

(1991) 02 GUJ CK 0007

In the Gujarat High Court

Case No : Spl. Civil Application No's. 5751 to 5753, 5893, 5894 and 5992 of 1990

Patel Jagrutiben Kalabhai (Minor) and

APPELLANT

Vs

Gujarat Secondary Education Board (Examination Wing)

RESPONDENT

Date of Decision : 28-02-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : AIR 1992 Guj 45 : (1991) 2 GLR 1250

Hon'ble Judges : C.K. Thakkar, J

Bench : Single Bench

Advocate : Girish Patel, for the Appellant; J.A. Shelat, for M.C. Bhatt, for the Respondent

Judgement

1. This group of petitions are filed by the petitioners under Art. 226 of the Constitution of India for an appropriate writ, direction and/or order directing the respondent-Board to declare the result of the students who have appeared in the new SSC examination and to permit them to prosecute further studies in Standard XI by quashing and, setting aside the impugned orders cancelling the result of their examinations.

2. For the purpose of appreciating the controversy raised in this group of petitions, it is necessary to set out facts in the first matter, i.e. Special Civil Application No. 5751 of 1990 since the facts are almost similar in all the petitions.

3. This petition i.e. Spl. C.A. No. 5751 of 1990 filed by Jagrutiben, a minor girl of 16 years of age through Kalabhai Maganbhai, her father. It is her case that she was a student of Swarninarayan Dwisatabdi Smarak High School, Lavarpur, Taluka & District Gandhinagar. She was having brilliant academic career to her credit and even in 8th and 9th Standard she had obtained 59% and 58% of marks respectively. She appeared in Std. 10th (New SCC) examination held by the respondent-Board in March 1990. Even in preliminary examination of the SSC she obtained 52.43% of marks. Her seat number in the Board examination was

A.52686. She attended all the papers and it is her case that she had done very well and was expecting first class with very good marks. To her utter shock and surprise, however, she was served with a notice dt. June 20, 1990, on June 22, 1990. It was alleged in the notice that she had attempted to secure more marks indirectly with the help of the Examiner/ Moderator or other persons and, therefore, her result was kept in abeyance. She was, therefore, called upon to show cause why proceeding should not be initiated and why punishment of cancellation of the result should not be imposed and she should not be debarred from appearing in four subsequent examinations. The petitioner replied vide her letter dt. June 22, 1990 denying the allegations levelled against her. It was stated by Jagrutiben as well as by her father Kalabhai that neither the petitioner nor her father had made any attempt to get the marks increased and that they were not knowing anything about the alleged act. The petitioner was asked to remain present on July 6, 1990 before the Committee constituted by the respondent Board. On that day, she was asked whether she would admit the guilt in respect of the illegality and irregularity alleged to have been committed by her and when she denied to admit the same, the impugned order was passed by the Board on July 25, 1990 cancelling the result of the examination in which she, appeared and also imposing punishment of debarring her from appearing in four subsequent examinations. It is this order which is challenged in the present petition. Similar orders are passed against some other students and they are challenged in this group of petitions.

4. I have heard Mr. Girish Patel and Mr. P. G. Desai, Advocate appearing for the petitioners and Mr. Shelat for Mr. M. C. Bhatt for the respondent-Board.

5. It is submitted on behalf of the petitioners in all these petitions that the impugned orders are required to be quashed and set aside on a number of grounds. It is contended that no inquiry worth the name has been "conducted or held by the respondent-Board and in absence of the inquiry, the students cannot be punished. It is also contended that these are cases of "no evidence" and in absence of "any evidence" no order of cancellation of the examination and/or debarring from appearing in subsequent examinations can be passed by the respondent-Board. It is argued that even if it is assumed for the sake of argument that some over enthusiasm has been" shown by the parents of the students appearing at the examination, it cannot be said to be a fault on the part of the students and they cannot be blamed or punished for some acts of their parents. Lastly it is contended that the quantum of punishment, which is the maximum in the instant case, is not called for and justified in the facts and circumstances of the case.

