
(1999) 03 GUJ CK 0042

In the Gujarat High Court

Case No : Special Civil Application No. 5508 of 1998

Gujarat State Fertilizers and Chemicals Limited

APPELLANT

Vs

Khagesh S. Dave

RESPONDENT

Date of Decision : 18-03-1999

Acts Referred:

Citation : (1999) 03 GUJ CK 0042

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Advocate : Thakkar Assoc, for the Appellant; K.S. Jhaveri, for the Respondent

Judgement

R. Balia, J.—This petition has been filed by the petitioner who is an employer of the respondent No.1 in the circumstances noticed hereinafter :-

The petitioner appointed respondent no.1 as Apprentice in the Trade of B.Sc. Attendant Operator under the Apprentice Act, 1961 for a period of three years. After completion of training, by order dated 5th January 1990, the respondent was appointed as Assistant Operator in Gr. III-D. By letter dated 3rd February 1990, the respondent was informed that,

"As per clause 7[a] of letter of appointment, you were sent for medical examination on 22nd December 1989 to our Industrial Physician. Since you were advised by our Industrial Physician proper correction of vision with glasses, you were allowed to join. However, after further investigation and as confirmed by Ophthalmologist, you have been declared unfit by our Industrial Physician. Hence, you are hereby relieved from the services of the company forthwith."

2. It appears that, soon after on receipt of the aforesaid letter dated 3rd February 1990, the respondent made a representation requesting the management to consider him for posting in some other department as it appears from the letter dated 15th February 1990 addressed to the respondent by the petitioner company. The letter dated 15th February 1990, after referring to petitions dated 6th and 7th February, reiterates that he has been relieved from

the duty on 3rd February 1990 and in view thereof, his petitions are rejected. He was asked to clear his accounts with the finance department. Ultimately, it appears further from the record that, by the order dated 25/28 th February 1991, the respondent was again appointed as Assistant Operator in Gr. III - D in Fertilizernagar Council in pursuance of his application dated 8th November 1990 w.e.f. 5/3/91. Since then, the respondent is continued in the service and is progressing in the service on the basis of his appointment dated 25th February 1991. On respondent's further representation by letter dated 22nd September 1992, the appointment of the respondent as Assistant Operator in Gr.III-D from the begining that is to say w.e.f. 5/3/1991 was made in Gr. III - C. Thereafter, it appears that the dispute has been raised by the respondent for the first time somewhere in 1994 about the termination of his services on 3/2/90 and respondent claimed for reinstatement w.e.f. 3/2/90 and continuance in service w.e.f. that date instead of w.e.f. 5/3/91. By award under challenge, the respondent's claim has been accepted and it has been directed that he is entitled to full wages from 3/2/90 to 22/2/91 land also entitled to count that period w.e.f. his first appointment on 5/1/90 for the purpose of increments, gratuity, provident fund, bonus, leave benefits and medical leave etc. as per the terms of employment prevalent in the company. The award is primarily founded on reaching conclusion that the respondent has been appointed by letter dated 3/2/90 after subjecting him to examination by the Industrial Physician on 22/12/89, which report according to the Labour Court had some interpolation which led it to infer that, by the said report, the respondent was found fit and it was only after finding him fit, the appointment was offered to him and any subsequent report, cannot result in denying him continued employment.

3. Controversy is around the certification of fitness. In this regard, the respondent alongwith his claim produced two certificates dated 18/1/90 from Dr. Vilas Bidaye, an Opthomologist, which documents are also amongst documents produced by the petitioner alongwith copy of certificate issued by industrial physician of the company on 22/12/89. All the three have a common feature in reporting that respondent suffers from myopia Ambylopia in left eye. The certificate dated 22/12/89, which is of a date anterior to appointment letter dated 5/1/90 carries with it two notes. First note is "Subject to proper correction of vision with glass". Second note which is apparently of a later date reads,

"Ambylopia [Lt.] eye

See enclosed note dated 2/2/90."

The note referred to in the report, reads -

"Shri K.S.Dave, who was examined for physical fitness for post of Assistant Operator on 22/12/89 is found to be suffering from Ambylopia [Lt.] eye - as confirmed by Opthalmogist. As per the standards of physical fitness, he cannot be declared fit for the job. Hence, he is declared unfit for the job."

It further shows printed words fit/unfit both scored out and word "unfit" written

by hand.

The two certificates dated 18/1/90 by Dr. Vilas Bidaye reports "his vision in right eye can be improved 6/6 with glasses. His left eye vision can be improved to 6/24 with glasses."

The difference in two certificate lies with that while one report ends with "his left eye has ambyopia, the other ends with "His left eye has no anatomical or pathological abnormality. It is a lazy eye."

As there was some dispute about interpolation as to writing "unfit" in certificate dated 28/12/89 and later note referring to report dated 2/2/90 at the suggestion of the court originals of certificate dated 28/12/89 alongwith examination report of the industrial physician on which certificate were founded and report dated 2/2/90 was produced in court and were taken on record.

