

(1995) 02 GUJ CK 0034
In the Gujarat High Court

Ajit D. Padival

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 22-02-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 226, 233

Citation : (1995) 1 GLR 889

Hon'ble Judges : H.L. Gokhale, J

Bench : Single Bench

Judgement

H.L. Gokhale, J.—This writ petition under Article 226 of the Constitution of India (hereafter mentioned as ""Constitution"" for short) involves

the consideration of the controversy concerning the recommendation of eligible persons made by the High Court in December 1994, for the

appointments to the posts of District Judges and Ahmedabad City Civil Court Judges, under Article 233 of the Constitution. The petition contains

mainly two grounds, namely, (a) the alleged denial of equal opportunity of being considered for the said offices under Article 16 of the Constitution;

and (b) the recommendations allegedly not being made by the Full Court contrary to the requirement of Article 233. During the course of the

arguments, two more grounds were also pressed, namely, (c) regarding the relevant rules being in derogation of the authority of the High Court

under Article 233; and (d) regarding the procedure followed in the matter of actual selection.

2. The petitioner is an Advocate practising in the Gujarat High Court for last about 14 years and has filed the present petition being aggrieved by

the aforesaid breaches of the provisions of the Constitution. It is his view that an advertisement calling the applications for these posts is a must. He

submitted that in some other High Courts, Recruitment Rules have been framed, providing for inviting of the applications and, in as much as, the

Gujarat High Court has not followed that procedure or "a procedure known to law" (as stated in the petition), many deserving candidates are left

out apart from causing injustice to some interested persons. He has, therefore, prayed to set aside the action of making the appointments by not

following the procedure like issuing advertisement and inviting applications for not being in consonance with Articles 233 and 309 of the

Constitution. He has also sought a declaration that the respondents are duty bound to get the approval of the Full Court while making these

appointments under Article 233. He has further sought a direction to the respondents to frame the necessary rules under Article 233 read with

Article 309 of the Constitution. Needless to state that he has sought an order restraining the respondents from making any appointments in the

cadre of District Judges and City Civil Court Judges, pursuant to the above referred interview and selection until the matter is fully heard and

decided.

3. The first respondent to this petition is the State of Gujarat, through the Secretary, Legal Department, the second respondent is the Registrar of

the High Court of Gujarat and the third respondents are the Honourable Members of the Selection Committee. When the matter first came up

before me on 16th January, 1995, after hearing the petitioner-Advocate in person, I formed an opinion that, it will be better that the papers of this

matter are placed before the Honorable the Chief Justice to consider whether the matter should be heard by a Division Bench taking up the

constitutional matters or some other Division Bench considering the importance of the issue raised. Accordingly, I directed the Registrar to place

the papers before the Honourable the Chief Justice. In view of the administrative order passed by the Honourable the Chief Justice thereafter, the

matter was referred back to me and it was placed before me on 19th January, 1995.

4. When the matter appeared before me on 19th January, 1995, at the outset, I draw the attention of Mr. Padival to the report which had

appeared in an Ahmedabad daily on 17th January, 1995, a copy of which was tendered to me by my Sherestadar. The report gave an impression

that the petition has been admitted by this Court on 16th January, 1995, apart from containing some other erroneous statements. Mr. Padival

accepted that the report was erroneous and assured that by the time the matter is subsequently heard, necessary clarifications will be issued. I

would like to record that Mr. Padival, accordingly, saw to it that the necessary clarification was issued. He also filed his own affidavit affirmed on

21st January, 1995, expressing regret for the said erroneous report.

