
(2015) 08 GUJ CK 0026
In the Gujarat High Court

Case No : Special Civil Application Nos. 10319 of 2001 and 7655 of 2005

Maheshkumar Prabhudas Patel

APPELLANT

Vs

Commissioner of Higher Education and Others

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Citation : (2015) 08 GUJ CK 0026

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : Dipak R. Dave, for the Appellant

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J—Since the issues arising for my consideration in both the captioned petitions are more or less the same those were heard analogously and are being disposed of by this common judgment and order.

2. The Special Civil Application No. 7655 of 2005 has been preferred by (1) the District Education Officer, (2) Commissioner of Higher Education, Gujarat State and (3) the District Education Office, Vadodara challenging the order passed by the Gujarat Higher Secondary School Tribunal dated 4th April 2001 in application No. 243 of 1998. While issuing Rule in the said petition this Court passed the following order:-

"Heard the learned advocates.

Draft amendment is allowed. The amendment shall be carried out within fifteen days from today.

Rule. To be heard with Special Civil Application No. 10319 of 2001. Mr. Dave waives service on behalf of the respondent No. 1.

In view of passage of time and the Order dated 20th October, 2004 passed in Civil Application No. 3473 of 2004, interim relief pending this petition is refused.

The petitioner No. 2 shall, within fifteen days from today, appoint the respondent No. 1 as directed by the Tribunal below. Pending this petition, such appointment shall be treated as ad hoc and appointment afresh, and shall be subject to the result of this petition. In the event the petitioner No. 2 fails to make such order within fifteen days, as aforesaid, the respondent No. 1 shall be entitled to receive pay and allowances commencing from 17th October, 2005. It is further directed that on receipt of the order, the respondent No. 1 shall immediately report for duty wherever he is posted. In the event, the respondent No. 1 fails to report for duty within five days from the date of the receipt of the order, the appointment order shall stand cancelled."

3. The Special Civil Application No. 10319 of 2001 has been filed by the respondent No. 1 of the Special Civil Application No. 7655 of 2005 referred to above calling in question the legality and validity of the order dated 14th September, 2001 passed by the Commissioner of Higher Education.

4. The facts giving rise to the two applications may be summarized as under:-

5. The petitioner was appointed as a Steno Instructor vide order dated 17th March, 1992 on the part time basis. The fixed pay scale of the petitioner was Rs. 403/-. It is his case that he was appointed by the respondent No. 2-District Education Officer after following the due process of recruitment in accordance with the law.

6. In the year 1992 on addition of one Class of standard-XII a vacancy of a full time Steno Instructor arose. In such circumstances, the petitioner was appointed as a full time Steno Instructor with effect from 23rd June, 1992 in the Jaydipsinh Baria High School. The petitioner was asked by the School authorities to pass the GCC Examination. The petitioner cleared the GCC Examination in August, 1992.

7. Having regard to the qualifications of the petitioner, the DEO, Godhara vide order dated 9th November, 1992 sanctioned the appointment of the petitioner as a full timer with effect from 23rd June, 1992.

8. The Higher Secondary stream of the Jaydipsingh Baria High School came to be closed in the year 1995-96. The State Government issued a resolution dated 21.05.1994 declaring that the employees who had been appointed prior to 16th April, 1994 would be given the protection of surplus. Thereafter, on 6th July, 1998 it was resolved by the Government that the employees who had been employed prior to 30th June 1998 would be given the protection of surplus.

9. Indisputably, the petitioner had been appointed on 23rd June, 1992 and was therefore, entitled to the protection of surplus. Since the petitioner was not given the protection of surplus by the school, he had to go before the Tribunal by way of the application No. 1 of 1997. The Gujarat Higher Secondary School services Tribunal (for short the Tribunal) allowed the application of the petitioner and directed the respondent No. 1 to declare the petitioner as surplus and also the protection of surplus. The petitioner was also given salary admissible for the

grant.

10. It is the case of the petitioner that the order of the Tribunal attained finality as the same was not challenged by any of the party to the proceedings. On account of the administrative exigency, the classes of the concerned school had to be reduced. The grievance of the petitioner is that although the Tribunal had issued clear directions to give him the protection of surplus, yet the respondent No. 1, Commissioner of Higher Education conducted an inquiry against the petitioner on the pretext that the Tribunal had given the authority to him to declare the petitioner as surplus.