5. During the course of proceedings before the Labour court, on 15/9/97, the first party company produced the copy of the documents in connection with the company's policy for physical fitness for training notified by Ministry of Labour in employment vide notification dated 27/8/62.

6. Except as the allegation of interpolation in the certificate dated 22/12/89 certifying the respondent as fit or unfit veracity of these documents have not been in challenge. In the circumstances, the contention as to the validity of termination order dated 3/2/90 founded on the unfitness of the respondent to be appointed as Assistant Operator Gr. III-D have been examined in the light of findings recorded by the Labour Court and above referred material.

7. I am of the opinion that, in reaching its conclusion, the Labour Court has ignored vital material on record and eloquent circumstances speaking from the material. Much stress has been led by both the parties on the importance of the medical examination which took place on 22nd December 1989 prior to appointment was offered to the respondent. The respondent contends that he has been appointed after he was certified as fit by the Industrial Physician of the company and review of that opinion was not permissible by the management without subjecting him to a fresh medical examination. It is the case of the petitioner that he was informed under certificate unconditionally physically fit, but was subject to conditions. The original certificate now produced discloses that the printed words "fit / unfit" both have been scored out and the word "unfit" has been written with astricks marks relating to a foot note. Relying on this, respondent contends that, cutting of words "fit and unfit" are interpolation inasmuch as according to him, in the original certificate, only unfit was scored out and since for the purpose of this litigation, the word "fit" has been scored out, both words now look scored out.

8. It is the case of the respondent that there was misunderstanding on part of the management in reading the certificate of the foot note and therefore, the opinion was sought on the report submitted by the Industrial Physician on

examination on 22/12/89 and he was certified to be unfit on that basis itself. In this connection, it is relevant to notice that, in letter dated 3rd February 1990, reference has been made to the medical examination dated 22/12/89 and the advise of the industrial physician thereof. The termination order itself points out that the respondent was examined on 22/12/89 and the industrial physician has advised proper correction of vision with glasses. With this advise, the respondent was allowed to join. However, on further investigation, it was confirmed by Optholmologist that the respondent was unfit and therefore, his services have been terminated. The two reports of Dr. Bidaye unmistakably suggests that respondent was referred to Dr. Bidaye, a Specialist Ophthalmologist in the light of note "Subject to correction of vision with glasses" after appointment letter dated 5/1/90 and termination dated 3/2/90 is a result of final opinion on fitness thereafter. The 2nd note on certificate refers to certificate dated 2/2/90. It may not be out of place to mention that examination report dated 22/12/89 by the industrial physician of company itself carries a note "Ref. to Opthamologist." The very fact that Dr. Bidaye's reports dated 18/1/90 have been produced by employee himself lends support to plea of the petitioner that after letter dated 5/1/90, the incumbent has been referred to specialist and the impugned act has followed that report. The employee has subjected to this investigation without objection. It is not the case of the workman that he on his own got himself examined by a specialist opthamologist to contradict the suspicion of employer. The certificate of Dr. Bidaye as to working of eye was only as an specialist and not with reference to requisite standard of fitness at the company for employment purposes. That certificate is to come from industrial physician undisputedly.

9. It becomes here relevant to refer to the physical fitness standard adopted by the company. As referred to above, the standard of vision in the notification dated 27/8/1962, read as under :-

"[A] Visual Acuity :-

The minimum standard of visual acuity for all trades shall be 6/18 in each eye or 6/12 in one eye and 6/24 in the other eye without glasses or 6/9 with glasses in both eyes.

Candidates with vision in one eye only shall be rejected."

The vision strength has not been stated in certificate of industrial physician dated 28/12/89. However, Dr. Bidaye's two certificates clearly states vision in left eye can be improved upto 6/24 with glasses which is below the standard of 6/9 prescribed for vision acuity with glasses in both eyes. Thus, the material that was before the labour court clearly disclosed that industrial physician's certificate said that there is myopia ambylopia in left eye and it is subject to correction of vision with glasses, which on later investigation by specialist did not measure upto prescribed norms. There is reference to note dated 2/2/90 on the foot of certificate dated 28/12/89. This can at best lead to inference that certificate

dated 28/12/89 was of conditional fitness subject to correction of vision with glasses, which when found could not reach the standard, the respondent was finally certified to be unfit on 2/2/90. In reaching its finding as to chance of subsequent writing of word "unfit", the labour court has apparently not noticed the vision acuity standard adopted by the company, vision acuity report of Dr. Bidaye and reference to later certificate dated 2/2/90 by the industrial physician. This has resulted in over emphasizing the use of word "unfit" in the certificate. It may be noticed that the industrial physician has been examined and he has stated that word unfit has been written in his hand writing. No question was asked when the word unfit was written.

10. In order to do complete justice, the original report examination report and certificate dated 2/2/90, which have been placed before the Court have also been examined in the presence of party.

