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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on :26.07.2017

Judgment delivered on: 01.08.2017

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W.P.(C) 6743/2015 & C.M. Nos.12303/2015 & 2581/2016

MASTER AKHIL SHARMA (MINOR)

..... Petitioner

Through: Mr K.C. Aggarwal, Adv.

Versus

SECRETARY (EDUCATION), GOVERNMENT OF NCT OF
DELHI & ANR

..... Respondents

Through: Mr Sanjay Ghose, ASC with Mr
Rishabh Jetley and Ms Aparajita
Sharan, Advs for GNCTD
Mrs Abha Malhotra and Mr Raj
Malhotra, Advs for R-2
Mr Anil Kaushik, Legal Assist. for
Dir. of Education_

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The petitioner has filed this writ petition through his natural guardian. The petitioner is a minor child. He had sought admission in the St. Xavier Senior Secondary School (respondent No.2) in the KG class. He was denied admission for the reason that he was overage; his application was refused; the KG norms prescribed a minimum age limit of 3 years and a maximum of 4 years. Since the petitioner on the date of the application was more than 4

years i.e. 4 years and 27 days, his application form was not accepted. The contention of the petitioner is that this is an illegality committed by respondent No.2 school. Being aggrieved he has filed this present petition.

2 Averments in the petition disclose that the petitioner was a weak child suffering from a weak constitution and although he was born on 04.03.2010 and as per the cut-off list displayed by the school, he was 27 days overage. The submission of the petitioner being that a minimum age limit could be prescribed but a maximum age of 4 years was against the Rules of respondent No.1 (Government of NCT of Delhi).

3 Learned counsel for the petitioner points out that respondent No.1 has issued a circular NO. F.D. E.15/Act-I/2013/12810-20 dated 18.12.2013 para 8 of which is relevant and which reads herein as under:-

“8. The various standing instructions/guidelines/order regarding various aspects of admission process issued by this directorate from time to time are reproduced herewith for strict compliance:

i.....

ii.....

iii. School arbitrarily fixing upper age limit.

The Directorate of Education vide order No.F./DE/15/1031/ACT/2007/7002 dated 24.11.2007 defined the minimum age for admission in pre-school as minimum of three years by 31st March of the year in which admission is being sought and further explained that the ages stipulated for entry classes are minimum ages and the issue of uniform upper age limit is being deliberated by the Government.”

4 Submission is that the question of upper age limit was yet being deliberated upon and as such respondent No.2 having fixed a criteria of upper age limit of 4 years and thus not permitting the application of the petitioner has committed a gross illegality.

5 The stand of respondent No.1 in its counter affidavit is that since respondent No.2 is a private un-aided minority institution, the provisions of Right of Children to Free and Compulsory Education Act, 2009 is not applicable and this has been up-held by the Supreme Court in (2012) 6 SCC 1 Society for Unaided Private Schools of Rajasthan Vs. Union of India & Anr.. Submission being that respondent No.2 being an unaided minority institution has a right under Article 30 to establish and administer admission to its school and educational institutions. The day to day administration is to be handled by them. It was denied that an arbitrary fixation of the upper age limit has been done by respondent No.2.

6 The counter affidavit of respondent No.2 reflected its stand. Submission of respondent No.2 school is that it is a society registered under the Societies Registration Act. It is a minority institution. Being a private unaided minority school, it is neither a 'State and nor an 'instrumentality of State' and thus is not amenable to writ jurisdiction of this Court. The petition should be dismissed on the ground of delay as the petition has been filed in July, 2015 when all admissions for all classes already stand closed. On merits, it is pointed out that the concept of an autonomy of such private unaided schools has been recognized by the virtue of Section 3 of the Delhi School Education Act and Rule 185 of the Delhi School Education Rules. The admission process is transparent. Since the petitioner had not fulfilled the criteria and was overage his application was rightly not considered. It is pointed out that Apex Court in the judgment of Writ Petition (Civil) No. 587 of 1986 decided on 17.11.1986 Frank Anthony Public School Employees' Association Vs. Union of India (UOI) and Ors. has held that the minority institutions can run their establishments as per their choice and the regulatory measures which are designed towards the achievement of their goal would not impinge the right guaranteed under Article 30 (1) of the Constitution. It is pointed out that in the judgment of (2002) 8 SCC 481 T.M.A. Pai

Foundation Vs. State of Karnataka, the twin test which has been laid for the functioning of minority institutions is that the procedure of admission should be fair and transparent and this freedom should not amount to mal-administration. There is no bar in prescribing in upper age limit as has been done by respondent No.2 school. Respondent No.2 school was admitting students in the KG class only those who were born between 01.04.2010 to 31.03.2011 which was the eligibility criteria which is both fair and transparent and cannot be termed as a 'mal-decision'. Learned counsel for respondent No.2 has placed reliance upon a judgment in (2014) 8 SCC Pramati Educational and Cultural Trust (Registered) and others Vs. Union of India and Others. It is pointed out that a private unaided minority school have a right to establish and administer educational institutions of their choice. Para 54 has been highlighted which inter-alia reads as under:-

“Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice and this Court has repeatedly held that the State has no power to interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities,

particularly in minority schools, so as to affect the minority character of the institutions.”

