

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**  
**R/SPECIAL CIVIL APPLICATION NO. 1499 of 2020**

**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 ?	

KIRITKUMAR RAVJIBHAI SHARMA  
Versus

PRINCIPAL/TRUSTEE SARASWATI KADAVNI MANDAL

Appearance:

MR GAUTAM JOSHI, SENIOR COUNSEL WITH MR BHAVESH J PATEL(6801) for the Petitioner(s) No. 1

MS SURBHI BHATI, ASST GOVERNMENT PLEADER for the Respondent(s) No. 2,3,4

MR S M KIKANI(7596) for the Respondent(s) No. 1

**CORAM: HONOURABLE MR. JUSTICE BIREN VAISHNAV**

**Date : 21/02/2022**

**ORAL JUDGMENT**

1. Rule returnable forthwith. Mr. S.M. Kikani and Ms. Surbhi Bhati, learned advocates for the respondents no. 1 and 2 to 4 respectively waive

service of notice of rule. With the consent of the learned advocates, matter is taken up for final hearing today. Heard learned advocates for the respective parties.

2. This petition has been filed by the petitioner challenging the communication dated 03.12.2019 by which the State has confirmed the order cancelling the appointment of the petitioner.

3. The facts in brief would indicate that pursuant to the an NOC granted by the District Education Officer on 04.12.2004 to recruit an Assistant Teacher, the respondent no. 1 advertised for the post of Assistant Teacher on 05.12.2004. The petitioner appeared for the selection and as per the selection committee's report the petitioner was placed at Sr. No. 1 with 23.56 marks, one Arvindbhai Patel was at Sr. No. 2 with 22.43 marks and one Valand Vinodkumar was at Sr. No. 3 with 20.64 marks. Based on a certificate of the Gujarat State Basketball Association dated 03.02.2005 which stated that the petitioner had participated in the state level basketball competition at Devgadhi Baria from 16.12.2004 to 29.12.2004, the petitioner was given an additional two marks and therefore found his name at Sr. No. 1. He was issued with an appointment order on 02.02.2005.

3.1 In April 2009, the Commissioner of Mid-day meal Schemes and Schools found that the petitioner was not entitled to the additional two marks and therefore his appointment was not in consonance with the certificate that was produced and his appointment be cancelled. The respondent no. 1 sought to terminate his appointment vide order dated 12.11.2009. The same was challenged before the Tribunal by the petitioner by filing Application No. 195 of 2009. It appears that on

29.12.2019 when the application was listed, during the course of hearing it transpired that the termination should be in accordance with the provisions of Section 36 of the Gujarat Secondary Education Act. The order of termination was subsequently withdrawn.

3.2 On an appeal being filed by the petitioner wherein it was specifically contended that the member of the Gujarat Secondary Education Board was a member of the selection committee the appointment could not have been cancelled, the petitioner failed. An appeal to the Commissioner too failed. The State by the impugned order of 03.10.2019 confirmed the order and held that the petitioner's appointment was not in consonance with the resolution dated 15.11.2003 inasmuch as the petitioner was not entitled to the additional benefit of two marks based on the certificate of the Gujarat State Basket Ball Association.

4. Mr. Gautam Joshi, learned Senior Counsel appearing with Mr. Bhavesh Patel, learned advocate for the petitioner would contend that apart from the fact that the petitioner did participate in the basketball competition for which certificate was given, the appointment was made in the year 2005 and more than four years thereafter it is not open for them to cancel the appointment on the ground of they having committed a mistake. The member of the Gujarat Secondary Education Board was a part of the selection committee. Moreover, he would also draw the attention of the court to an interim order of the Tribunal by which the contender second in line Mr. Arvind Patel who had made an application for being joined as party respondent in the Tribunal subsequently withdrew the application and also withdrew the petition which was filed in this court. The contending candidate no. 2 in the list who otherwise

would be eligible on the petitioner's removal therefore gave up his right to claim appointment.

5. Mr. Surbhi Bhati, learned AGP would draw the attention of the court to the affidavit-in-reply and submit that the certificate produced by the petitioner could not have been taken into consideration inasmuch as it was a mere certificate of participation in the sport and only if the team had ranked, any marks could have been awarded to the petitioner. The mistake that was committed was sought to be rectified. To an order dated 03.10.2011 of the State in one such case wherein the order of the Commissioner of Schools cancelling the appointment after six years was set aside on the ground of delay, Ms. Bhati would contend that the facts were not similar and in the present case the rectification was done after four years.

6. Considering the facts on hand, what is evident is that the petitioner was appointed vide order dated 04.12.2004. To contend by the State that the appointment was provisional inasmuch as terms and conditions of the order dated 02.02.2005 so mentioned can not be of any support to the case of the respondents inasmuch as taking a stand four and half years after his appointment was certainly a case correcting a mistake belatedly. In this regard, it shall be worthwhile to make note of a decision of the Apex Court in the case of **Bharat Sanchar Nigam Limited vs. BPL Mobile Cellular Ltd. reported in (2008) 13 SCC 597**. The Apex Court therein has held as under:

“32. Indisputably, mistakes can be rectified. Mistake may occur in entering into a contract. In the latter case, the mistake must be made known. If by reason of a rectification of mistake, except in some exceptional cases, as for

example, where it is apparent on the face of the record, mistake cannot be rectified unilaterally. The parties who that would suffer civil consequences by reason of such act of rectification of mistake must be given due notice. Principles of natural justice are required to be complied with. The fact that there was no mistake apparent on the face of the records is borne out by the fact that even the officers wanted clarification from higher officers. The mistake, if any, was sought to be rectified after a long period; at least after a period of three years. When a mistake is not rectified for a long period, the same, in law, may not be treated to be one.”

6.1 Accordingly, even if it is a mistake it was not open for the authorities to so rectify it after four and half years of the petitioner having been appointed to the post.

7. Assuming for the sake of argument that it was open for the authorities to do so, further facts would indicate that the petitioner had participated in the sport of basketball. A certificate was also annexed accordingly. It is not the case of the respondents that the certificate was obtained by fraud so as to mislead the authorities in accepting the fact of the petitioner's participation when in fact it was not. Even if two marks are even then discounted for such a stand and accepting it, the marks of the petitioner would be 21.56. Candidate no. 2 Mr. Arvind Patel who had sought to be impleaded as party respondent in application filed by the petitioner before the Tribunal abandoned his claim. It is evident from the order of the Tribunal dated 08.08.2019 passed below Ex. 19 in Application No. 1253 of 2014. Third candidate in merit had marks of 20.64 which is lesser than the petitioner. Even on this count therefore, no case is made out for the respondent authorities to cancel the appointment of the petitioner at this stage.

8. Accordingly, petition is allowed. The impugned order dated 03.12.2019 is hereby quashed and set aside. The petitioner's appointment shall be treated as one having been made after due procedure. No mistake or illegality has been so committed. He shall therefore be entitled to all benefits available to a regularly selected candidate and he be paid salaries in accordance with the grant-in-aid policy of the State . Rule is made absolute. Direct service is permitted.

DIVYA

**(BIREN VAISHNAV, J)**