Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION No.677 OF 2019

Rhea Ghanashyam Sardesai,
aged 22, daughter of Ghanashyam
Sardesai, unmarried, resident of
House No.375, 'Vruddhi',
D.B. Bandodkar Road,
Miramar, Panaji, Goa. ….. Petitioner.

Versus

1) Goa University,
through the Hon'ble Vice Chancellor,
Taleigao Plateau, Goa 403 206,

2) The Controller of Examinations,
Goa University,
Taleigao Plateau, Goa 403 206.

3) Don Bosco College of Engineering,
through the Principal,
Fatorda, Margao, Goa 403 602. ….. Respondents.

Mr. Anirudha Borkar, Advocate for the Petitioner.

Ms. A. A. Agni, Senior Advocate with Ms. Jay Sawaikar, Advocate for Respondent No.1.

Mr. C. A. Ferreira, with Mr. Shane G. Pereira and Mr. Allan Andrade, Advocate for Respondent No.3.

Coram : M.S. Sonak &
C.V. Bhadang, JJ.

Reserved on : 4th November, 2019.
Pronounced on : 5th November, 2019.

JUDGMENT : (Per M.S. SONAK, J.)

Heard learned Counsel for the parties. Rule. Rule is made returnable forthwith, with the consent of and at the request of the learned Counsel for the parties.

2. The challenge in this petition is to the notice and order dated 8/5/2019 and 24/6/2019, imposing penalty of annulment of the performance of entire T.E. Civil Engineering Examination (Semester VI) held in November/December 2018 plus two chances.

3. This petition was initially directed against the order/notice issued by the Controller of Examinations, Goa University, informing her the decision of the Vice Chancellor, imposing the following penalty upon the Petitioner on account of her resorting to unfair means at the T.E. Civil Engineering Examination (Semester VI):

> *"Annulment of performance of entire T.E. Civil Engineering examination (Semester VI) held in November/December 2018 plus two chances. The candidate is permitted to appear for the examination to be held in May/June 2020 and onwards."*

4. By an order dated 13/05/2019, the learned Single Judge of this Court entertained the present petition and made an interim order, permitting the Petitioner to appear for Semester VI examination, scheduled on 14.05.2019. By further order dated 22.5.2019, the Petitioner was permitted to appear for papers scheduled on 3.6.2019, as well. However, it was made clear that there shall be no assessment of such answer papers, which were to be kept in a sealed cover until further orders.

5. After institution of the Petition, the Petitioner was furnished a copy of the order dated 24.6.2019, in which she was informed that the penalty imposed upon her has been confirmed. The Petitioner, by amending the petition has, therefore, challenged the order dated 24.6.2019, as well.

6. Mr. Borkar, learned Counsel for the Petitioner, by relying upon AO-5.14.18 submits that the University is mandatorily required to conclude the process leading to imposition of any penalty for resort to unfair means by a student within 6 months or, in any case, before the commencement of the next examination. He submits that in the present case, the next examination commenced on or about 13.05.2019 and the process has concluded by issuance of order dated 24.06.2019, way beyond the prescribed period. He, therefore,

submits that the impugned order dated 24.06.2019 is required to be set aside, since beyond the prescribed period the Vice Chancellor of Goa University lacked any authority to impose any penalty.

7. Without prejudice to the aforesaid, Mr. Borkar submits that in the present case, the Petitioner, at the earliest opportunity, had admitted to being in possession of the copying material. However, the Petitioner denied the actual copying from such material. He submits that there is absolutely no evidence on record that the Petitioner actually copied from her Apple Smart Watch, which she accidentally and unintentionally carried into the examination hall. Mr. Borkar submits that in such circumstances, the maximum penalty that could have been imposed upon the Petitioner was, annulment of the performance of entire examination and not annulment of the performance of the entire examination plus two chances. Mr. Borkar points out that even the show cause notice dated 18.12.2018, issued to the Petitioner required the Petitioner to show cause as to why the penalty of annulment plus one chance, be not imposed upon her. He submits that ultimately, the penalty imposed upon the Petitioner travels beyond the penalty proposed in the initial show cause notice dated 18.12.2018. He, therefore, submits that the impugned orders, to the extent they propose penalty beyond annulment of performance of the entire

examination, warrant interference.

8. Ms. Agni, learned Senior Advocate appearing for Goa University submits that the provisions prescribing the time period in AO-5.14.18 are not mandatory, but only directory. She submits that this is clear from the use of expression *"ordinarily"* in AO-5.14.18(b). In any case, she submits that in the facts of the present case, there is absolutely no prejudice demonstrated by the Petitioner and the contention that the Vice Chancellor is denuded of his authority to impose penalty, is quite misconceived.

