

(1987) 05 GUJ CK 0001

In the Gujarat High Court

Case No : Spl. Civil Application No. 308 of 1987

Kadiwala Bharatkumar Jamiyatram

APPELLANT

Vs

Chauhan

RESPONDENT

Date of Decision : 01-05-1987

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Higher Secondary Certificate Examinations Regulations, 1977 — Regulation 29, 30, 34(2)

Citation : AIR 1988 Guj 6 : (1987) 2 GLR 839

Hon'ble Judges : D.H. Shukla, J;A.M. Ahmadi, J

Bench : Division Bench

Advocate : B.J. Shethna, for the Appellant; J.A. Shelat, for the Respondent

Judgement

D.K. Shukla, J.—The Petitioner, Kadiwala Bharatkumar Jamiyatram, of Sagrampura, Surat, has filed this Special Civil Application to obtain a direction to the Gujarat Secondary Education Board for the production of his answer-book of the Gujarati Paper of XIth Standard Examination, held, in May, 1986, for the purpose of verification of the marks, and for a further declaration of his passing in the said examination, if that be, the result of verification.

2. The Petitioner, Candidate No. G 171838, appeared at the XIIth Standard Examination in a general stream. His results were declared on 22-9-1986, and he was declared failed. His marks sheet showed that he failed in Gujarati subject, having secured only 18 marks out of 100 marks. A copy of his marks-sheet is produced at Annexure "A" to the petition.

3. On the next day, after knowing his result, he applied for rechecking of his mark in Gujarati subject. A copy of the receipt of the fees for rechecking is at Annexure "due to the petition. The petitioner avers that the respondent did not reply within 21 days and he, therefore, sent a reminder-letter dated 29-11-1986 requesting the respondent to intimate to him early the result of verification. Since he did not receive a reply to this reminder also, on 11-12-1986,

accompanied by one Manish Saorathia, he called upon the Assistant Secretary of the respondent-Board, Shri Chauhan, to inquire about his application. Shri Chauhan called two concerned persons from his office and told the petitioner to return to him about an hour later. When he did so, Shri Chauhan told the petitioner that he would receive the reply within a week. The petitioner, however, did not hear from Shri Chauhan for a period of about 20 days, and, therefore, on 6-1-1987, the petitioner, accompanied by one Shri Bhupendra Gajjar, again called on Shri Chauhan. Shri Chauhan again called two persons and also called for the answer paper of the petitioner. The petitioner avers that in his presence the verification with the answer-paper was made, and it was found that he has secured 48 marks and not 18 marks. Shri Chauhan assured the petitioner that the mistake would be corrected and the petitioner would be informed in writing within two or three days. To the utter surprise of the petitioner, however, he received a letter dated 6-1-1987 from the Examination Secretary of the Board informing him that no change was required in the marks obtained by the petitioner and that marks assigned to him were proper. A copy of the said letter dated 6-1-1987 is at Annexure" to the petition. Having been aggrieved by the aforesaid letter received from the Examination Secretary of the respondent Board, the petitioner has filed the present petition.

4. The petition is resisted by the respondent-Board. It has filed an affidavit-in-reply of one Shri Hasmukhrai N. Hingu, Secretary of the Board, dated 23-2-1986. It is averred in the affidavit-in-reply that the petitioner's averments about the part played by Mr. Chauhan are not true. The true facts are that the answer books of the April 1986 Examination had been sent for being reduced to pulp, prior to 6-1-1987, and as a corollary, therefore, all that is said about what transpired on 6-1-1987 between the petitioner and Shri Chauhan, allegedly in the presence of Shri Bhupendra Gajjar is necessarily untrue. It is, therefore, not true to suggest that the petitioner had secured 48 marks and not 18 marks, as alleged by the petitioner. It is further averred that after the answer books are examined by the examiners, the moderators prepared moderators' sheets wherein marks of each candidate are mentioned. In this case also, the moderator prepared the moderator's, sheet from the original answer book, wherein also marks secured by the petitioner in Gujarati (L.L.) is shown as 18, A copy of the moderator's sheet is produced at Annexure "A" to the affidavit-in-reply. It is further contended in the affidavit in reply that after having received the application of the petitioner for the verification of the marks, all possible efforts were made to procure original answer-book of the petitioner, but the respondent Board was unable to put its hands on the answer-book of the petitioner. The respondent, therefore, could verify the marks obtained by the petitioner only on the basis of the moderator's sheet. To substantiate his say, the Secretary has further deposed in his affidavit-in-reply that by a letter dated 24-12-1986, the respondent had informed waste paper merchants to collect used answer books from its Gandhinagar Office and Baroda Office, and to collect the same at the earliest. Accordingly, used answer books were collected by the said merchants

