

(2019) 06 GUJ CK 0028

In the Gujarat High Court

Case No : ??R/Special Civil Application No. 16640 Of 2017

Jayrajsinh Bhratsinh Chauhan

APPELLANT

Vs

State Of Gujarat & 1 Other(s)

RESPONDENT

Date of Decision : 28-06-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 06 GUJ CK 0028

Hon'ble Judges : N.V.Anjaria, J

Bench : Single Bench

Advocate : Darshan Dave, HL Patel, Jayneel S. Parikh

Final Decision : Allowed

Judgement

N.V.Anjaria, J

1. Heard learned advocate Mr.Darshan Dave for HL Patel Advocates for the petitioner and learned Assistant Government Pleader Mr.Jayneel S.

Parikh for the respondent â?" State ad its authorities.

1.1 It was stated by learned advocates appearing for the parties that they argued the petition finally. They also stated that pleadings are complete and no further pleadings are required to be filed.

2. By this petition filed under Article 226 of the Constitution, the petitioner has prayed to set aside the decision reflected in communication dated 14th

December, 2016 of the Deputy Secretary (Examination), Gujarat Subordinate Services Selection Board, Gandhinagar, whereby the candidature of the

petitioner for the post of of Non-Secretariat Clerk and Secretariat Assistant, Class-III, was cancelled on the ground that the petitioner had not signed

the OMR-sheet of the written examination. It is further prayed to declare the

petitioner as successful candidate.

3. It was pursuant to advertisement No.83/2016- 17 dated 22nd April, 2016 issued by respondent No.2 â?" Gujarat Subordinate Services Selection

Board for various posts including for the post of of Non-Secretariat Clerk and Secretariat Assistant, Class-III, that the petitioner applied as SEBC

category candidate. Written examination was held on 16th October, 2016. The petitioner with his Seat No.83615449, submitted the answers as per

Optical Mark Reader (OMR) system. The petitioner obtained 129.25 marks whereas cut-off in the category of SEBC to which the petitioner belonged

was 103 marks.

3.1 The petitioner however received impugned order dated 14th December, 2016 from respondent No.2 stating that candidature of the petitioner for

the post in question was cancelled on the ground that petitioner has not put his signature on the OMS-sheet of the examination which was held on 16th

October, 2016.

4. Learned Assistant Government Pleader relied on the affidavit-in-reply filed on behalf of the respondent â?" Board to contend that instructions were

clear and the mistake cannot be said to be a bona fide mistake in not putting the signature on the OMR-sheet. It was submitted that nor it could be

said to be out of ignorance. Learned Assistant Government Pleader pressed into service decision of Division Bench of this Court in Railway

Recruitment Board v. Vihol Mahendra Nathusinh being Special Civil Application No.7446 of 2010 decided on 09th February, 2015. In that case, there

was a breach of instructions by the candidate which was on facts not accepted as condonable by the Court.

4.1 Learned Assistant Government Pleader next relied on decision of this Court in Mali Pareshkumar Danaji v. State of Gujarat being Special Civil

Application No.16922 of 2018 decided on 16th April, 2019. It was a case where petitioner mentioned wrong percentage of his graduation result

disregarding clearly the requirement. The petitioner had not mentioned marks of 5th and 6th Semesters of his graduation which resulted into difference

of 0.27 percentage to show that petitioner had obtained higher percentage.

5. In Solanki Parvatikumari Rameshbhai v. State of Gujarat being Special Civil Application No.22981 of 2017 decided on 2t7h December, 2018, the

petitioner who had appeared in the selection process for the post of Commercial

Tax Officer undertaken by the Gujarat Public Service Commission, came to be denied the candidature in the later stages of recruitment process on the ground that his SSCE Certificate was not produced. The application form was sent on-line and sending certificate along with on-line certificate was a sheer omission. The petitioner did produce, at the time of written examination, the certificate which was already in existence and available with the petitioner. The petitioner was permitted to appear in the written examination but for want of SSCE Certificate along with online application, the candidature was cancelled.

5.1 The Court, on the facts of the case, noticed to conclude that non-production of certificate at the time of making application was out of

inadvertence and in no way could be said to be fraudulent or misrepresentative character. It was held that such an omission was not liable to be

treated as defect of the degree of illegality, due to which the candidature could have been treated as ineligible. The Court in *Solanki Parvatikumari*

Rameshbhai (supra) observed that there was a clear distinction between illegality and irregularity.

5.2 The statement of law in that regard recorded in paragraph 5.2, the decision would apply in the present case.

Law conceives a clear differentiation between illegality and irregularity. This nice distinction brings home the case of the petitioner. An illegality is

something which amounts to substantial failure in compliance of requirement. It denotes such breach of rule or requirement which alters the position of

a party in terms of his right or obligation. Illegality denotes a complete defect in the jurisdiction or proceedings. Illegality is properly predictable in its

radical defects. It is a situation contrary to the principle of law. As against this, an irregularity as defined lexicographically, is want of adherence to

some prescribed rule or mode of proceedings. It consist in omitting the rule something that is necessary for due and orderly conducting of a suit or

doing it in an unreasonable time or improper manner. In *Law Lexicon* by R. Ramanatha Aiyar, 1997 Edition, irregularity is defined as "a neglect of

order or method; not according to regulations; the doing of an act at an unreasonable time, or in an improper manner; the technical term for every

defect in practical proceedings or the mode of conducting an action or defence, as distinguished from defects in pleading. Irregularity is failure to

observe that particular course of proceedings which, conformable with the practice of the court, ought to have been observed.