9. Ms. Agni referred to the material on record before the Unfair Means Inquiry Committee and pointed out that the Petitioner had never admitted that she was in possession of the copying material, so as to attract the penalty of only annulment of the performance of entire examination. In any case, she submits that there is ample evidence on record to sustain the finding of fact that the Petitioner was actually caught copying from the material on the smart watch, in the course of the examination. She relies on ***Director (Studies), Dr. Ambekar Institute of Hotel Management, Nutrition & Catering Technology, Chandigarh and ors. Vs. Vaibhav Singh Chauhan***[1] to submit that the scope of judicial review in such matters is extremely limited and sympathy has no role

1 (2009) 1 SCC 59

in such matters. She submits that this decision is an authority for the proposition that mere possession of a slip during the course of examination constitutes malpractice, irrespective of the fact whether or not the slip was actually used for copying. For these reasons, Ms. Agni submits that this Petition may be dismissed and the interim orders made earlier, vacated.

10. Mr. C.A. Fereira, learned Counsel for Respondent No.3 supports and adopts the submissions made by Ms. Agni, learned Senior Advocate appearing for Goa University.

11. Rival contentions now fall for our determination.

12. On the first aspect, reference is necessary to be made to AO-5.14.18, which reads as follows :

> *"AO-5.14.18(b). (a) The Examiner, shall, if he suspects unfair means while evaluating the answer scripts or other material, return the said answer scripts or other material with reasons in writing for such suspicion on evaluation to the Controller of Examinations by name separately. He/she shall enter 'suspected unfair means case' against the code number of the candidate in the input form.*
>
> *b) Ordinarily, the University shall conclude the process within a period of six months or in any case before the commencement of the next examination."*

13. Sub-clause (b) of AO-5.14.18, no doubt, suggests that the

University must conclude the process of inquiry into the allegations of unfair means within a period of six months ordinarily. However, the sub-clause proceeds to state that such process, in any case, is required to be concluded before commencement of next examination.

14. Aforesaid means that as far as possible, the University must complete the process within six months and, in any case, such process must be completed before commencement of the next examination. The reason for such a provision is quite clear. If, ultimately, the student is found not to have indulged in any unfair means, such student should not be deprived of the opportunity for appearing at the next immediate examination, merely because of the delay on the part of the University in concluding the process. In the facts of the present case, however, we are not inclined to go into the issue, whether requirement of concluding the process before commencement of the next examination is mandatory or directory, because in the facts of the present case, the Petitioner has been found to have indulged in unfair means. In fact, the Petitioner has herself admitted that she was in possession of copying material and such admission is more than sufficient to conclude that the Petitioner had indeed indulged in unfair means, in the course of the examination. Therefore, in the peculiar facts of the present case, we are not inclined to entertain or uphold the contention raised on behalf of

the Petitioner that the Vice Chancellor is denuded of his jurisdiction to impose any penalty beyond the period prescribed in clause (b) of AO-5.14.18.

15. In order to appreciate the Petitioner's next contention, however, reference is necessary to the provisions in AO-5.14.19, which deals with the schedule of penalties to be imposed for various types of unfair means. Relevant extracts from this ordinance read as follows :

> "***OA-5.14.19 Schedule of Penalties to be imposed for various types of unfair means.*** *(No changes)*
> ***(A) Theory Examination.***

Sr. No.	***Nature of Unfair Means***	***Quantum of punishment***
1.	*Possession of copying material = Admit*	*Annulment of the performance of entire examination.*
2.	*Possession of copying material = Denial*	*Annulment of the performance of entire examination. + one chance.*
3.	*Possession of copying material = actual evidence of copying = Admit*	*Annulment of the performance of entire examination. + one chance.*
4.	*Possession of copying material + actual evidence of copying = Denial*	*Annulment of the performance of entire examination. + two chances*
5.	*Possession of another*	*Annulment of the*

	candidate's answer -book but no evidence of copying = Admit.	*performance of entire examination. + once chance (Both the candidates)*
6.	*Possession of another candidate's answer -book but no evidence of copying = Denial.*	*Annulment of the performance of entire examination. + two chances (Both the candidates)*
7.	-	-
8.	-	-
9.	-	-
10	-	-
11	-	-
12	-	-
13.	-	-
14.	-	-
15.	-	-
16.	-	-
17.	-	-
18.	-	-
19.	-	-
20.	-	-

I) All the other offences not covered in the schedule given above should be dealt with according to the gravity of the offences.

II) If on previous occasion also disciplinary action was taken against a student for malpractices at examination and he/she is caught again for malpractices at examination then, he/she is to be dealt with severely. Such students can be imposed with enhanced punishments. This enhanced punishment may extend to two to three times the punishment provided for the act committed at the second or subsequent examination.