and four different trucks were loaded on 29-12-1986 and 30-12-1986. A copy of the bill of Shree Naroda Motor Weigh Bridge Company, Baroda, is at Annexure "C" to the affidavit-in reply. The used answer books were required to be sent for being reduced to pulp because new answer books for the October examination had started reaching the Board's office. As per the relevant resolution, the used answer-books are required to be sent for being reduced to pulp after two days of the declaration of the result. Thus, it would be seen that what the petitioner has averred in relation to Mr. Chauhan having verified the marks of the petitioner from the answer books on 6-1-1987 is totally false. The deponent has further stated that "it is not true that Mr. Chauhan had assured the petitioner that the mistake would be corrected and he would be informed in writing within two or three days.

5. In support of his statements made in the affidavit-in-reply, several documents are produced to prove that the answer-papers were dispatched for being reduced to pulp, nearly a week prior to 6-1-1987.

6. A further affidavit is filed by Mr. Dharamraj Kishanrav Chavan, Assistant Secretary Of the Gujarat Secondary Education Board, for "a limited purpose in respect of an alleged conversation narrated by the petitioner having taken place with him. He submits that he cannot say at this point of time that the petitioner did come to inquire on 11-12-1986 and 6-1-1987 about his application for verification of marks. However, he states that on 6-1-1987 he did not call two persons for bringing answer books of the petitioner. It is also not true that in the presence of the petitioner it was found that the petitioner had secured 48 marks and not 18 marks. Therefore, the question of giving assurance to the petitioner that the mistake would be corrected and he would be informed in writing within two or three days does not arise. He has also stated that the used answer books of April, 1986-examination were sent for being reduced to pulp much prior to 6-1-1987, and therefore the question of calling of the answer-books of the petitioner on 6-1-1987 does not arise.

7. The petitioner has filed an affidavit-in rejoinder alleging that the facts are tried to be suppressed before this Hon'ble Court that the petitioner has secured 48 marks in Gujarati paper, and not 18 marks. He has questioned the moderator's sheet produced by the respondent, alleging that it is a concocted document. It does not bear the date, and name of the petitioner is shown at the bottom of the moderator's sheet and number is also not there in the serial. There are several other grounds also on which the genuineness of the moderator's sheet is questioned, but it is not necessary to reproduce all these details in our judgment. It is further contended that the petitioner had applied in time for rechecking of the marks and therefore the respondent could not have disposed of the answer-books. The respondent-Board has not given sufficient reason, according to the petitioner, why the answer-book was not checked before being sent for being reduced to pulp. He has reiterated his meeting with Mr. Chauhan, and in support of his contention he has filed the affidavit of Mr. Bhupendra Gajjar, who had

accompanied him.

8. This Special Civil Application came up for hearing before Brother D. C. Gheewala, J. He has observed : "The petitioner, of course, has come out with a case, which is not acceptable, that he was shown the answer book and instead of 18 he was getting 48 marks. That appears to be a blatant lie." We are also of the view that the petitioner's say in this regard is not believable in view of the evidence,- especially documentary evidence, produced on the record of this petition.

9. Gheewala, J. has also considered the reliance which is placed by the petitioner on the respondent's letter dated 6-1-1987, that the marks were tallied with the answer books and therefore answer books must have been there on 6-1-1987. He has however, not accepted the petitioner's inference drawn from the letter of 6-1-1987, at Annexure" to the petition, observing that the letter was on a printed form and it is quite possible that what is contained in the print was not cancelled through oversight. In view of the other documentary evidence on record, no reliance could be placed on the contents of the printed form to reach the conclusion that the contention of the Board about the answer, books having been sent for being reduced to pulp is untenable. We agree with Gheewala, J.

10. Mr. B. J. Shethna had invited the attention of Gheewala, J. to the judgment of Brother R. C.. Mankad, J. in Special Civil Application No. 5535 of 1984, decided on 123-198S, wherein he held that if the answer book was lost, the examining body should add the requisite marks and declare the candidate as having passed. However, so far as this judicial opinion as pronounced in the judgment and order rendered in Special Civil Application No. 5535 of 1984 is concerned, there is a difference in judicial opinion, because in a similar matter, which subsequently came up before Brother M. B. Shah, J. in Special Civil Application No. 1720 of 1986, decided on 25-7-1986, a different view was taken. It appears that R. C.Mankad, J. himself took a different view in another Special Civil Application No. 7108 of 1985, decided on 9-1-1986. In view of the conflicting judgments of this Court on the same point, Gheewala, J. found that it was proper that the matter was decided by a Division Bench. Hence, this reference.