11. It is the case of the petitioner that the respondent No. 1 conducted an absolutely illegal inquiry by virtually sitting in appeal over the order of the Tribunal. The respondent No. 1 took the decision that the petitioner was not entitled to the protection of surplus.

12. It appears that the inquiry was conducted by the respondent No. 1 on the pretext that at the time of the appointment of the petitioner he had produced a false certificate of a government recognized institution dated 5th October, 1991. The Commissioner took the view that the petitioner had cleared the Exam conducted by the State Examination Board in the month of August, 1992, whereas, the petitioner was appointed in the year 1991. According to the Commissioner the petitioner had played a fraud by producing a false certificate. According to the Commissioner the petitioner had obtained the necessary qualifications after he was appointed in the service. The Commissioner took the view that having regard to such irregularities alleged to have been committed by the petitioner he was not entitled to the protection of surplus as provided to the other surplus employees.

13. Mr. Dave, the learned advocate appearing for the petitioner submitted that the impugned order passed by the Commissioner of Higher Education is absolutely illegal, unjust and improper. He submitted that at the time of the appointment of the petitioner, the certificate which is sought to be relied upon by the respondents was not required to be produced and in fact it had not been relied upon by the authorities. Mr. Dave submitted that as the post of a full time Steno Instructor became vacant, his client was asked to pass the said examination. It is only after proper verification that the Office of the DEO had approved/sanctioned the appointment of the petitioner with effect from 23rd June, 1992.

14. Mr. Dave submitted that the Tribunal in its order dated 12th October, 2000 directed that the petitioner should be declared as surplus. Mr. Dave submitted that in view of such clear directions issued by the Tribunal there was no scope for the Commissioner to inquire into the matter. Mr. Dave submitted that in view of the order of the Tribunal passed in the application No. 1 of 1997 as well as the application No. 243 of 1998 the impugned order could be termed as without jurisdiction. Mr. Dave submitted that identically situated persons like his client

were absorbed in service and were also granted all the benefits including the benefit of surplus.

15. Mr. Dave submitted that after a period of almost six years from the date of the appointment that the respondents came forward with the case of production of a bogus certificate of the GCC.

16. Mr. Dave submitted that the petition deserves to be allowed and the relief prayed for in this petition may be granted.

17. On the other hand, this petition has been opposed by Mr. Rohan Yagnik, the learned AGP appearing for the respondents. He submitted that no error not to speak any error of law could be said to have been committed by the Commissioner in passing the impugned order. Mr. Dave relied on the affidavit-in-reply filed on behalf of the respondent No. 2. The following averments have been made in the reply of the respondent No. 2:-

"4. At the outset, I deny all averments, allegations and submissions in the petition memo, which are contrary to and are inconsistent with what is stated in the present affidavit and/or records of the respondent as is they are individually and specifically dealt with and traversed, save and except those which may be expressly admitted hereinafter, I humbly submit that merely because any of the allegations or averments or submissions are not specifically dealt with or replied, none of them may be presumed as admitted.

5. Before proceeding further I may at this stage, mention some of the relevant facts and circumstances which, in my humbly submission, would conclusively demonstrate the factual portion and petition deserves to be dismissed with cost.

6. With reference to para - I of the petition I say and submit that the same being formal in nature and therefore do not offer any remarks at this state.

7. With reference to para 2 of the petition, I say and submit that the petitioner herein was come to be appointed as Steno Instructor in Jaydipsinh Bariya High School, Chhohanpur, I further say and submit that the petitioner herein has produced the certificate of the Government recognized institution dated 5-10-91 at the time of his appointment as steno instructor. However, it is most pertinent to note that the petitioner has passed the examination taken by the State Examination Board in the month of August, 1991, and hence, it is most pertinent to note that at the time of appointment the petitioner played a fraud by producing the false certificate. I say and submit that the petitioner has obtained necessary qualification after he has been given the appointment in the service. I further say and submit that after such irregularities committed by the petitioner came to the notice it was resolved that he shall not be given the protection given to the other surplus employees. By way of a letter dated 20-07-1998 issued by the Commissioner Mid-day Mill Scheme, State of Gujarat protection of surplus was not accorded to the petitioner. I further say and submit that as the petitioner has not been given the protection of surplus, petitioner preferred an application

before Hon"ble Gujarat Higher Secondary Schools Tribunal by way of preferring an application No. 243 of 1998. Hon"ble Tribunal passed an order to hold an inquiry and further directed to appoint an Inquiry Officer to do the needful in the matter and, therefore the Commissioner appointed the District Education Officer as an Inquiry Officer. I further say and submit that the District Education Officer in the capacity of inquiry officer has prepared the inquiry report and same as forwarded to the Commissioner, Gandhinagar on 4-8-2000.