*B) **Practical Examination** :*
Candidates involved in malpractices at practical examinations will be dealt with as per the provisions for theory examinations."

16. From the aforesaid, it transpires that where a student is found in possession of copying material and the student admits to such a charge, then, the quantum of punishment prescribed is annulment of the performance of entire examination only. Further, where a student is found in possession of the copying material and admits to copying from such material, the quantum of punishment prescribed is annulment of the performance of entire examination, plus one chance. It is only where the student is found, in the course of an inquiry to be in possession of the copying material and there is actual evidence of copying from such material, the penalty of annulment of the performance of entire examination, plus two chances can be imposed, that too, where the student has not admitted, but denied the charge.

17. In the present case, we agree with Mr. Borkar, learned Counsel for the Petitioner that the Petitioner, at the earliest opportunity, has admitted to the charge of being in possession of the copying material *i.e.* Apple smart watch, which contained material having nexus with the examination which she was answering on the

fateful day. The submission of Ms. Agni that there was no admission on the part of the Petitioner as regards this aspect, deserves no acceptance, if one has to go by the material on record.

18. The incident of resort to unfair means is alleged to have taken place on 17.11.2018. On the same day, the Petitioner tendered a written letter to the Chief Conductor, admitting that she was wearing a smart watch in the examination hall, which was confiscated. She expressed regrets about carrying the watch and profusely apologized for the same. This was followed by yet another communication dated 21.12.2018 in response to the show cause notice issued to her by the Controller of Examinations, in which, she accepted that she was found in possession of the smart watch with which she walked into the examination hall, unknowingly and for this she tendered her apology, as well. In the communication dated 21.12.2018, however, the Petitioner denied the charge of using the watch for actually copying. To the same effect, are other replies/communications addressed by the Petitioner to the authorities, in which she has accepted that she was found in possession of the smart watch, which, in the facts and circumstances of the present case can be regarded as the copying material. Therefore, we are unable to accept the contention of Ms. Agni and Mr. Fereira that the Petitioner had no where admitted being in possession of the copying

material, so as to attract the punishment of annulment of the performance of entire examination only and not the punishment which is imposed upon her by the University.

19. The next issue which arises for consideration is whether there is any evidence at all on record to suggest that the Petitioner was found to be actually copying from the very smart watch which is to be regarded as the copying material.

20. The University and the College referred to the statement of the Junior Supervisor Mr. B.R. Anirudha before the Unfair Means Inquiry Committee, in which he has stated that he found the Petitioner copying from the smart watch. He has elaborated this by stating that he noticed the brightness of the dial of the watch changing and, therefore, he called Senior Supervisor Shwetha Prasanna. Upon arrival of the Senior Supervisor Shwetha Prasanna, the watch was confiscated from the Petitioner.

21. Though the Senior Supervisor Shwetha Prasanna and two others have also deposed in the course of the inquiry before the Unfair Means Inquiry Committee, there is really nothing in the evidence of these witnesses from which the finding that the Petitioner was actually found to be copying from the smart watch, can be

sustained. Statement of Mr. B.R. Anirudha, if read in its entirety, only suggests that he noticed the brightness of the smart watch and on such basis, he suspected that the Petitioner was actually copying from her smart watch. Even, in a domestic inquiry, mere suspicion cannot take the place of proof. In any case, on such basis, it cannot be said that there is any material on record to sustain the finding that the Petitioner was actually found to be copying from the smart watch.

22. It is pertinent to note that in this case, none of the witnesses have bothered to compare the material found on the smart watch and the material reflected in the answer papers of the Petitioner. If this exercise were to be undertaken, then, possibly it could be said that the Petitioner was found to be actually copying from the material found on the smart watch. Based upon a vague statement of B.R. Anirudha, it is not possible to sustain the finding that the Petitioner was found to be actually copying from the smart watch in her possession in the examination hall. As noted earlier, in order to attract the punishment of annulment of performance of entire examination, plus two chances, the charge against the student has to be in possession of copying material and actual evidence of copying. Further, for such penalty to apply, the student must have denied the charge of possession of copying material and actually copying in the

course of the examination.

23. Possibly, realising the aforesaid position, even the show cause notice issued to the Petitioner on 18.12.2018 required the Petitioner to show cause as to why the penalty of annulment of the performance of entire examination plus one chance be not imposed upon the Petitioner. The penalty, ultimately, imposed upon the Petitioner, however, travels beyond the show cause notice dated 18.12.2018 issued to her. The justification that such show cause notice referring to annulment of the performance of entire examination plus one chance was issued to the Petitioner, because there are instances where the students admit to the charge of possessing of copying material and actually copying cannot be accepted. According to us, this is no justification for issuing a show cause notice proposing a particular penalty and thereafter proceeding to impose enhanced punishment, for which there was no show cause notice issued in the first place.