5. As stated above, mainly two submissions have been made in the petition, one of which is regarding the recommendations not being made by the

Full Court. Since I had the personal knowledge of the fact that the decision had been taken by the Full Court, to which I was a party, I informed

Mr. Padival accordingly and asked him whether he has any objection to my taking up the matter, on which Mr. Padival stated that he has no such

objection to my taking up the matter. Thereafter, I drew the attention of Mr. Padival to certain statements in the petition as it initially stood in

paragraphs 11 and 14 thereof. In my view, the statements therein were scandalous and would have invited appropriate action. On drawing his

attention to those paragraphs, Mr. Padival expressed his regret and sought to delete those paragraphs. Necessary amendment was carried out

forthwith. After hearing Mr. Padival, I formed a view that certain information was required to be placed officially on the record of this matter. In

the case of Hari Datt Kainthla and Another Vs. State of Himachal Pradesh and Others, the Supreme Court had held as follows:

Where the Government acts on the recommendation of the High Court while making appointment of District Judges and the action of the

Government is challenged by way of writ petition, in order to facilitate appreciation of issues raised, the administrative side of the High Court, if

joined as a party, must appear and place before the Court the entire record for a fair and judicial adjudication of the issues on the judicial side of

the High Court.

Following that dicta, I sought information from respondent No. 2 on the following four questions:

(a) Whether there are any rules governing the process of selection of the direct appointees to the cadre of the District Judges and City Civil Court

Judges.

(b) If so, what has been the procedure followed by the High Court to assess and consider the eligible candidates.

(c) Who has finally taken the decision to recommend the selected candidates; whether the Full Court or otherwise.

(d) Whether the recommendations have been forwarded to the Governor of Gujarat.

6. Mr. Padival did not press for any ad-interim injunction on the recommendations at that stage and that was recorded and, accordingly, notice was issued to respondent No. 2 by my order dated 19th January, 1995. In my view, no notice was required to respondent No. 3, i.e., the

Members of the Selection Committee, inasmuch as, no allegations have been made against them in the petition nor have they any interest in the

selection made one way or the other. A similar approach has been approved by the Honourable Supreme Court in the case of Union Territory of

Chandigarh Vs. Dilbagh Singh and others, . A dubious selected list of candidates for appointment to Civil posts prepared by a Selection Board

was interfered with and set aside by the Chandigarh Administration. That was done without any notice to the members of the Selection Board. The

said action was interfered by the Central Administrative Tribunal. The Supreme Court reversed the decision of the Central Administrative Tribunal

and held in paragraph 7 of the said judgment that an opportunity of hearing to the members of the Selection Board cannot be a requirement of

either law or any principle of natural justice. It is so for the reason that, no member of the Selection Board acquires any vested right or interest in

sustaining a selected list prepared by the Selection Board.

7. Respondent No. 2 filed an affidavit-in-reply on the returnable date, i.e., on 21st January, 1995. He was represented by the Government

Pleader, who also waived the service of the notice for respondent No. 1 and has appeared on its behalf as well. With respect to query No. (a), it

is stated as follows:

The recruitment of District Judges and City Civil Court Judges is made as per provisions of the Gujarat Judicial Service Recruitment Rules, 1961.

Rule 6 thereof deals with the method of recruitment to the Senior Branch, i.e., the District Judges and City Civil Court Judges. No separate

process is laid down by any statutory provision.

Thereafter, Rule 6 is quoted, the relevant clauses of which read as follows:

6. Method of recruitment to the Senior Branch:

(1) The appointment to the post of the Principal Judge of the Ahmedabad City Civil Court shall be made by the Governor in consultation with the

High Court by selection from amongst the Judges of the City Civil Court or the District Judges, or the members of the Bar.

(2) (i) the appointment to the post of a District Judge shall be made by the Governor-

(a) In consultation with the High Court by promotion from amongst the members of the Junior Branch who have ordinarily served as Assistant

Judges, or

(b) on the recommendation of the High Court from amongst members of the Bar who have practised as Advocates or Pleaders for not less than

seven years in the High Court or Courts subordinate thereto:

Provided that a person recruited at the age of not more than 45 years (except in the case of a person belonging to a community recognized as

Backward by Government for the purpose of recruitment in whose case at the age of not more than 48 years) shall before he is appointed as a

District Judge, be appointed in the first instance to be an Assistant Judge for such period as may, on the recommendation of the High Court, be

decided by Government on the merits, of his case:

Provided further that, ordinarily the number of posts to be filled in by promotion under Sub-clause (a).shall be equal to the number of those to be

filled on the recommendation of the High Court from amongst members of the Bar under Sub-clause (b).