6. Mr. Shelat on the other hand appearing for Mr. M. C. Bhatt supported the order passed by the respondent-Board and submitted that since this court is not exercising appellate power, it cannot re-appreciate the evidence and cannot substitute its finding for the findings arrived at and recorded by the respondent-Board and the petitions are liable to be dismissed.

7. I am of the considered opinion that the contentions raised on behalf of the petitioners are well founded and all these petitions are required to be allowed.

8. So far as the notice Annexure-B to the petition is concerned, it is delightfully vague. It is alleged in the said notice that looking to the record, it appears that an indirect attempt appears to have been made by the student by contacting examiner/ moderator or other concerned persons. Thus, so far as notice is concerned, no specific averments or allegations have been made as to who was contacted by the student. However, I am not basing my conclusion only on this basis inasmuch as it is a starting point of inquiry and it may be that at that time when the inquiry was still to be conducted by the respondent-Board and allegations are required to be made that the allegations may be of a general nature.

9. As stated above, those allegations have been denied" by the students and by their parents. It is also clear that the students were asked to appear before the committee and then impugned orders were passed. Now, the order is annexed at Annexure D to the petition in Special Civil Application No. 5751 of 1990 and it gives an interested reading. In the said order it is stated that either the parents or the representatives of examinee (student) had attempted to get more marks by contacting any examiner at the place of assessment which was established from the marks which were found on the answer book. Then the marks were mentioned and they were as under:

Question Marks given Marks after erasures Initially 1. 4 6 2. 2 3 3. 6 8 4. 3 6 5. 4 5 6. 4 5 7. 2 4 8. 7 7 9. 6 6 Total 38 50

10. Thus, there was difference of 12 marks and instead of 38 marks which the petitioner was originally getting, they were found to be 50 i.e. 38 + 12. Then it is alleged as under: (Matter in vernacular omitted - Ed.).

11. It means that it cannot be accepted that without being influenced by any financial benefit, from a guardian an examiner/ moderator would add marks. Usually change of marks takes place only under pressure.

12. The order proceeds to observe that had the student admitted the allegations, a lighter punishment could be imposed on her. But since she had not admitted her guilt, it was decided to cancel the result of the examination by debarring her from appearing in four subsequent examinations.

13. From the impugned order, it clearly appears that really this is a case of "no evidence". The respondent-Board is not sure about the fact even at the time of passing of the impugned order and taking penal action that the petitioner has in fact committed any irregularity or illegality at the examination. The respondent-Board is also not sure as to who has committed the alleged illegality/ irregularity. In my opinion, the learned counsels for the petitioners are right that without there being any evidence no such finding can be said to have been recorded. They rightly submitted that as soon as the examination is over all the papers are

collected by the officers of the respondent Board and the students are having no access at all. The students do not know and are not expected to know where the answer books are kept or sent for the purpose of assessment. They are also not aware and not expected to know the names of the examiners and/or moderators. The answer papers are not assessed in presence of the students or their guardians. The answer papers are not kept at the Center at which the students appeared and they are taken in safe custody by officers of the respondent-Board. After the examination is over students come to know for the first time about the marks obtained by them when the result is declared. In these circumstances, it is not possible to assume without there being any evidence on record either direct or circumstantial that something has been done either by the student or by her/his guardian.

14. It is contended on behalf of the petitioners that, there is no evidence to come to the conclusion that the students had committed any irregularity or illegality. In reply to the show cause notice the petitioner had denied that she had committed any illegality at the examination. The matter, however, did not end there. Along with the affidavit-in-reply, the respondent-Board has produced statements of the petitioner as well as the examiner. So far as the petitioner is concerned, her case was of total denial. But even the examiner, in his statement dt. June 8,1990, Annexure-I to the affidavit-in-reply ha also denied to have committed any unauthorised change on the answer paper. He has stated that the assessment of 38 marks made by him was correct and that the change from 38 marks to 50 marks was unauthorised and it was not made by him. He had specifically stated that he was not aware as to who had made that unauthorised correction and that the initial put on the said correction was not in his hand.

