited was for the current academic year i.e. the year 2009-10 only.

3. The Petitioner No. 1 on passing the Class I Xth exam was promoted to Class Xth. While so promoting the Petitioner No. 1, the Respondent No. 1 School again asked the Petitioners to pay the balance arrears of fee of Rs. 73,660/- as earlier demanded. Aggrieved there from the present petition was filed. In the present petition also, vide order dated 5th August, 2010 while issuing notice, subject to the Petitioners tendering current year's fee to the Respondent No. 1 School, the Respondent No. 1 School was directed to allow the Petitioner No. 1 to continue in the Respondent No. 1 School. The Petitioner No. 1 continues in the Respondent No. 1 School till date. The pleadings have been completed and the counsels have been heard.

4. The admitted position which emerges is that the Petitioners were given fee concession of 50% in the year 2004-05, no concession in the years 2005-06, 2006-07, fee of Rs. 500/- per month only was agreed to be charged in the year 2007-08 and fee concession of 50% again was given for the year 2008-09. The year 2009-10 as aforesaid was subject matter of earlier writ petition and fee concession of 50; wherein was also given.

5. During the hearing of this petition on 24th September, 2010, it transpired that the Petitioners had not paid 50% fee of the academic year 2009-10 also as directed to be paid in the earlier writ petition. The Petitioner was directed to pay the same as a pre-condition to pursuing this petition. The said amount has since been paid. Similarly, 50% fee for the current academic year has also been deposited.

6. The dispute which however remains is with respect to the sum of Rs. 73,660/ being the arrears of fee from the year 2004 onwards.

7. It is the stand of the Respondent No. 1 School that though the Petitioners in the earlier writ petition besides claiming fee concession for the then current year 2009-10 and for future, had also challenged the demand for arrears since the year 2004 then also claimed but ultimately confined the relief to concession for the current academic year only as offered by the Respondent No. 1 School and did not press their challenge to the arrears of the earlier years and the Respondent No. 1 School thus remained entitled to claim the said arrears.

8. Per contra, the counsel for the Petitioners has contended that the Respondents, after having demanded arrears challenged in the earlier writ petition, having agreed to allow the Petitioner No. 1 to continue in the Respondent No. 1 School on payment of 50% fee for the year 2009-10 only, are now not entitled to re-agitate the claim for arrears. It is stated that the claim, if any, of the Respondent No. 1 School for arrears thus stood extinguished. Reference is also made to Rule 167 of the Delhi School Education Act and Rules, 1973 which is as under :

167: Name of the student to be struck off for non-payment of fees and contributions - If a student omits or fails to pay the fees and contributions due to a school together with the fine due thereon by the last working day of the month in which they are due, his name shall be struck off the rolls of the school on the last working day of the month and may be readmitted on payment of all school dues including fresh admission fee :

Provided that in the case of non payment of fees for the month of May in which the school closes in the middle of the month for long vacation, the name of the student shall be struck off on the last working day of the month of July, if the fees remains unpaid up to that day.

It is argued that the remedy of the School for non-payment of fee for any month is to strike off the name of the student from the roll of the School on the last working day of the month for which the fee is due save for the month of May, the fee whereof is permitted to be paid till the last day of July. It is thus the contention that the Respondent No. 1 School having not struck off the name of the Petitioner No. 1 since the year 2004 since when arrears of fee were / are claimed, is not now entitled to claim the arrears. The principles of estoppel are also sought to be invoked.

9. The Respondent No. 3 Department of Education has not filed any pleading. The stand of the Respondent No. 3 Department of Education was asked for from the counsel. The counsel stated that he has no instructions.

10. The senior counsel for the Respondent No. 1 School has controverted the contentions of the Petitioner. He has also relied on The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and

others, to contend that the Petitioners having raised the aspect of arrears in the earlier writ petition and having given up the same are now barred from raising the same in this writ petition on the principles of res judicata. On enquiry, as to how the claim in July, 2010 of arrears with effect from the year 2004 was within time and /or enforceable, the senior counsel contends that the Petitioners having admitted the arrears in the earlier writ petition filed in the year 2009, the demand was within time. Reliance is also placed on Rule 166 of the Rules which provides for fine for late payment of fee at the rate of five paise for everyday for which the default continues. It is urged that the same indicates that the arrears are recoverable at all times and there is no limitation therefore. On further enquiry as to why 50% concession even was not given for intermittent years, attention is invited to Rule 158 of the Rules to contend that fee concession cannot be claimed as a matter of right but is a matter of discretion.