(ii) the appointment to the post of a Judge of the City Civil Court, Ahmedabad, shall be made by the Governor-

(a) on the recommendation of the High Court from amongst the members of the Bar who have practised as Advocates or Pleaders for not less

than seven years in the High Court or Courts subordinate thereto, and (b) in consultation with the High Court from amongst the District Judges, the

Chief Judge, Small Cause Court, Ahmedabad, and the Chief Metropolitan Magistrate, Ahmedabad or from amongst District Judges by transfer.

8. On query No. (b), it is stated in the affidavit that, as per the resolutions passed at the Chamber Meeting, the subject of selection and promotion

of Judges is to be dealt with by the Standing Committee and, therefore, the matter was placed before the Standing Committee on 20th September, 1994, when it was decided to fill up the vacancies from the members of the Bar. It was further decided to request all the District Judges, including the Principal Judge, City Civil Court, to suggest names of eligible and willing Advocates having 7 years practice at the Bar upto the maximum age of 50 years for being considered by the High Court. The Honourable the Chief Justice also requested all the Honourable Judges of the High Court to recommend names of eligible candidates as per above decision. All the concerned were accordingly requested to send recommendations to High Court. Thereafter, it is further stated in the affidavit that, as per the decision of the Standing Committee held on 27th October, 1994, a Sub-Committee was constituted comprising of the Honourable the Chief Justice and the next two senior most Judges to finalise the selection process latest by 15th December, 1994. The Sub-Committee decided to call all the candidates for personal talks. On receipt of the names, the candidates were, accordingly, called and the members of the Sub-Committee had personal talks with them and interviewed them and prepared a list of selected candidates. It is further stated that the above procedure has been followed by the High Court since its inception and that it is inherited from the Bombay High Court, as it then was followed.

9. With respect to query No. (c), the affidavit states as follows:

The report of the Sub-Committee, i.e., names of selected candidates was placed before the Full Court for consideration at the Chamber Meeting held on 28th December, 1994. The Full Court approved the selection made by the Sub-Committee. Thus, the decision of the Sub-Committee has become the decision of the Full Court.

On query No. (d), it is informed that the recommendations of the High Court have been already forwarded to the Government of Gujarat on 17th January, 1995.

10. In view of this affidavit, the Government Pleader was asked as to how many candidates were recommended and interviewed, on which he informed that the number of candidates interviewed was 52, out of whom, 4 have been recommended for appointment as District Judges and 3 for appointment as Judges of the City Civil Court, at Ahmedabad. Mr. Nanavati also

tendered a copy of the Gujarat Judicial Services Recruitment Rules, 1961, and the same has been taken on record and marked as Annexure ""X"". These rules are prepared in exercise of the powers conferred by Article 234 and the proviso to Article 309 of the Constitution, as the Preamble of the rules state. The relevant portion of Rule 6, with which we are concerned, has already been quoted above. Mr. Nanavati pointed out that the provision with respect to appointment to the post of District Judge contained in Rule 6(2)(i)(b) and the one with respect to appointment to the post of a Judge of the City Civil Court, Ahmedabad, contained in Rule 6(2)(ii)(a) is on par with the provision contained in Article 233 of the Constitution. He further stated that these rules state nothing more or nothing less than what is contained in Article 233. After the aforesaid return was made by respondent No. 2, Mr. Padival moved an amendment, seeking to add paragraph 16(A) and one Annexure marked as Annexure ""A"" to his petition. The Annexure contains a xerox copy of a notice issued by the High Court of Himachal Pradesh inviting applications for the posts of Additional District and Sessions Judges. The said amendment application dated 21st January, 1995 is allowed, though Mr. Nanavati has preferred not to file any reply thereto. Mr. Padival has, therefore, filed his rejoinder to the aforesaid reply which is affirmed on 30th January, 1995. Mr. Nanavati has stated that the respondents deny the allegations contained therein and his denial is recorded. He could not file a further affidavit, inasmuch as, the Registrar concerned had, in the meanwhile, been transferred to the City Civil Court as Additional Principal Judge. The only submission in the rejoinder which required to be dealt with was one contained in paragraph 8 therein. It was contended therein that, since I had heard the matter on 16th January, 1995 and sent the papers to the Honourable the Chief Justice to decide as to whether the matter should be heard by a Division Bench, it was not expected of the High Court to forward the recommended names in the meanwhile, i.e., on 17th January, 1995, in view of the pendency of the matter. With respect to this allegation, Mr. Nanavati submitted that, much later, i.e., on 19th January, 1995, Mr. Padival has not pressed for any ad-interim order, the recommended names had been forwarded by the concerned section of the Administration and that was not so done intentionally to frustrate the