15. From the above facts, it is clearly established that the examiner who had examined the answer paper of the petitioner has refused to make any addition, alteration or correction of marks obtained by the student at the examination. It is not even the case of the respondent Board that the petitioner herself has made correction of marks on her answer book. Now, at the cost of repetition, I may say that it is only for about three hours during the examination time that the petitioner was in possession of the answer paper and thereafter it was in the custody of the board all throughout. In these circumstances, in my opinion it cannot be assumed without there being any evidence on record that some correction has been made by the student or at .her instance. The respondent-Board. is not sure who has committed irregularity or illegality and the said fact is reflected not only in the show cause notice but even in the impugned order wherein it is mentioned that the correction of marks would not have been possible unless some economic benefit had been extended to examiner/moderator. In this case, therefore, on one hand there is denial of any illegality or irregularity committed by the student and on the other hand specific denial of correction addition or alteration of marks by the examiner concerned. It is not the case of the respondent Board that what the examiner was saying was incorrect or false, or that some proceedings had been initiated against him or

any other person. Taking clue of such a situation, it was contended on behalf of the petitioners that there is no evidence to connect the petitioner with the so called illegality or irregularity and to award punishment on her and the impugned order requires to be quashed.

16. It is, however, submitted by Mr. Shelat that the fact remains that alteration of marks had taken place and unless some financial benefits had been extended to the examiner/moderator ordinarily he would not oblige the student by altering the marks. But then, in my judgment that cannot be said to be evidence direct or circumstantial. It is merely a suspicion, surmise and conjecture. What is expected and needed for the purpose of holding a student guilty of adopting illegal means at the examination is not suspicion, surmise or conjecture, but evidence direct or indirect in the form of circumstances. Unfortunately in this case there is "no evidence" to prove that the student has committed this illegality.

17. The petitioners also appear to be right in contending that maximum penalty was imposed only on the ground that they did not admit their guilt. It is contended that if they have not committed any illegality, obviously they would deny it. But from that it cannot be said that there was evidence to hold them guilty and to award maximum punishment.

18. I have minutely gone through "the affidavit-in-reply by Shri A.D. Patel, Officer on Special Duty of the respondent-Board and" even that affidavit does not carry the matter any further. In the affidavit it is stated by the deponent that all the material evidence on record on which reliance was placed was shown to the students; but then what is so called "material evidence" on record on which reliance is placed by the Board? It is merely an answer paper. In reply to the show cause notice, the allegations are denied by the petitioner. In her statement before the committee, she reiterated her stand taken earlier in her reply. The examiner concerned had also unequivocally denied to have made any correction or alteration of marks and he had stated in no uncertain terms that the initial made on the answer book was not in his hand. There is no other evidence.

19. It is contended by the learned counsels for the petitioners that the factum of correction of marks on the answer paper was treated as evidence and sufficient evidence by the Board. But according to them that cannot be said to be "evidence" but a fact. A student can be punished not because of the fact but on the basis of evidence leading to the illegality committed in the examination. It was also contended that it may be that for a number of other reasons or circumstances that such an alteration of marks may take place. For instance, an enemy of a student may be an influential person and with a view to ruin the career of a particular student, he may approach an examiner/moderator/officer of the Board and may get marks of that student corrected so that his future would be adversely affected. Similarly, in a given case the school management or the principal may take undue interest with a view to get favorable result of the Institution by approaching the above officers. It may also happen that a student

may approach the examiner/ moderator or other responsible officer but there may be some misunderstanding or mistake either on the part of the student or on the part of that officer in giving or taking seat Number and instead of addition or alteration of the marks in the answer paper of that student, it may take place in the answer paper of some other student. Now in all these cases one thing is certain that the student on whose answer book the correction of marks took place cannot be blamed. He is not responsible. He has not committed any irregularity or illegality. Obviously, therefore, he should not suffer. Thus, merely from the fact that there is alteration and addition of marks at the most it can be said that someone has committed mistake and made alterations and additions but it cannot be said, ipso facto that the student is responsible for the said alteration of marks and that he was liable to be punished.