11. The first question which arises is whether claim of fee stands extinguished under Rule 167 (supra) if the School does not strike off the name of the student on the last day of the month for which the fee is due, and allows the student to continue. Though the Rule uses the word "shall" and not "may" but I am still notable to accept the said position. The use of the word "shall" is not always indicative and instances of "shall" being read as "may" are not unknown. The Supreme Court in P.T. Rajan Vs. T.P.M. Sahir and Others, reiterated that a statute must be read in the text and the context thereof - whether a statute is directory or mandatory would not be dependent on the use of the words "shall" or "may" - such a question must be posed and answered having regard to the purpose and object it seeks to achieve. Similarly in State of Haryana and Another Vs. Raghubir Dayal, it was held that the word "shall" is to be not interpreted as mandatory if the scope of the enactment or the consequences to flow from such construction would not so demand.

12. I am unable to hold that it is incumbent upon the School to so strike off the name as provided in Rule 167. Rule 167 is only intended to vest the school with a power to strike off the name of a student who has not paid the fee rather than being compelled to file suits for recovery of fee from its students. However, Rule 167 was not intended to lay down the law of limitation for recovery of fee. The Rules have been made in exercise of powers u/s 28 of the Delhi School Education Act, 1973 and which does not vest a power for making rules changing the period of limitation for recovery of fee from that under the Limitation Act, 1963. Thus Rule 167 can neither be read as laying down the period of limitation for recovery of fee or as making it mandatory for the School to strike off from the rolls the name of a student who had not paid the fee by the last day of the month for which it is due. If such pedantic interpretation were to be taken, it would cause extreme hardship. The relationships with the School are for normally over a decade and in which long time a rapport is built between the school and the parents, the aim of both being the welfare of the child. The School may in its discretion agree to relax the time for payment of fee if the situation so demands. If the interpretation propounded by the Petitioners were to

be accepted, it would interfere with such relationship between the Schools and the parents. The Division Bench of this Court also in *The Forum of Minority School Vs. Director of Education and Another* while allowing the Schools to enhance the fee consequent to the recommendations of the Pay Commission held the Schools to be at "liberty" to take recourse to Rule 167 and with respect to default in paying arrears of fee restrained the Schools from taking coercive steps.

13. Rule 167 is intended to be just one of the modes to enforce payment of fee. It is not intended to be a substitute for the ordinary mode of recovery provided in-law. In the absence of such a rule, the Schools would have been compelled to institute suits for recovery. Merely because an additional power to enforce recovery has been vested in the School cannot be read as taking away from the School the ordinary mode of recovery of dues i.e. through the Civil Courts or through the process of arbitration etc. and within the law of limitation by which such foras are governed.

14. If the Schools were to go before a civil court or before the Arbitrator for recovery of fee, the limitation would be governed by the provisions of the Limitation Act, 1963. I do not find any specific Article in the Schedule to the Limitation Act dealing with proceedings for recovery of fee by the Schools. However, payment of fee is a matter of contract between the School and the parents and the limitation would depend upon such agreement whether the fee is agreed to be paid monthly, bi-monthly, six monthly or annually and the limitation would be governed by the residuary Article 113 in the Schedule i.e. three years from the date when the right to sue accrues and which will accrue, either on the day agreed / provided for payment of fee or if fee becomes payable on the raising of the bill on the day when the bill is raised.

15. Another ancillary question which arises is whether the modus of striking off the name from the rolls of the School provided for in Rule 167 can be availed of only on the last working day of the month for which fee is due or can be availed of subsequently also. In consonance with what has been held hereinabove, the said modus can be availed of subsequently also as long as the amount for recovery whereof the modus provided in Rule 167 is invoked is within limitation. It would be preposterous to say that the modus of enforcement of payment provided in Rule 167 can be invoked for time barred dues also. Though the Courts in relation to electricity charges have held that though a provider of electricity may be barred from instituting proceedings for recovery of dues for electricity but remains entitled to disconnect the supply on account thereof but it has been so held treating the electricity dues to be public dues. The same is not the position in relation to the School fee.