I further say and submit that above referred order was passed pursuant to the order passed by the Gujarat Higher Secondary School Tribunal dated 21-1-99 and 13-8-99 and as such the petitioner herein was given an opportunity of hearing. After considering the various aspects the inquiry officer has prepared the report whereby the charges levelled against the petitioner was proved, and therefore, a show cause notice was issued to the petitioner herein. He was also given opportunity by way of issuing show cause notice to put his stand before the disciplinary authority. I further say and submit that hearing was fixed on 25-9-2000 before the Commissioner Mid-day Mill Scheme. I further say and submit that it is most pertinent to note that Criminal case was also came to be lodged against the Manager of Adesh Type Class who has issued a false certificate to the petitioner herein.

I further say and submit that Adesh Type Class Institute had issued a false certificate to the petitioner on 5-12-1991 on the basis of which the petitioner fraudulently obtained his appointment.

I further say that it is most pertinent to note that the petitioner as such passed the examination in the month of August, 1992 with regard to the English Steno Exam.

I further say that in view of what is stated hereinabove as the petitioner has subsequently obtained the necessary qualification he is not entitled to the protection of surplus employee into the service. Hence, in view of what is stated hereinabove the present petition has no legs to stand and is required to be rejected at the threshold and no relief as prayed for by the petitioner required to be granted."

18. Mr. Yagnik submitted that there being no merit in this writ-application the same be rejected.

19. It appears that in the past the petitioner had filed the Special Civil Application No. 12551 of 2000 regarding the subject matter with which I am concerned. The same was disposed of vide order dated 11th December, 2000 as under:-

"Heard Mr. Deepak Dave, learned advocate for the petitioner. The Gujarat Higher Secondary School Services Tribunal has passed order in Application No. 243 of 1998 on 22nd January, 1999 and thereafter, it is directed to the Commissioner [Mid-day Meal] to examine whether the petitioner is entitled to benefit of surplus

teacher or not? Accordingly, that aspect has been examined by the authority by order as per the direction issued by the Tribunal on 12th October, 2000. The main application No. 243/1998 is still pending before the Tribunal and therefore, the petitioner has made grievance against this order passed by the Commissioner [Mid-day Meal] dated 12th October, 2000 but on perusal of the same, this Court is of opinion that, in fact in pursuance of the direction issued by the Tribunal, the order impugned has been passed and therefore, said order can be challenged before the Tribunal by the petitioner when the application No. 243 of 1998 is very well pending before the Tribunal. Therefore, considering the fact that when the petitioner is having alternative and efficacious remedy before the Tribunal to challenge the order in question in the pending application by necessary proceedings, this petition is not entertained only on that ground. Therefore, as and when the petitioner will approach the tribunal, the tribunal will examine the order passed by the Commissioner [Mid-day Meal] in accordance with law. However, Mr. Dave submitted that the petitioner has not received salary for more than 3 years period and therefore some suitable direction may be issued to the tribunal to decide pending application No. 243/98 within some reasonable time. In light of this submission, it is directed to the tribunal concerned to decide application No. 243/1998 within period of three-months from the date of production of the writ of the order of this Court. However, it is clarified that the tribunal shall decide the application strictly in accordance with law without being influenced of the order passed by this Court. However, it is open for the petitioner to raise all the contentions available to the petitioner in accordance with law before the Tribunal. In view of above observations and directions, the present petition is disposed of accordingly."

20. Since the entire matter hinges around the two orders passed by the Tribunal I deem it necessary to look into the same. The order passed by the Tribunal in application No. 1 of 1997 dated 1st October, 1997, reads as under:-

"Ld. Ad. Mr. P.K. Shastri for the applicant L.G.P. Mr. N.H. Shah for the DEO & CHE.