20. In this connection, my attention was invited to some decisions of the Supreme Court as well as of this court. I do not intend to burden my judgment by referring those judgments in extenso, but it is necessary to make a reference to some of them. In the leading case of S.M. Sharma v. South Gujarat University, reported in 1982 (1) 23 Guj LR 233, the Division Bench of this court consisting of P.D. Desai J. (as he then was) and D. H. Shukla J. considered and extensively discussed the concept of "no evidence". Relying on the English as well as Indian cases and quoting Wade, (Administrative Law), the Division observed:

"30. On gleaning through these illustrative decisions and examining their rationales closely, it would appear that the "no evidence" rule has the same content and meaning in our country as in England. "No Evidence" does not merely signify total dearth of evidence; evidence which does not reasonably support the conclusion is also comprehended within the meaning of the said expression. In other words, cases where there is complete lack of evidence and cases where the evidence, if any, is incapable of rationally leading to the conclusion reached, are both treated, on a par so far the applicability of the rule of "no evidence" is concerned. In none of these decided cases, there was "no evidence" in the sense of there being utter paucity of evidence. There was some evidence, direct or circumstantial, on the basis of which the domestic tribunal had reached the conclusion of guilt. The grievance that there was "no evidence" was examined by applying the test whether or not, accepting the whole of the evidence as it stood, the impugned conclusion followed legally or logically. In cases where direct evidence was not available, the totality of circumstances was carefully considered and the challenge that there was no evidence in support of the decision was examined by applying the test whether probabilities and circumstantial evidence justified the conclusion. Where direct evidence was available, the challenge was examined by applying the test whether it was so thoroughly inconsistent with the rest of the evidence as to make it impossible of acceptance. Mere suspicion, even if honestly and bona fide entertained on the basis of apparently cogent circumstances, was held to be out of bounds even in domestic inquiries, where the principle that in punishing the guilty scrupulous care must be taken to see that the innocents are not punished was found to

apply as much as it applies to regular criminal trials. In the ultimate analysis, the test which appears to have been applied is whether there was some material capable of having any evidential value. If not, the case was held to fall within the mischief of the rule of "no evidence".

31. It would thus appear that the Court exercising the power of judicial review is to look upon the decision of the domestic tribunal as sacrosanct so long as it rests on findings of fact which are supportable on evidence in the sense explained above. The limit of indulgence is reached if the evidence does not meet with the above test or standard and the "no evidence" rule would then enable the Court to quash the decision on the ground that it discloses an apparent error of law."

21. It is, thus, clear that "no evidence" does not mean only total dearth of evidence. It extends to any case where the evidence taken as a whole is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. It is well established that to reach a conclusion on "no evidence" is to commit an error of law apparent on the face of the record. Again to base a decision on "no evidence" is that the decision is perverse, unreasonable and ultra vires.

22. A similar question arose in *Chetan Savala v. Gujarat University* in Spl. C.A. No. 5528 of 1987 decided by R.C. Mankad J. In that case also, the allegation was levelled against the petitioner that he was permitting one Heena a candidate who was sitting behind him to copy from his answer book. The observer of the University saw him allowing to copy from the answer book of the petitioner and after holding inquiry, the punishment was imposed. He approached this court by filing a petition challenging the order of punishment. Even though it was the case of the observer that he had seen the petitioner allowing Heena to copy from his answer book, this court allowed the petition holding that there was no evidence in the eye of law, on the basis of which the petitioner could be punished. The petitioner denied having allowed Heena to copy from his answer book in his statement. Similarly Heena had also in her statement denied that she was copying from the answer book of the petitioner. In these circumstances, according to this court, the case was suspicion and not of evidence. The Court observed:

"In view of this total denial by the petitioner, it was necessary to establish the charge against the petitioner by other evidence. In other words, in the absence of admission by the petitioner, the charge against the petitioner had to be established by relevant, cogent and reliable evidence. In the inquiry, the examination committee recorded the statements of the petitioner and the observer Kanubhai. In his statement the petitioner stated that in order to properly support his answer book, he was sitting in an oblique manner or at an angle on the bench. He was not knowing whether or not Hina was copying from his answer book. According to the petitioner, he was engrossed in writing answers. Observer Kanubhai in his statement stated that the petitioner was