11. R. C. Mankad, J. considered Regulation 34 of the Higher Secondary Certificate Examination Regulations, 1977, hereinafter referred to as the "Regulations", and observed as under, in the judgment rendered in Special Civil Application No. 5535 of 1984 :

.....The mark sheet prepared by the examiner reflects only total marks obtained by candidates who had appeared at the examination. It is not stated as to how the marks sheet is prepared by the moderator. In other words, it is not made clear whether the moderator prepares mark-sheet on the basis of the mark sheet prepared by the examiner or whether he examines each and every paper before inserting marks in his mark sheet. But apart from that separate marks for each answer are not entered in the mark sheet prepared by the examiner or

moderator. Thus it would not be possible to find out from the mark sheets of the examiner and the moderator whether each and every answer written by a candidate has been evaluated or not. It will, therefore, appear that once that answer book is lost or not traceable, it would be difficult to find out whether any answer written by a candidate has remained unevaluated. Therefore, in a case where answer book is lost, the procedure laid down in regulation 34 of verification of marks would be unworkable and the right conferred on the candidate for verification of marks obtained by him would become meaningless

R. C. Mankad J., under the facts and circumstances of the case, relied on Regulation 30 of the regulations, which deals with condonation of deficiency in special cases. Regulation 30 run thus:

"30. Condonation of deficiency in special cases : :

It shall be competent to the Board to review special cases not, covered by Regulation 29 above."

Having held that Regulation 29 of the Regulations does not cover the case of a petitioner, Mankad, J. observed in the above said judgment as under :

"However, regulation 30 confers wide power on the Board to condone deficiency in cases not covered by regulation 29".

Having examined the petitioner's earlier performing R.C. Mankad, J. observed in the said judgment as under

"I am, therefore, of the opinion that the Board should have exercised its power under Regulation 30 and condoned deficiency in the marks

He accordingly gave a direction to the Board to condone deficiency of marks for passing in the subject of English under regulation 30 of the Regulations and to declare the petitioner in that case as passed in the subject of English.

12. A similar matter, namely, Special Civil Application No. 7108 of 1985 came up before R.C. Mankad, J., which he rejected by M order dated 9- 1- 1986. He observed therein as under :

"It, however, appears that in spite of its best efforts, the answer books in this subject have not been traced. Under these circumstances, it is not possible to come to the conclusion that any mistake in calculation of the marks is committed by the respondent Board. Ordinarily it should be presumed that marks are properly calculated or added up. However, it further appears that in the moderator's sheet, the marks entered are the same as those shown in the marks sheet so far as the subject of Biology is concerned. There is no reason to doubt the correctness of the entries made in the moderator's sheet. It would, therefore, appear that the marks in the subject of Biology stated in the mark sheet are correct. In any case, petitioner has failed to show that there is mistake in adding up of marks in the subject of Biology

He rejected the said petition.

13. A third petition of the same nature came up before M.B. Shah, J. It was Special Civil Application No. 1720 of 1986, decided on 25-7-1986. M. B., Shah, J. followed the view taken by R.C. Mankad, J. in, the latter Special Civil Application, namely, Special Civil Application No. 7108 of 1985, decided on 9-1-1986, and rejected the petition. Attention of M.B. Shah, J. was invited to the earlier decision in Special Civil Application No. 5535 of 1984 by R. C. Mankad, J. He, however, did not follow the decision in the earlier petition -on the ground that it was decided in view of the facts of that particular case.

14. We are called upon to resolve the cleavage that arises from the aforesaid three Special Civil Applications.

Regulation 29 of the Regulations runs as under :

"29. Condonation of deficiency of marks for passing in a subject :

(1) If a candidate excepting isolated candidates fails by not more than eight marks in not more than two subjects taken together such an efficiency shall be condoned.

(2) If a candidate who appears in all the subjects required for obtaining the Higher Secondary Certificate at one and the same Examination fails in one or two subjects, the total of his deficiency in marks in one subject or both the subjects up to a maximum of 15 marks in aggregate shall be condoned on the basis of one mark for every one per cent by Which the total marks secured by him, in all the subjects exceed 35 per cent of the maximum number of marks obtaining in those subjects. For this half a percent or more shall be rounded to the next whole percent.