relevant reliefs as prayed in the petition. Mr. Nanavati, however, submitted that, if for any reason, this Court felt that on that ground itself an interim

order was necessary, this Court may as well pass the same. In view of this statement, I hold that the allegation is unsustainable.

11. It may be also stated for the sake of record that, Advocates, Mr. Avinash Mankad and Mr. P.J. Mehta filed two Civil Applications seeking to

be impleaded as parties in this petition. However, inasmuch as, they were allowed to intervene and address the Court along with Senior Advocates

Mr. H.M. Mehta and Mr. Girish Patel, the learned Advocates did not press for orders on the Civil Applications. A number of authorities were

cited from both the sides to assist this Court by all the concerned Advocates.

12. The petitioner, amongst others, relied upon the observations of the Law Commission of India in its 14th Report made in the year 1958. He

relied upon the relevant quotation from the said report quoted in paragraph 9 of its judgment by the Honourable Supreme Court in the case of All

India Judges' Association Vs. Union of India and others, . The Law Commission has stated in the said report as follows:

If we are to improve the personnel of the subordinate judiciary, we must first take measures to extend or widen our field of selection so that we

can draw from it really capable persons. A radical measure suggested to us was to recruit the judicial service entirely by a competitive test or

examination. It was suggested that the higher judiciary could be drawn from such competitive tests at the all-India level and the lower judiciary can

be recruited by similar tests held at State level. Those eligible for these tests would be graduates who have taken a law degree and the requirement

of practice at the Bar should be done away with.

Such a scheme, it was urged, would result in bringing into the subordinate judiciary capable young men who now prefer to obtain immediate

remunerative employment in the executive branch of Government and in private commercial firms. The scheme, it was pointed out, would bring to

the higher subordinate judiciary the best talent available in the country as a whole, whereas the lower subordinate judiciary would be drawn from

the best talent available in the State.

13. As it will be seen, the recommendation in the report is to widen the field of selection. The method of holding competitive test or examination is

a suggestion made to the Commission and not that of the Commission and it is incorporated by the Commission in its report. Mr. Padival however, submitted that it is high time that the recommendations of the Law Commission made way back in the year 1958 be put into practice. He submitted that, if one wants to extend or widen the field of selection, so as to draw really capable persons, there was no alternative to issuing advertisement and inviting applications. He, therefore, pressed in service the fact that some other High Courts have adopted such a method. He, therefore, drew my attention to the notice of the Himachal Pradesh High Court brought on record through the amendment, inviting applications for the posts of Additional District and Sessions Judges, through public notice for making the recommendations under Article 233 of the Constitution. In the petition, it is averred in paragraph 6 that, in the States of Karnataka, Andhra Pradesh, Kerala, Rajasthan and Madras also, similar recruitment rules have been framed, but he could not produce those rules.

14. Before I proceed with the submissions made from both sides, it will be relevant to reproduce the relevant Article 233 along with Article

234 of the Constitution of India, which read as follows:

233. Appointment of District Judges: (1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be

made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less

than seven years an Advocate or a Pleader and is recommended by the High Court for appointment.