sitting and writing in such a manner that Hina could see. He added that this is what he believed. It would appear from the statement of the Observer that he believed or inferred from the manner in which the petitioner was sitting and writing that Hina could see and it was on that basis that he inferred that the petitioner was allowing Hina to copy. It would thus appear that it was only from the manner in which the petitioner was sitting that the observer believed that he was allowing Hina to copy from his answer book. It further appears that no attempt whatsoever has been made to compare the answer books namely that of the petitioner and of Hina to find out whether Hina had copied from the petitioner's answer book. Further, Hina herself had stated that the petitioner was innocent and that he did not know that she was copying from his answer book. It is pertinent to note that the examination committee while considering the case against the petitioner has not at all taken into consideration the statement which Hina made before the Senior Supervisor or the Observer. Her statement is also not recorded in the inquiry against the petitioner. Thus Hina's version has not been taken into consideration at all by the examination committee. Therefore, the only evidence against the petitioner is the belief or inference of the observer based on the manner in which the petitioner was sitting to hold petitioner guilty of the charge of allowing Hina to copy from his answer book. Such belief, in my opinion, can hardly be considered to be evidence or proof of guilt. It is only suspicion which the observer entertained when he came to, inspect the examination hall."

23. Mr. Shelat, however, drew my attention to the case of Master Pragneshkumar Krishnavadan Desai v. South Gujarat University, Surat; -in Special Civil AppIn. No. 1724 of 1977 decided on December 15, .1977. In that case after recording a finding of. fact that the examiner had altered marks from 36 to 50 of the petitioner, dismissed the petition holding that no examiner would be interested in any student unless the student or any one on his behalf had approached him.

24. Mr. Shelat also draw my attention to a judgment of the Supreme Court in the case of Board of High School and Intermediate Education U.P. v. Bagleshwar Prasad AIR 1966 1 SC . 875. He particularly relied on para 12 of the judgment which reads as under:

"In dealing with. petitions of this type, it is, necessary to bear in -mind that educational institutions like the Universities or appellant No-. I set up Enquiry Committees to deal with the problem. posed by the ad option of unfair means ."by candidates, and normally it is within the jurisdiction of such domestic Tribunals to decide all relevant questions in the light of the evidence adduced before them. In the matter of the adoption of unfair means direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. This problem which -educational institutions., have to face from time. to time is a serious problem and unless there is justification to do so, Courts should be slow to interfere with the decisions of the domestic

Tribunals, appointed by educational bodies like the Universities. In dealing with the validity of the impugned orders passed by Universities under Art. 226, the High Court is not sitting in appeal over the decision in question; its jurisdiction is limited and though it is true if the impugned order is not supported by any evidence at all, the High Court would be justified to quash that order. But the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. Enquiries held by domestic Tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves, and in holding such enquiries the Tribunal must scrupulously follow rules of natural justice; but it would, we think, not be reasonable to import into these enquiries all considerations which govern criminal trials in ordinary Courts of law. "

25. There cannot be any dispute about the proposition of law laid down by the Supreme Court and I am bound by it. The ratio laid down in the said judgment, however, does not apply to the facts of the instant case. The Board of High School and Intermediate Education U.P. Vs. Bagleshwar Prasad and Others, has been extensively considered by the Division Bench in S.M. Sharma's case (1982 (1) 23 Guj LR 233) (supra) and the Division Bench has rightly observed that, a number of circumstances were considered "by the Supreme Court. They Were-

"(i) as a result of the unhealthy atmosphere ailing at the centre, examinations had not been held there for some years, but on account of public pressure they were restarted.

(ii) at the examination held at the centre, unfair means were adopted on a very large scale by a large number of the students and the examination appeared to have been conducted in the atmosphere which was not at all congenial to the enforcement of the discipline which has to be observed in conducting examination; (iii) the invigilators themselves were so much frightened by the prevailing rowdiness and by pressure from influential people that they found themselves powerless to maintain discipline in the examination hall and to prevent copying and some of the invigilators had to be warned to be careful in future; and (iv) on the day on which the examination in English was held and while the students were answering the paper, an answer paper by some outsider was dropped into the room fifteen minutes before the time to answer questions was over and the room in which the answer paper was thrown was the same in which the delinquent candidate was appearing for the Hindi examination."