The vision strength of respondent's eyes on 22/12/89 recorded by the industrial physician are as under:-

Without glasses - right eye - 6/6 left eye - 6/36

With glasses - right eye - 6/9 left eye - 6/18

It also made a note on the top "Referred to Opthomologist"

11. With these reports, he has advised subject to proper correction of vision as has been mentioned both in his pre-employment examination report as well as certificate. For this purpose, report also makes a reference to Otholmologist by diagnosing of emphilopia of left eye. This corroborates with the statement in the letter dated 3/2/90 that assuming on this certificate, subject to vision fitness reported by the Optholmologist, the appointment has been offered. By document exh.10/5, by Dr. Bidaye, it was certified that, "His vision in right eye can be improved to 6/6 with glasses, his left eye vision can be improved to 6/24 with glasses." It is acting on this report that an order dated 3/2/90 was made. If one examines the pre medical employment report made by the industrial physician as well as post employment report made by Dr. Bidaye about the vision acuity of left eye, it did not corresponds to the physical fitness standard adopted by the company. Dr. Manubhai, the author of pre appointment medical examination report and the certificate dated 22/12/89 deposed in his statement that he had sent the respondent to an eye specialist to examine him for ambylopia and vide exh.10/5 reported that his left eye cannot improve beyond 6/24 with glasses. That would not rank the respondent as medically fit. In the cross examination, he has asserted that word "unfit" in exh. 10/4, the certificate dated 22/12/89 has been written in his own hand writing and cutting of "fit and unfit" both have been made by him which necessitated himself by writing in hand. Even assuming for the sake of argument that words "unfit" has been written later on, it does not alter from the fact that even acuity recorded on 22/12/89 by Dr. Manubhai or by Dr.Bedaye in exh. 10/5 did not conform to the standard of fitness required in document exh. 17/1 which according to note appended alongwith filing of the

document and as per the statement of Dr. Manubhai is the prevalent standard of fitness required for appointment in the company. As pointed out above, it can lead to only one inference that in the first instance the respondent was certified "fit with condition as to correction of vision of left eye and on that condition of correction of vision in left eye having not been fulfilled upto requisite standard, he was certified unfit by scoring out fit on receipt of report vide note dated 2/2/90.

12. Viewed in that light, it may be further noticed that appointment dated 5/1/90 was on probation and during the course of probation, the services of the respondent could have been terminated without assigning any reasons. The services have been terminated soon after it was confirmed that the respondent was not physically fit as per standard. In the circumstances, I am of the opinion that the order dated 3/2/90 could not have been termed as invalid either on account of breach of any terms of employment or as an unreasonable action on part of the petitioner.

13. Condition No. 7 C in the letter of appointment dated 8/1/90 required physical fitness certificate from the industrial physician of the company and his opinion to be binding and final. The first certificate dated 28/12/89 was a conditional certificate. Certificate thus became final one way or other on fulfillment of the said condition. The examination of incumbent after appointment on 18/1/90 and veracity of examination report is not in dispute. Read in the light of physical fitness standard, the respondent was not having standard vision fitness. Ordinarily, adjudicating tribunals are not to sit in appeal on the opinion of the specialist doctors.

14. It will be profitable to notice a decision of Supreme Court in State Bank of India vs. G.K. Deshkar 1994 SCC 410. In the said case, the Supreme Court found High Court in error on sitting over the certificate of Specialist doctor who did not find the incumbent medically fit in the absence of case of mala fides. Present is a case where demonstrably the industrial physician on examination of respondent did not find his vision acuity upto the requisite standard and certified him to be unfit, a fact which was confirmed in oral testimony of the said doctor. There is nothing to suggest any malafide on the part of certifying doctor or against the management.

15. It may be noticed in this connection that respondent made representation for offering him appointment in alternative department soon after he received letter terminating his services which was responded by the company on 15th February 1990 itself rejecting the prayer. Thereafter, respondent made an another representation on 8th November 1990 which received the consideration of the management and resulted in giving the appointment to the respondent in another department where vacancy was existing and which did not require the vigorous adherence to standard vision acuity. The appointment was made on the same post of Assistant Operator Gr. III-D. On further representation, the appointment of respondent was made to the higher post of Assistant Operator

Gr. III-C w.e.f. 5/3/91, the date of initial appointment vide order dated 25/28th February 1991. Until then, no contention was raised about the invalidity of termination dated 3/2/90. The invalidity of the termination order dated 3/2/90 for the first time appears to have been raised after the respondent has secured job anew on a higher grade w.e.f. 5/3/91 after about 3 years.

16. In the circumstances, I am of the opinion that the Labour Court has apparently erred in granting the relief prayed for by the respondents by considering his first appointment w.e.f. 1/1/90 to be continuous treating the termination order dated 3/2/90 to be invalid.

17. Accordingly, the impugned award is quashed. There shall be no orders as to costs in the circumstances of the case. The original documents filed by the petitioner may be returned to him after copies of the same have been retained on record.