234. Recruitment of persons other than District Judges to the judicial service: Appointments of persons other than District Judges to the judicial

service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State

Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

15. Both these Articles form part of Chapter VI (which is on Subordinate Courts) from Part VI of the Constitution. Now, it is material to note that,

whereas Article 233 deals with the appointment of District Judges, Article 234

deals with recruitment of persons other than District Judges. Article

233 is sub-divided into two parts. Article 233(1) deals with (a) appointments, (b) posting and (c) promotion of the District Judges in any State and

it is stated that they shall be made by the Governor in consultation with the High Court exercising jurisdiction in relation to such State. Article

233(2) deals with a specific category of the appointees, namely, the persons not already in the service of the Union or of the State. The Advocates

being considered for appointment to the posts of District Judges will fall in this category. For this category, it is further stated that a person in this

category shall only be eligible to be appointed if (a) he has been for not less than seven years an Advocate or a Pleader, and (b) the person

concerned is recommended by the High Court for appointment. Article 236 (a), which is on interpretation, states, amongst others, that the

expression ""District Judge"" includes Judge of a City Civil Court. Article 234 which deals with persons other than District Judges on the other hand

states that their appointments shall be made (a) by the Governor of the State, and (b) in accordance with the rules made by him in that behalf, after

consultation with the State Public Service Commission and the High Court. Thus, framing of the rules, after consultation with the State Public

Service Commission and High Court and the action in accordance with the said rules is a must when it comes to recruitment of persons other than

District Judges. As far as the appointment of the District Judge is concerned, Article 233 does not provide for the decision of appointment to be in

accordance with any such rules. When it comes to the appointments from the category of Advocates, all that Article 233 requires is that the

appointment shall be in consultation with the High Court and the Advocate concerned shall be eligible to be appointed (a) only if he has put in not

less than seven years as an Advocate or a Pleader and (b) if he is recommended by the High Court for his appointment. Thus, the recommendation

by the High Court forms a very important part for an Advocate to be eligible to be appointed as a District Judge.

16. Now the questions to be considered are:

(1) Whether an Advocate has a right to know through appropriate advertisement and a right to apply for being considered before the High Court

decides to recommend some names to the Governor.

(2) Whether in view of the absence of these expectations, the present recommendations can be considered to be violative of Article 14 and particularly Article 16 (1) of the Constitution.

(3) Whether it is necessary that the decision in this behalf to recommend has to be made by the Full Court and, if so, in what manner.

(4) Whether there should be any norms or method in selection and whether the present selections are bad in the absence of any such norms and the decision being taken only on the basis of interview.

(5) Whether the relevant rules can be said to be in derogation of the authority of the High Court.

17. Before I deal with the aforesaid questions, it is necessary to see as to what is the scope of Article 233 in the light of the other relative Articles.

Article 235 of the Constitution vests the control over subordinate Courts completely in the High Court. It is true that the appointment of the District

Judge has to be made by the Governor, but the same has to be done in consultation with the High Court only. As held by the Supreme Court in

M.M. Gupta and Others Vs. State of Jammu and Kashmir and Others, , "Art. 235 of the Constitution vests the control of judicial administration

completely in the High Court excepting in the matter of initial appointment and posting of District Judges and the dismissal, removal or termination

of services of these officers. Even in these matters, the requirement of the Constitution is that the Governor must act in consultation with the High

Court. If in the matter of appointment, the High Court is sought to be ignored and the executive authority chooses to make the appointment,

independence of the Judiciary will be affected." While emphasising the role of the High Court in this behalf, a Constitution Bench of the Supreme

Court had earlier held in Chandramouleswar Prasad Vs. The Patna High Court and Others, as follows:

The appointment of a person to be District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so

in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there has been a

deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be

promoted as District Judges. The High Court alone knows their merits as also

demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court about B's claim vis-a-vis A's promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constitution. Consultation with the High Court under Article 233 is not an empty formality.