5.3 It was observed to hold in paragraph 5.3 of Solanki Parvatikumari Rameshbhai (supra) that mere procedural irregularity, stand in contradiction of the illegality, would not have any vitiating effect.

A thing irregularly done is not regularly done. It is not in conformity of rule or principle. The concepts 'illegal', 'irregular' and

'procedurally irregular', are often understood in terms of their degree which they bear to be not in conformity with rule of particular course of

action. The illegality is a highest kind of breach of law which will taint and vitiate the action. One who commit 'illegality' has to be denied the

assertion of his right and he stands disentitled to relief in law. Irregularity, as noticed, is breach of procedure of rule or some orderly conduct but not of

such nature which could be said to be in the nature of a debilitating defect. It is pardonable in law. The concept of procedural irregularity is indicative

of lapse of minor nature in procedure which could not affect adversely rights of a party, nor would exceptionally reverse the obligation of the other

side.

5.4 The Division Bench decision of Rajasthan High Court in Sanjeev Kumar Saini v. Union of India being Civil Writ Petition No.11263 of 2014

decided on 15th May, 2015, came across where facts were quite similar to the facts of the present case. The petitioner before that High Court

belonged to OBC category, had applied for Group D post pursuant to employment notice issued by North Western Railway. The petitioner cleared the

written examination and was called for verification of documents. At that stage, petitioner was denied appointment, on the count that petitioner had not

signed the OMR-sheet, which he filled in for appearing in the written examination. The breach of instructions was considered to be fatal, leading to

rejection of the candidature.

5.5 The High Court went into details inter alia to consider as to what was the object behind necessitating upon signature in a particular way alone in

the OMR-sheet. The Court found that the object behind the instructions was to ensure that no one was able to impersonate the applicant whose name

had have been shown in the OMR-sheet. It was noticed by the High Court that all the other formalities were fully complied with by the petitioner

while indicating his role number and thumb impression which was countersigned by the Invigilator. The High Court concluded that all the possibilities

that someone may impersonate a person who has participated in the examination had been completely ruled out.

5.6 The High Court in Sanjeev Kumar Saini (*supra*), giving the relief to the petitioner, noticed and noted that identity of the candidate could be

established from the photograph which he was required to be affixed on the application form as well as from the role number and admit card issued to

him and that the signature in the capital letters which was required was not of much use for achieving the objects of verifying the identity of the

candidate. It was observed that the case was of pure human error which, in totality, did not result into doubts as to the identity. It was recorded that

the OMR-sheet filled by the petitioner was countersigned by the two invigilators and all other formalities were complied with.

6. In the present case also, the omission to sign the OMR-sheet has no adverse reflection on the identity of the petitioner " candidate. His identity

and the factum of his appearance in the examination was duly supported by cogent and authenticated documents. The petitioner had admittedly signed

the attendance-sheet whereon his photograph was affixed. The attendance-sheet, which is on record, indicated presence of the petitioner in the

examination hall and the supervisor had countersigned the same. The factum of petitioner's appearance and that he actually appeared and took the

examination was never in dispute. It is true that requirement was mentioned for signing the OMR-sheet but the same was not followed out of the

sheer mistake which could hardly be attributed as deliberate.

6.1 The decision relied on by the respondents in Vihol Mahendra Nathusinh (*supra*) did not apply to the facts of the case as therein there was a clear

breach of instructions which was of the nature to be complied with mandatorily. Similarly, the decision in Mali Pareshkumar Danaji (*supra*) also stood

on its own facts which were evidently different. The petitioner had shown the marks contrary to instructions to bring the percentage at higher level by

mentioning the marks of the last two semesters only.

6.2 When the presence and participation of the petitioner in the examination and the fact that OMR-sheet in question duly signed was established and

vouchsafed by the concrete evidence, mere omission on part of the petitioner to

sign the OMR-sheet which, in the facts and circumstances of the case, was a pure bona fide mistake, could hardly become fatal aspect to justify cancellation of candidature of the petitioner. It was a mere irregularity, and did not become illegality to subject the petitioner to adverse consequences or action.

6.3 The lapse committed by the petitioner in not signing the OMR-sheet was a procedural mistake. It could not have substantially defeated the rights of the petitioner who had participated and was allowed participation in the examination, more particularly when his identity was never in dispute, which was an object of having OMR-sheet signed by the candidate. The OMR-sheet in question was that of the petitioner, which fact was vouchsafed by signature of the supervisor. The defect incurred on part of the petitioner â?" candidate could be countenanced as procedural irregularity so as not to disentitle him and his candidature could not have been rejected on that ground.

6.4 Notice was issued by this Court on 12th September, 2017. After the returnable date, affidavit-in-reply was filed by the respondent on 04th June, 2019. It was stated by both the sides that pleadings were completed. Figures on record draft amendment of the date when the notice was issued wherein the petitioner prayed for insertion of prayer 7(BB) in the prayer clause seeking direction against the respondents to keep one post vacant for the post of Non-Secretariat Clerk and Secretariat Assistant, Class-III. From the record, it transpired that this amendment was not granted and/or not pressed until the petition was finally decided. Be that as it may.

7. For the foregoing reasons and discussion, the petitioner is entitled to succeed. The impugned order dated 14th December, 2016 passed by the Deputy Secretary (Examination), Gujarat Subordinate Services Selection Board, Gandhinagar is hereby set aside. Consequentially, the petitioner shall be treated as successful candidate for the post of Non-Secretariat Clerk and Secretariat Assistant, Class-III.

Direct service is permitted.