The applicant has file this application against the order of CHE, depriving him from the right of surplus. The CHE has taken the ground and as per G.R. dt. 22.09.87 and 3.3.92 that he is not qualified for the post. Relying on the G.R. dated 27.05.1997 of CHE, he himself ordered that the applicant's service should be terminated.

To-day the L. Adv. for the applicant has produce the letter of D.E.O. Ahmedabad which says that by the order of CHE dated 16/08/97, the operation of condition No. 3, 4 & 5 of G.R. dated 27.05.97 is stayed.

In view of this position, the applicants service cannot be terminated. He is required to be declared surplus and his services should be regularised and he should be absorbed in another school where there is vacant post.

In view of this clear legal position, the DEO concern will do the needful as per the instruction of CHE dated 16/08/97 and letter of D.E.O. Ahmedabad dated 2.9.97.

The matter is disposed off as no grievance survives. I.R. Vacated notice discharged.

Relying the order of CHE if management has passed any order it is to be set aside. The applicant is declared to be surplus. He is entitled for the protection of surplus. His salary will be admissible for grant."

21. The order passed by the "Tribunal in application No. 243 of 1998 dated 4th April, 2001, reads as under:-

"To decide the bonafide of the applicant the following question are required to be decided:

(1) At the relevant time was the certificate of G.C.C. Of 100 w.p.m. Passed through the State Examination Board required for the job? The answer is No. When no advertisement was published on 30.11.1991 it is mentioned that the certificate of a recognized institution is required. The private class is recognized by the Government and no G.C.C. Certificate was required. On the date of interview on 29.02.1992, the G.C.C. Certificate issued by the State Examination Board was not required.

(2) The second question is required to be decided that by producing the alleged certificate whether the applicant has acquired any illegal benefit which he could not get without producing the same. The answer is No.

At the relevant time, the rules framed by the G.R. dated 22.09.1987 were in force and as petition the same it was required for the post of Shorthand Instructor to have speed of 100 w.p.m. in English Shorthand from the Government recognized institution (not G.C.C. Certificate issued by the State Examination Board). Therefore, by procuring internationally wrong certificate on 05.12.1991 did not weight to benefit the applicant. Further also, the appointment was for part time instructor for which there was no rules. The certificate of Gujarati shorthand produced by the applicant is also of Government recognized institution and not of G.C.C. examination conducted by the State Examination Board. Therefore, the benefit of doubt must be given to the applicant.

First time by the G.R. dated 3.3.1992, Government fixed requirement of G.C.C. certificate. Thereafter, in August, 1992, the applicant has obtained G.C.C. certificate in Gujarati as well as English Shorthand which he has produced on record in his earlier application No. 1/97. Earlier, he was not made full time employee. In November, 1992, when he cleared G.C.C. Examination, he was made full time employee with deemed date of 23.06.1992. Therefore, it cannot be said that he has received any benefit out of this mistake or he has hidden anything from the authority. After acquiring qualifications as per G.R. dated 03.03.1992 in August, 1992 e was made full timer and before that he was a part time employee.

Till November, 1995, the regular inspections have been made in the School and no one has raised this dispute and the applicant continued to receive salary

under direct payment scheme though all the record was available with the authority.

After joining in March, 1992, the question arose in 1995 whether the applicant can receive the benefit of surplus scheme or not as there was class reduction in the School. At that time after hearing the parties and examining all the documents, the CHE held that the applicant was less qualified. Therefore, he cannot be given the protection of surplus.

The applicant has challenged this order of the CHE by filing application No. 1/97. Since this period, there was no whisper or doubt created against the applicant that he has produced wrong certificates for obtaining this job in Application No. 1/97, the applicant himself has produced all the relevant certificates including the disputed certificate issued by the Private Class and G.C.C. Certificate which he has obtained after five months of joining. At that time also, there was an dispute regarding submitting false certificates. That matter was disposed of keeping in view the Government policy to give benefit to all the less qualified employees. It was also the contention of the applicant that he has obtained and acquired the qualification as per the new G.R. in August, 1992. The Tribunal directed to give benefit of surplus scheme to the applicant. Thereafter, this second round of litigation is started.

Till this date, there was no whisper about incorrect certificate produced by the applicant from any authority and on 28.06.1998 first time the CHE come to conclusion that the applicant has produced a false certificate dated. 05.12.1991 and after inquiring into the same he has again reached to the same conclusion by order dated 12.10.2000.