16. The next question which arises is whether owing to Rule 166, it can be said that the arrears of fee can be recovered as long as the School is entitled to charge the late fee i.e. that there is no limitation provided for recovery thereof. In view of what has been held hereinabove, this proposition of the Respondent School cannot be accepted. The limitation for recovery of fee would continue to

be governed by the Limitation Act as aforesaid and late fee cannot be charged for dues which have become time barred and are no longer recoverable.

17. Seen in the aforesaid light, even if there are arrears of fee since the year 2004, the Respondent No. 1 School at the time of permitting the Petitioner to class Xth was entitled to claim the fee only for the last three years i.e. from the academic session beginning 2007-08. Admittedly there are no arrears for the year 2007-08 and for the year 2008-09 fee concession of 50% had been given (out of total fee of Rs. 27,135/- and there are arrears of Rs. 11,534/-). The fee for the year 2009-10 stood paid in pursuance to orders in the earlier writ petition. Thus, the Respondent No. 1 School was entitled to claim the sum of Rs. 11,534/- only from the Petitioners towards arrears and not Rs. 73,660/- as claimed.

18. Another question which arises is whether there is any admission of the Petitioners in the earlier writ petition so as to make the claim for arrears forth earlier period recoverable. The Petitioners in the earlier writ petition had only admitted the demand of the Respondent School for arrears from the year 2004 but had not admitted the said arrears. Rather the Petitioners were disputing the said demand of the Respondent No. 1 School. Thus, it cannot be said that either in the pleadings or in the proceedings in the earlier writ petition, there was any admission of the Petitioners for arrears with effect from the year 2004-05 so as to make the same now recoverable.

19. The next question which arises is whether the said claim of Rs. 11,534/- is not maintainable owing to the proceedings aforesaid in the earlier writ petition. In my opinion No. The senior counsel for the Respondent No. 1 School is correct in contending that though the Petitioners had claimed the relief with respect to the arrears but at the time of hearing did not press the said claim. I have also considered whether it can be said that the Respondent School by making a statement in the earlier proceedings that it had agreed to give concession of 50% for the current academic year, had given up the claim for earlier arrears if any due. I am unable to conclude so. One of the prayers of the Petitioners in the earlier writ petition was for concession for the then current academic year of 2009-10 and it was only that which was conceded and upon which concession the Petitioners chose to have the petition disposed of. Had the Petitioners sought a decision from the Court on the earlier arrears, then a finding in that respect would have come. The Petitioners having opted not to seek adjudication in the earlier writ petition on the arrear prior to the then academic year, it cannot be said that the Respondents in any manner waived the same. Rather the senior counsel for the Respondents is correct in contending that it is the Petitioners who are now debarred from challenging the said arrears. However, the same would still remain subject to the law of limitation.

20. The senior counsel of the Respondent No. 1 School has also argued that the Petitioner No. 1 is not entitled to any fee concession for the year 2010-11. Reliance in this regard is placed on the form filled up by the Petitioner No. 2 and

at page 81 of the paper book where the income of Petitioner No. 2 is filled as of Rs. 10,000/- per month. However that is of the year 1999. There is no proof of income of the parents of the Petitioner No. 1 for the current academic year. It would thus remain open for the Petitioners to claim and for the Respondent No. 1 School to consider the claim of the Petitioners, if any, for concession for the current and future academic year.

21. The petition is therefore disposed of with the declaration that the Respondent No. 1 School at the time of promoting the Petitioner No. 1 to Class Xth was entitled to claim past arrears of Rs. 11,534/- only besides the fee agreed to be paid for the year 2009-10. As far as the current academic year is concerned, the Petitioners have already paid 50% under direction of this Court. It will be open to the Petitioners to in accordance with law apply for fee concession for the current academic year and if the same is allowed, the fee shall be paid in accordance therewith. However, if no application for fee concession for the current academic year is filed within 30 days hereof, the balance fee for the current academic year shall be paid after the said 30 days and before 60 days of today. Insofar as the earlier arrears of Rs. 11,534/- are concerned, the Petitioner is permitted to pay the same before taking the final exam of Class Xth.

22. I have also considered about the late fee provided for in Rule 166 of the Rules. In the aforesaid facts, if the Petitioners pay the fee as directed above, they shall not be liable for any late fee; however if the Petitioners default in paying so, the Respondent No. 1 School shall be at liberty to take action under Rule 167 of the Rules as well as charge late fee under Rule 166.

The petition is disposed of. No order as to costs.