

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 6480 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

DHARABEN DHANSUKHBHAI JOSHI
 Versus

GUJARAT GAUN SEVA PASANDGI MANDAL THROUGH SECRETARY

Appearance:

DEEPAK N KHANCHANDANI(7781) for the Petitioner(s) No. 1
 MR. KRUTIK PARIKH, ASSISTANT GOVERNMENT PLEADER for the
 Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE BIREN VAISHNAV

Date : 21/04/2022

ORAL JUDGMENT

1 Rule returnable forthwith. Mr. Krutik Parikh, learned AGP, waives service of rule on behalf of the State – respondent. With consent of learned advocates appearing for the respective parties matter is taken up for final hearing.

2 Discretion under Article 226 of the Constitution of India, can or cannot be exercised in favour of a petitioner depends on the facts and circumstances of a case. Bound by the rules, it may be the case of the respondent that exercise of discretion in favour of the petitioner would tantamount to overstepping. Facts in this case would show otherwise. The petitioner, a young lady aged 29 years, who was taking care of her ailing mother suffering from cancer has by the impugned order dated 25.11.2021 been debarred from appearing in any competitive examination that may be held by the Gujarat Subordinate Services Selection Board for a period of three years. Reading of the impugned order indicates that while the petitioner appeared for the competitive examination for the post of Senior Clerk, Class-III, through oversight, she carried her mobile phone into the hall. The invigilator having found her possessing a mobile, confiscated it and opined that the petitioner was found using unfair means. The question is whether the fall out of this action and debarring the petitioner from appearing in any examinations that may be held by the Board for a period of three years can be held to be reasonable.

3 Facts in brief would indicate that an advertisement was issued for competitive examinations for the post of Senior Clerk, Class-III. The petitioner applied for the same. Written examinations were scheduled on 31.07.2021. The examination centre of the petitioner was at a school in Rajkot. The reporting time was 10 am for the exams to be held from 11 am to 1 pm. The petitioner is a resident of Amreli. Pleadings in the petition and as argued by Mr.Khanchandani, learned advocate, indicates that the mother of the petitioner was a cancer patient undergoing treatment at a hospital. She was discharged from the hospital on 27.07.2021. Obviously therefore, the petitioner was under immense pressure due to the critical ailment of her mother. Considering the fact

that the mother was ailing and needed care and attention, the explanation of the petitioner of entering the hall with the possession of the mobile with her which was in the pouch during the examination was not well appreciated by the authorities. Just 15 minutes before the examinations could be completed, it appears that the mobile which was not on the silent mode rang, which came to the notice of the invigilator and the phone was confiscated.

4 On 04.10.2021, the petitioner received a letter from the respondent asking her to remain present on 11.10.2021 at 12 p.m to give an explanation. The petitioner remained present on 11.10.2021. Mr.Khanchandani, learned counsel for the petitioner, would invite the Court's attention to the statement given by the petitioner on 11.10.2021. Reading the statement would indicate that the petitioner had explained that she had rushed to the centre after paying attention to the needs of the mother who was in the critical stage of her disease. Forgetting about the instructions that warranted her to deposit her mobile outside, she stepped into the hall. The statement would indicate that she had stated that it was not the case that she had used her mobile for operating and searching the internet. She admitted the lapse and based on this admission, the respondents holding that the petitioner had committed unfair means, debarred her from appearing in any examination for period of three years.

5 It appears that Non Secretariat Clerk examinations which were postponed earlier are scheduled to be held on 24.04.2022. By virtue of the impugned order, the petitioner is not permitted to appear in the said examination to be held by the Subordinate Selection Board.

6 Mr.Khanchandani, learned counsel for the petitioner, would submit that considering the fact that the petitioner's mother was ailing from cancer, failing to put the mobile phone on silent mode and carrying it in the pouch into the examination hall was completely unintentional. Had the petitioner the intention of using the phone, she would have put it on silent mode and made attempts to surf the net on the phone which infact has not even been the case of the respondents. Carrying the mobile phone itself therefore cannot be branded as an unfair means and result in debarring the petitioner from any examinations for a period of three years.

6.1 Mr. Khanchandani, learned counsel, would rely on a decision of the Delhi High Court dated 08.04.2013. He would submit that in the facts of that case, the information bulletin provided that a candidate would be guilty of using unfair means if he was found using electronic gadgets as mobile phones. Carrying of a mobile phone itself could be an inadvertent act which itself cannot be held to be one as unfair means and result in debarring the candidate for a period of three years.

7 Mr.Krutik Parikh, learned AGP, appearing for the respondent - State would vehemently oppose granting of any relief in favour of the petitioner. He would submit that the hall ticket itself stipulated as per condition, namely, condition no. 10 that a candidate was prohibited from carrying a mobile phone into the examination hall. Even the OMR Sheet had instructions particularly instruction No.8 which notified a candidate that he could not carry a mobile phone or any other electronic gadget in the examination hall.