In both the orders, the applicant has been found guilty of producing wrong certificates and taken illegal benefit.

As discussed above, the Tribunal comes to the conclusion that at the time of advertisement dated 30.11.1998, and at the time of interviews on 29.12.1992, there was no reason or need to produce wrong certificate dated 05.12.1991 as at the relevant time, the G.R. dated 22.09.1987 was in force and the applicant was not required to pass G.C.C. Examination according to it. Moreover, the applicant was appointed on part time post and after 03.03.1992, he acquired the qualification of G.C.C. Examination in August, 1992 and he was made full timer in November, 1992 with deemed date of 23.06.1992 when the applicant has passed G.C.C. Examination in August, 1992 and produced the certificate of the same and thereafter, the department has given benefit of making him full time employee. The department has regularized services of even less qualified employees. Therefore, there is no question of taking benefit by producing incorrect certificate and it is true that the applicant has produced incorrect certificate but he has not obtained any benefit out of it and the benefit of bonafide mistake can be given to the concerned employee.

In view of the above it is ordered that the order of the Commissioner of Higher

Education dated 12.10.2000 is set aside. The applicant should be declared surplus and should be given the benefit of surplus scheme and absorbed anywhere with effect from the date of pronouncement of this judgment. His sanction of full timer with deemed date of 23.06.1992 is set aside as he was not qualified for that but he is only qualified from the date of declaration of the result of the GCC Examination. Therefore, his services as full time employee are required to be declared continued from the date of declaration of the result of GCC Examination instead of 23.06.1992. His services are required to be declared continued but no back wages should be given to the applicant as this litigation and confusion has been created by him by his own gross negligence by producing incorrect certificate dated 5.12.1991 as admitted by him that the contents of the certificate are wrong. He, being the literate person, could have very well gone to the institution for its modification. Further, the contention of the recognized institution for its modification. Further, the contention of the recognized institution which has issued the certificate in question creates doubt as they have contended that the certificate is correct, the signature on the certificate is correct, it is not forged but the contents of the certificate is not correct which is not issued by the institution. No record prior to the year 1996 is available with the institution as the record has been lost in the flood of river. In such a situation, when the applicant has produced all the relevant material on record with the authority prior to the issuance of such notice and the applicant has not taken any advantage of such certificate as it was not required under the law at the relevant time. The benefit of doubt for committing the bonafide mistake is given to the applicant. The applicant has furnished the required certificate and justified the requirement as laid down in both the G.R.s (dated 22.09.1997, 3.3.92) as the relevant times but he has produced incorrect certificate to the authority concerned though it was not required by the law. With the above observation and direction the application is partly allowed."

22. Thus, it appears that the Tribunal in so many words observed that the petitioner herein was required to be declared as surplus and was also entitled to the benefit of the surplus scheme and absorption at any other place. At the same time the Tribunal also observed that the sanction which was accorded as a full timer with the deemed date of 23rd June, 1992 was required to be set aside as the petitioner was not qualified for the same and he could have been treated as qualified only from the date of declaration of the result of the GCC Examination.

23. The Tribunal also took the view that there was no question of the petitioner taking the benefit by producing a bogus certificate and even if it was believed that he had produced an incorrect certificate he had not obtained any benefit out of it. It appears that in the year 2004, the petitioner was reinstated in service and is serving as on today. Considering the findings recorded by the Tribunal referred to above I am of the view that this petition deserves to be partly allowed and the same is accordingly partly allowed. The impugned order passed by the Commissioner of Higher Education dated 14th September, 2001 is hereby quashed and set aside. The petitioner shall be paid 50% of the arrears of salary

with effect from April, 1996 till the year of his absorption in 2004. The requisite amount equivalent to the 50% of the arrears towards salary shall be calculated and paid to the petitioner within a period of three months from the date of the receipt of the writ of the order. Rule is made absolute to the aforesaid extent.

24. So far as the Special Civil Application No. 7655 of 2005 is concerned the same fails in view of the above and is hereby rejected. Rule stands discharged.

After the order is pronounced Ms. Pathak, the learned AGP appearing for the State-respondent prays for stay of the operation of the order passed in the SCA No. 10319 of 2001.

In view of what has been stated above, the request is declined.