7 Rejoinder has been filed. On behalf of the petitioner it is pointed out that even presuming private unaided schools are not strictly governed by the provisions of Right to Education Act and do not come under the purview of respondent No.1 yet the judgment relied upon by respondent No.2 itself clearly indicates that regulatory measures can be enforced by respondent No.1; it was well within the domain of respondent No.1 to ensure that the Rules and Regulations which are being followed by respondent No.2 are fair and meet the standards which are applicable to all other schools; no arbitrary and whimsical decision can be taken. Learned counsel for the petitioner points out that in W.P. (C) No.57/2016 Master Uday Pratap Vs. Government of NCT of Delhi & Anr a batch of writ petitions had challenged the order of respondent No.1 dated 18.12.2015 wherein an upper age limit for admission to pre-school, pre-primary and class I had been affixed. In the course of those proceedings, the counsel for the Delhi Government had made a statement that this circular would not apply to the case of the petitioners before that Court; that was for the reason that the said petitioners had approached the Court prior to the last date of filing of their application form. That writ petition had been disposed of in those terms. Learned counsel for

the petitioner points out that even in a subsequent order passed in W.P.(C) No.962/2016 Suman Mishra Vs. Government of NCT of Delhi dated 02.05.2017 where the question of upper age limit was again an issue; the submission of the Government of NCT of Delhi had been recorded wherein it was noted that upper age limit for Nursery class would be 5 years and K.G. up to 6 years in the academic session 2017-2018. Submission of the petitioner being that both these orders should be read in his favour as the Courts have been taking a consistent view that a upper age limit cannot be fixed by the Government and in fact the Circular dated 18.12.2013 (which is still in force) (quoted supra) clearly holds that the upper age limit is yet being deliberated upon; meaning thereby that it was not within the domain of respondent No.2 to have fixed this upper age limit.

8 Arguments have been heard. Record has been perused.

9 There is no doubt to the settled proposition that a private un-aided school is not an instrumentality of the State and as has been held by the Apex Court in the judgment of Pramati Educational and Cultural Trust (supra), Article 21-A which is the constitutional obligation of the State to provide free and compulsory education of children between 6 to 14 years would not be made applicable to private unaided educational institutions. Article 30 (1)

of the Constitution was also the scope of discussion. The Apex Court had noted that although all religious and linguistic minorities have a special constitutional right to establish and administer educational schools of their choice and the State has no power to interfere with the administration of minority institutions yet the power of the State to undertake regulatory measures has not been taken away.

10 The question which has to be answered by this Court as to whether the right of respondent No.2 to fix an upper age limit for admission to KG/Prep class was a regulatory measure which could have been regulated by respondent No.1 or was it within the independent domain of respondent No.2 to fix its own age limit.

11 The Circular of the Government of NCT of Delhi dated 18.12.2013 which has been quoted supra clearly provides that a minimum age limit for an entry class can be stipulated but the issue of a uniform upper age limit was yet being deliberated upon by the Government. The fact that this circular holds good till date is not in dispute.

12 The admission criteria of respondent No.2 has been annexed along with the counter affidavit of respondent No.2. Annexure R-2-C provides that children born between 01.04.2010 to 31.03.2011 are alone eligible for

admission to prep. A minimum entry level age bracket has been fixed as also the upper age bracket. Learned counsel for respondent No.2 again vehemently points out that it was well within the domain of respondent No.2 to carry out this exercise and in fact the circular of respondent No.1 dated 04.04.2014 (page 97 of the counter affidavit of respondent No.2) has fixed the age of the students. A perusal of this circular dated 04.04.2014 however does not support the stand of the respondent. A perusal of this circular shows that it makes reference to the age limit of children to be admitted from the 2nd standard to the 11th; this circular makes no mention of the age limit for nursery or Prep/KG children.

13 In T.M.A. Pai Foundation (supra), the word ‘regulatory’ was expounded to read as :

“The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of mal-administration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a government body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.”