7.1 Mr.Parikh, learned AGP, would rely on the Rules namely the Sr.

Clerk, Class-III, in the Non Secretariat Departments & Offices (Competitive Examination) Rules, 2016. Rule 15 provides for disciplinary actions against the candidate. Rule 14 provides for prohibition to use certain devices in the examination hall. Sub Rule 2 of Rule 14 provides that a candidate shall not be allowed to carry amongst other things, a cellular phone that would make the candidate guilty of using unfair means during the examination. Relying on Clause 1 of Rule 15, Mr.Parikh, learned AGP, would submit that it is within the domain of the authority that in case a candidate is found violating any of the conditions for admission to appear in the examination, a candidate is liable to be disqualified by the Board from appearing the examination or be debarred either permanently or for a specific period.

7.2 Inviting the Court's attention to the Minutes of the Meeting held by the Gujarat Subordinate Services Selection Board, in light of the paper leak controversy, Mr.Parikh, learned AGP, submitted that the Board had resolved that if any candidate was found in possession of a mobile phone or any other electronic device, such a candidate shall be debarred from appearing in any competitive examination for a period of three years. In his submission therefore, the order impugned in the petition cannot be faulted as it was within the limits of the powers that the authorities have exercised.

7.3 On the aspect of discretionary relief that be granted to the petitioner, Mr.Parikh, learned AGP, would also oppose the petition on the ground that though the order impugned was passed on 25.11.2021, more than six months thereafter, the present petition is filed challenging this debarment. Reliance was placed on a decision of the Hon'ble Supreme Court in the case of ***The State of Tamil Nadu & Ors. vs. G.Hemalathaa***

& Anr., in Civil Appeal No. 6669 of 2019 dated 28.08.2019. That was the case of a candidate using unfair means as she had underlined some portions of the answer sheet with pencil despite the rule being otherwise. The Hon'ble Supreme Court referring to the decision in the case of **Umeshchandra Shukla vs. Union of India**, held that hard cases cannot be allowed to make bad law. A strict construction of the rules must be permitted to operate and the High Court cannot hold otherwise when the rules are such which permit imposing debarment. The observations of the Supreme Court "hard cases make bad law" is emphasized to submit that it may be unfortunate that a candidate is debarred from undertaking a public examination but the fact remains that once having been found in possession of mobile phone which was prohibited, no mercy can be shown to such a candidate.

8 It is not a matter of dispute that when the provisions of the rules required a candidate not to carry a mobile phone within the hall is breached, consequences can or should follow. The question is whether the consequences should have followed in a case on hand has to be tested on the anvil of it being reasonable. Was in the facts of the present case, the Board justified to debar a candidate and disqualify her from appearing for three years in public examination just because the rule provided so is to be considered in the facts that have unfolded during the submissions made by the learned counsel for the parties and the pleadings in the petition.

9 Notwithstanding the age of the petitioner being on her side, she being 29 years of age and may be having a promising career in future and chances to appear in several examinations that may be conducted by the present Subordinate Selection Board or other agencies, was this single act

of carrying a mobile phone so reprehensible that she needs to be debarred for a period of three years is the question. Pleadings in the petition and the statements made by the petitioner at the time of her being given an opportunity of personal hearing indicates that the girl had a mother ailing from cancer. The mother, in a critical stage was discharged from hospital on 27.07.2021. The examinations were scheduled on 31.07.2021 at Rajkot. She was a resident of Amreli. A plausible explanation was tendered by her when she offered to do so at the hearing that being under tremendous pressure due to attending her mother who was critically ill, she inadvertently carried her mobile into the hall. That coupled with the fact that no emboldened attempt was made on her part to deceive the respondents by putting it on a silent mode and just because by accident it rang 15 minutes before the examinations were to end, emboldened the authorities to confiscate her mobile and brand her of using unfair means.

10 In the facts and circumstances of this case, the rigour of the rule was applied without compassion and application of mind. Reasonableness tempered with mercy was expected of authorities rather than mathematical application of rules.

For all these reasons, the impugned order dated 25.11.2021 is quashed and set aside. The petitioner shall be held eligible to appear in all the examinations that are held hereinafter by the Gujarat Subordinate Services Selection Board. Since the order impugned is quashed and set aside, needless to say that the petitioner shall be permitted to appear in the examinations notified on 24.04.2022 pursuant to the advertisement no. 150/2018-2019 and a call letter be issued to appear. The petition is allowed, accordingly. Rule made absolute. Direct service, today is permitted.

(BIREN VAISHNAV, J)

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