(3) A candidate may be given the benefit of condonation under either Clause (1) or under Clause (2) above but not under both the clauses.

(4) In the case of a candidate appearing for the Examination in isolated subjects under Clause (3) of Regulation 20 any deficiency up to four marks in any two subjects shall be condoned."

It is evident from the perusal of Regulation 29 that it deals with condonation of deficiency of marks in different sets of circumstances. In order to take care of an unforeseen circumstance, Regulation 30 provides that it shall be competent to the Board to review special cases not covered by Regulation 29. A conjoint reading of Regulations 29 and 30 thus covers the power of condonation of deficiency of marks for passing in a subject. Now, the case of the present petitioner is not that condonation of deficiency of marks is called for in his case. His case is that he has passed the examination and that the declaration of his failure is unjustifiable on the facts of the case. He avers that he had secured 48 marks and not 18 marks, as disclosed by his marks-sheet, and therefore, he must be declared as having passed in that examination. In other words, he does

not pray for condonation of deficiency of marks either under Regulation 29 or Regulation 30, but his case is that there is no deficiency at all. We are of the view, therefore, that the application of Regulation 29 or Regulation 30 of the Regulations to the case of the petitioner does not arise at all and, with respect, the view taken by R.C. Mankad, J. in Special Civil Application No. 5535 of 1984, that Regulation 30 should be applied in a case such as this is not correct.

15. There is another aspect of consideration in regard to the invocation of Regulation 30 of the Regulations. Before seeking the invocation of Regulation 30, the petitioner should first have approached the Board to review his case, since the powers are vested in the Board. A necessity of judicial review can only arise after the Board has rejected his application to review his case under Regulation 30 of the Regulations. Till this condition precedent is fulfilled, there does not arise any scope for alleging arbitrariness or male fides on the part of the respondent-Board. Mr. B. J. Shethna candidly admitted that the petitioner before us has not made any such application to review his case under Regulation 30 of the Regulations. Since this situation has not arisen, we are of the view that the question of invoking Regulation 30 of the Regulations in the petitioner's case does not arise before us.

16. Lastly, it was argued that since the petitioner had applied for verification of marks under Regulation 34 of the Regulations within the prescribed time, it was the duty of the Board to verify whether the candidate's answer in any particular subject was evaluated or whether there was a mistake in totaling of marks in the concerned subject and failure to do so for want of the candidate's answer book entitles the candidate to be declared to have passed in the said subject. Under Regulation 34(2), unless on verification it is discovered that there was an omission to evaluate and mark any answer or answers and/or there was a mistake in totaling of the marks, the candidate cannot be declared successful. Therefore, in order to succeed, the candidate must show that there was either an omission to evaluate and mark any answer or that a mistake in totaling the marks had crept in. In the present case, neither of the conditions is shown to exist."It is dear from the mark sheet that the petitioner had secured 18 out of 100 marks in Gujarati. The orator's sheet produced with the affidavit of H.N. Hingu also shows that the petitioner had secured only 18/100 marks. These two documents prima facie show that the petitioner had failed in Gujarati (I-L) subject. There is a presumption under S. 114(e), Evidence Act, that official acts must have been properly performed and- this presumption is certainly not weakened by the moderator's sheet. The petitioner cannot claim to be declared successful merely because the Board destroyed the answer book without waiting for the period prescribed by Regulation 34(1) for verification. It is undoubtedly true that the Board should not have destroyed the answer book in haste before the prescribed period ran out but that by it is not sufficient to hold that the candidate is entitled to be declared successful. The absence of the answer book cannot efface the probative force of the mark-sheet and the moderator's sheet. We are, therefore, of the view that the premature destruction of the answer book is

by -itself not sufficient to declare the petitioner successful in " the Gujarati (I-L) subject; it is another matter that he may have a remedy at common law.

17. Before we part, we are constrained to observe that since a candidate is entitled under the Regulations to seek verification, the answer books should be retained till the time for applying for verification expires and the requisitions for verification are dealt with and the result is communicated to the concerned candidates. We would like the Board to lay down safeguards in this behalf so that such incidents causing avoidable misgivings do not recur in future. Such incidents, apart from involving the Board in litigation, erode the credibility of the Board. We do hope that the Board will take sufficient precautions to see that such incidents do not recur in future to avoid litigation and possible claims for damages.

18. In the above view of the matter, we reject this Special Civil Application. Rule is discharged with no order as to costs.

19. Application dismissed.