14 These measures which (just a few illustrations) are indicative of the checks and balances which respondent No.1 can impose upon unaided educational institutions; unfair practice and general fairness for the teachers, staff and necessarily the students has to be maintained. These regulatory measures (as has been held in the judgment supra) must satisfy a dual test i.e. the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. As has been held by the Apex Court, these Regulations must be in the true interests of the efficiency of instruction, discipline, health, sanitation, morality and public order; these would not amount to restrictions.

15 The admitted position thus being that regulatory measures of respondent No.1, even upon institutions of the nature of the petitioner i.e. minority unaided private institutions have to be abided by.

16 Thus what could fall within the scope and ambit of regulations has been the subject matter of judicial discussion and which list is not and cannot be exhaustive but in the view of this Court would include within its ambit a regulation not to have an arbitrary upper age limit to be prescribed by the school. By enforcing such an upper age limit for KG/Prep class which is

admittedly not prevalent or ordained by any Government circular, a number of students could be excluded; i.e. either those who did or could not apply within the age span (which in turn could be for various accentuating reasons) and this would be for no fault of theirs for which they would loose out on admission to study in a school. This is probably the reason why in the circular dated 04.04.2014 (relied upon by the respondent), there is no upper age limit carved out for either nursery, Prep or KG classes; as these are “entry to school” level admissions. This is also so in view of the circular (dated 18.12.2013) of respondent No.1 which clearly states that a minimum entry level age limit can be prescribed for the students but the maximum age limit is still under consideration. In fact learned counsel for respondent No.1 has admitted that the order passed in W.P. (C) No.962/2016 Suman Mishra holds the forte as on date and the upper age limit for K.G. has gone up to 6 years. The idea and object being that more and more students who have missed the bus are able to be accommodated and do not miss out of their right to be admitted in a school.

17 A Bench of this Court in 2011 V AD (Delhi) 530 Abdullah (Minor) (Master Mohd.) Vs. Govt. of NCT of Delhi & Others had noted that there are

no legislations or rules governing the admission to pre-school which stipulate a maximum age limit.

18 The judgment of another Bench of this Court in 172 (2010) DLT 344 Kumari Uzma Bano and Anr. Vs. Govt of NCT of Delhi and Anr., while referring to Section 4 of the Right to Education Act and Explanation to Rule 21 of the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 had noted herein as under:-

“The counsel for the petitioners however contends that if such an interpretation is taken, the first proviso to Section 4 of RTE Act will become redundant. In my opinion, No. Even though the child may be admitted to class below that in which others of his age are studying, the child is still likely to require the special training mentioned in the said proviso. I may also add that there does not appear to be any maximum age limit for admission to any particular class and the School Act or the Rules do not provide any class in relation to age. The counsel for the petitioners has rather shown the explanation to Rule 21 of the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 which only provides the minimum age for admission and expressly provides that there is no bar for older children to getting admission for Pre-school Class or Pre-primary Class or Class-I. For this reason also it cannot be said that there is any law or Rule connecting a class to age. The expression "in a class appropriate to his or her age" in Section 4 of RTE ACT cannot be read as "in a class to which others of his age are studying" and it shall remain open

to the head of the School to which admission is sought to, in consultation with the Zonal Education Officer determine the Class to which such student should be admitted.”

19 In this background, this Court is of the view that respondent No.2 school in not allowing the petitioner to fill his application because of the upper age limit which had been set up by the school is an arbitrary exercise by respondent No.2. Prescription of upper age limit by a school in the view of this Court would be a regulatory measure which the State could regulate qua respondent No.2 school. The upper age limit was yet to be fixed by the Government for their Government schools; this was under deliberations; the upper age limit for KG/Prep students has now been enhanced to 6 years.

20 It is also the case of the petitioner that he is a physically weak child and that is why instead of nursery he has chosen to be admitted in K.G. class in order that he could better equip himself and compete with his peers in that class. It is also the case of the petitioner that the sister of the petitioner is studying in Presentation School which is just a short distance from where St. Xavier Senior Secondary School is located and where the petitioner wishes to study.

21 Learned counsel for respondent No.2 points out that on the neighborhood criteria, the petitioner would get no marks as he is a resident of Bhajan Pura which is far away from respondent No.2 school and he would not get the benefit of neighborhood point. This Court notes this submission of respondent No.2. The petitioner is presently studying in the second class in a local school.

22 This Court is of the view that the case of the petitioner be considered and minus the upper age limit which has been imposed; his application be considered on its own merit, i.e. de hors this hurdle.

23 Petition allowed in the above terms.

INDERMEET KAUR, J

AUGUST 01, 2017

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