26. I am in respectful agreement with the views expressed by the Division Bench of this court in S. M. Sharma's case (1982 (1) 23 Guj LR 233) (supra). It is undoubtedly true that the problems which the educational institutions have to face from time to time is a serious problem and unless there is justification to do so, Courts should be slow to interfere with the decisions of the domestic Tribunal appointed by educational bodies like the respondent-Board. But at the same time

the orders passed by the authorities like the respondent Board must be supported by some evidence. It may be in form of direct evidence or indirect and circumstantial evidence. As mentioned above, in *The Board of High School and Intermediate Education U.P. Vs. Bagleshwar Prasad and Others*, though there was no direct evidence, indirect evidence in, form of a number of circumstances was there which was considered by the University as sufficient and when the action was quashed by the High Court, the Supreme Court rightly set aside the order of the High Court observing that it was for the authorities to consider the evidence and the High Court was not iustified in interfering with the said order. The High Court was not a court of appeal and cannot enter into sufficiency, adequacy. or otherwise of the evidence before the authority. At the same time, however, it should not happen that a student is punished and his career is jeopardised only on the basis of suspicions, surmises and conjectures without there being any evidence worth the name. In my opinion, in this case there is no evidence whatsoever which has some probative value in the eye of law and merely on the basis of suspicion that the impugned action is taken by the respondent Board which is arbitrary, irrational, perverse and no reasonable man in the facts and circumstances of the case would reach to that conclusion and, therefore, it is required to be interfered with in the exercise of the powers under Art. 226 of the Constitution of India.

27. Mr. Patel, learned counsel for the petitioners submitted that in over enthusiasm if the parents or guardians of a student commit some mistake by contacting the Examiner/ Moderator or any Officer of" the Board for the purpose of getting more marks of their wards, the students should not suffer. He attempted to draw a dividing line and distinction between the irregularity committed by students themselves in the examination hall; for instance; copying a paper etc. and other cases. In the former class of cases, obviously the student is to be blamed and he will have t o face consequences of his action. But if on the other hand, without his consent or even his knowledge, the parents indulge into irregular activities, why should the student suffer. However, in view of the fact that I am allowing the petition on the ground that there is "no evidence" to hold the student guilty, I am not expressing any final opinion on the above argument advanced by Mr. Patel.

28. Lastly, Mr. Patel submitted that even if it is assumed that the petitioner is guilty of the charge levelled against her in the facts and circumstances of the case, the maximum punishment of cancellation of the result and debarring her from appearing at four subsequent examinations must be held to be harsh, excessive and grossly disproportionate. Here also, Mr. Patel attempted to draw a distinction between irregularity committed by an examinee in the examination hall itself and some irregularity said to have been committed by the parents. In the first category of cases, the examinee is directly responsible and lie is the only person responsible for such activity. But so far as the second category is concerned, it Is not the student who is directly responsible for the act in question. At the most it can be said that he is indirectly responsible. But then the

respondent Board is bound to apply its mind to the above distinction. In the instant case, the Board has not applied its mind at all to the above circumstance and since the petitioner refused to confess the guilt which she had not committed, a mechanical order of imposing maximum punishment was passed and it requires to be interfered with by this Court under Art. 226 of the Constitution.

29. Prima facie I am of the opinion that the submission made by Mr. Patel appears to be well founded. It is not that in every case, the maximum punishment should be awarded to the students. Mr. Patel is right in drawing a distinction between the two class of students. When I am allowing this petition in its entirety and quashing and setting aside the impugned order, it is not necessary to deal with the above argument. However, in the facts and circumstances of the case, even if the petitioner can be said to be responsible and some punishment can be imposed on her in my opinion, ends of justice would be met if the quantum of punishment is reduced and over and above, cancellation of result of the examination in which the petitioner appeared, she may be debarred from appearing in two subsequent examinations rather than four subsequent examinations.

30-31. In the result, all these petitions are allowed and the orders passed by the respondent-Board cancelling the result of the petitioners of SSC Examination held in March 1990 and debarring them from appearing in four subsequent examinations are hereby quashed and set aside. The respondent-Board is directed to assess the petitioners' answer books in accordance with law and declare their results within two weeks from today. Rule is accordingly made absolute with no order as to costs.

32. Petitions allowed.