24. In ***Union of India and others vs. Gyan Chand Chattar***[2] the Hon'ble Apex Court, in the context of departmental inquires, has held that the finding should not be perverse, nor the same should be based on conjunctures and surmises. Further, there is a distinction

[2] (2009) 12 SCC 78

between *"proof"* and *"suspicion".* *In* ***Roop Singh Negi vs. Punjab National Bank and others*** [3]**,** the Hon'ble Apex Court again, in the context of departmental inquiries, has held that though the provisions of the Evidence Act may not be applicable in a departmental proceeding, finding based upon surmises and conjunctures cannot be sustained. Further, the Hon'ble Apex Court has held that suspicion, as is well known, however high may be, can under no circumstances, be held to be a substitute for legal proof. In ***Taralakshmi Maneklal Thanawalla (since deceased) through LRs. vs. Shantilal Makanji Dave and ors***.[4] this Court has held that the expression *'no evidence'* should not be construed literally, and in a pedantic manner, meaning thereby that there is no evidence at all or total dearth of evidence. The expression takes within its sweep and includes cases of evidence which may not reasonably support the main conclusion. Where finding is on the basis of evidence, which taken as a whole, is not reasonably capable of supporting the finding, or the finding is based upon conjectures or surmises, it can well be said to be a perverse finding or a finding based on *no evidence* and therefore capable of correction by a certiorari.

25. In any case, the material on record clearly establishes that the Petitioner was found in possession of the copying material *i.e.*

---

[3] (2009) 2 SCC 570

[4] 2015 (5) Mh.L.J. 933

Apple Smart Watch and, further the Petitioner has clearly admitted to be found in possession of the copying material *i.e.* Apple Smart Watch. There is absolutely no evidence on record to support the finding that the Petitioner was actually caught copying from the Apple Smart Watch, so as to attract the penalty of annulment of the performance of entire examination plus two chances. Accordingly, we uphold the contention of Mr. Borkar that in the present case, no penalty over and above the annulment of the performance of entire examinations could have been imposed upon the Petitioner, in the facts and circumstances of the present case.

26. The ruling in *Vaibhav Singh Chauhan* (supra), is clearly distinguishable. In that case, the omnibus contention that the possession of a slip during the course of examination does not constitute *"unfair means"* in the absence of actual evidence of copying from that slip, was negatived by the Hon'ble Apex Court. No such issue arises in the present case, inasmuch as it is not even the case of the Petitioner that the possession of the copying material *i.e.* Apple Smart Watch, in the course of the examination, does not constitute *"unfair means"*. Besides, in *Vaibhav Singh Chauhan* (supra), there was no Ordinance akin to Ordinance OA-5.14.19 which prescribes in precise terms for quantum of punishment to be

imposed in relation to the nature of unfair means specified. In the present case, the Ordinance with which we are concerned, specifically provides that where a student is found in possession of copying material and such student admits to such possession, then, the quantum of punishment prescribed is annulment of the performance of the entire examination and nothing further. Besides, this is not a case of any relief is being extended to the Petitioner on the basis of sympathy or by reappreciating the material before the Unfair Means Committee. Rather, this is a case where the University has ignored the relevant portions of its own Ordinance, but relied upon the portions which were clearly not attracted in the facts and circumstances of the present case. Besides, this is a case where the evidence of actual copying from the smart watch is based upon no evidence whatsoever.

27. Accordingly, we uphold the impugned order to the extent it annuls the performance of the Petitioner's entire T.E. Civil Engineering (Semester VI) Examinations held in November/December 2018. However, we quash and set aside the impugned order to the extent it debars the Petitioner from appearing for Semester VI Examinations for the next two chances.

28. Based, upon the interim orders made in this Petition, the

Petitioner has already appeared for Semester VI Examinations in May-June, 2019. We, therefore, direct the Respondents to declare such results on or before 10/11/2019. In case the Petitioner does not pass in the said Examinations or even otherwise, the Petitioner is to be permitted to appear for her Semester VI Examinations scheduled from 11/11/2019. This direction is issued because Mr. Borkar, learned Counsel for the Petitioner expresses apprehension that the Petitioner might not pass the Examinations held in May/June 2019, which examinations she had to answer under severe mental stress on account of the penalty imposed upon her.

29. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

30. All concerned to act on the basis of an authenticated copy of this order.

C.V. Bhadang, J. ***M.S. Sonak, J.***