18. Recently, in the case of Supreme Court Advocates-on-Record Association and another Vs. Union of India, in the context of Article 217 (1)

which deals with the appointment of High Court Judges, Honourable Mr. Justice Pandian observed in paragraph 120 (of AIR) as follows:

It is clear that under Article 217(1), the process of "consultation" by the President is mandatory and this clause does not speak of any discretionary

"consultation" with any other authority as in the case of appointment of a Judge of the Supreme Court as envisaged in Clause (2) of Article 124.

The word "consultation" is powerful and eloquent with meaning, loaded with undefined intonation and it answers all the questions and all the

various tests including the test of primacy to the opinion of the CJI.

Similarly, the consultation with the High Court under Article 233 also is neither discretionary nor an empty formality, but is a must before the

appointments are made thereunder.

19. As far as the provisions of Article 235 are concerned, the provisions thereof along with that of Article 309 of the Constitution came up for

consideration before the Honourable Supreme Court in the case of B.S. Yadav and Others Vs. State of Haryana and Others, . In that case, in the

context of the control over the subordinate Courts, the Supreme Court held as follows in paragraph 46:

In the first place, the power of control conferred upon High Courts by the first part of Article 235 is expressly made subject, by the second part of

that Article, to laws regulating conditions of service of its Judicial officers. The first part of Article 235 is, as it were, subject to a proviso which

carves out an exception from the area covered by it. Secondly, the Governor, in terms equally express, is given the power by the proviso to Article

309 to frame rules on the subject. A combined reading of Articles 235 and 309 will yield the result that though the control over Subordinate

Courts is vested in the High Court, the appropriate legislature, and until that legislature acts, the Governor of the State has the power to make rules

regulating the recruitment and the conditions of service of Judicial officers of the State. The power of the legislature or of the Governor thus to

legislate is subject to all other provisions of the Constitution like, for example, Articles 14 and 16.

That was a case concerning determination of seniority of the subordinate Judicial officers in accordance with the relevant rules and in that context,

the Supreme Court held that the power of the Legislature or of the Governor to legislate on the relevant subject is subject to all other provisions of

the Constitution like, for example, Articles 14 and 16.

20. The question before me is whether the considerations of Articles 14 and 16 can be brought in while looking into the recommendations made

under Article 233 of the Constitution. Article 235, as seen above, is admittedly, on a different footing and deals with the control of the subordinate

Judiciary after the appointments are made. As far as the appointments themselves are concerned, they are governed under separate Articles,

namely, Article 233 for the District Judges and Article 234 for the Judges other than the District Judges in the subordinate Judiciary. While dealing

with this issue, it will be necessary to look into the constitutional scheme and the nature of the post of a District Judge. Firstly, as stated above, the

District Judge has to be appointed only on consultation with the High Court and in case of members of Bar, they become eligible only if they have

put in seven years as Advocates or as Pleaders and are recommended by the High Court for the appointments. The post of a District Judge is a

very significant post in the scheme of Judicial Administration and is, therefore, specifically dealt with separately by a special Article, namely, Article

233. It is a post under the Constitution. As aptly described by the Supreme Court in the case of All India Judges' Association v. Union of India

(supra) the District Judge is the principle Judicial Officer of the district. As the Honourable Supreme Court states in paragraph 31 of the said

judgment in All India Judges" Association Vs. Union of India and others, ""the District Judge is the principal Judicial officer of the district. Ordinarily every revenue district has a District Judge and his seat is located at the headquarters. In heavy stations, the District Judge has a team of Additional District Judges to assist him. There would also be a number of judicial officers of lower categories working at the headquarters. It is the obligation of the District Judge to operate as the captain of the team both under his direct supervision at the headquarters and in respect of the officer located in different areas within his district. Of late, lower or subordinate Courts are being established in the outlying and rural interior. It is the obligation of the District Judge to inspect the outlying Courts, maintain the proper judicial tempo and temper of functioning in his district and be responsible for the efficient running of the system."" Again, it is material to note that the judicial service is not service in the sense of employment, at whatever level the Judges may be. In paragraph 4 of the judgment in the case of All India Judges" Association and Others Vs. Union of India and Others, the Supreme Court has recorded that the members of the judiciary exercise sovereign judicial power of the State. They are pillar of the State itself and they represent the authority of the State. As stated by the Supreme Court in the said judgment, the judicial service cannot be construed in the sense of an employment. I am aware of the observations of that the Supreme Court are not in the context of Article 14 or 16, but one cannot ignore the significance of the relevant observations when one has to construe the scope of Article 233. The Supreme Court states in paragraph 4 therein as follows:

It is not necessary to repeat here what has been stated in the judgment under review while dealing with the same contentions raised there. We cannot, however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hostility displayed by the review petitioners to the directions given in the judgment. The judicial service is not service in the sense of "employment".

The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the Council of Ministers and the members of the legislature. When it is said that in democracy such as

ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three

essential functions of the State are entrusted to the three organs of the State and each one of them in the represents the authority of the State.

However, those who exercise the State power are the ministers, the legislatures and the Judges, and not the members of their staff who implement

or assist in implementing their decisions. The Council of Ministers or the political executive is different from the secretarial staff or the administrative

executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges

from the judicial staff. The parity is between the political executive, the legislators and the Judges and not between the Judges and the

administrative executive. In some democracies like the U.S.A., members of some State Judiciaries are elected as much as the members of the

legislature and the heads of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative

executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the

judiciary, either constitutionally or functionally.

Mr. Patel submitted, in this context, that the judicial service may not be construed as an employment, but as far as the District Judges are

concerned, they constitute a part of the subordinate judicial service as distinct from the higher judiciary consisting of the Supreme Court and the

High Courts. He, therefore, submitted that the observations of the Supreme Court in the aforesaid case cannot be used to deny the application of

Articles 14 and 16 to these officers. The Courts presided over by the District Judges and the city Civil Court Judges are, undoubtedly, subordinate

Courts, inasmuch as, they are covered in Chapter VI entitled as ""Subordinate Courts"". However, that will not take away the character of a pillar of

the State at whatever level they may be and the element of sovereignty that is passed on to them. Again, it cannot be ignored that the appointment

of a District Judge under Article 233 is to be made ""in consultation with the High Court"" and the same provision and terminology of consultation

with the appropriate Constitutional Authorities is provided under Article 217(1). This is quite distinct from the provision of Article 234 where the

appointments of persons other than District Judges are to be made in accordance with the rules, though these rules are made after consultation with the State Public Service Commission and the High Court. Whereas on the one hand a similar terminology is used in Article 233 which is comparable with Article 217(1), the methodology used in Article 233 is different and distinct from the one in Article 234. This will, certainly, not take away the significance attributed to the Judges other than District Judges by the Honourable Supreme Court in the above referred judgment, when it stated that "Judges at whatever level may be, represent the State and its authority". However, under the scheme of the Constitution itself, if a distinction is made between Article 233 and Article 234, that cannot be lost sight of. Whereas Article 234 requires the appointments to be made in accordance with the rules, Article 233 requires the appointments of District Judges to be made only on consultation with the High Court. It appears that the Constitution makers were conscious of the pivotal role that the District Judge plays in the Judicial Administration. In the Civil matters, certain types of matters, including those against the State can be heard and decided by the District Judges. The capital punishment can be imposed only by the District and Sessions Judge (though to be confirmed by the High Court). No doubt, the other subordinate Judges have also every chance to rise to the High Judiciary through their promotional channel, but as far as the District Judges are concerned, they are only one step short of their appointment to the High Court. These are some of the factors which make their position distinct from that of other subordinate Judges and which provide for a different methodology in Article 233 as distinct from Article 234.

21. Having noted the nature of the post of a District Judge, then comes the question as to whether it is permissible to restrict the zone of consideration in any manner. As stated in the reply filed by the Registrar, the authority to make the recommendation is that of the High Court and all the High Court Judges were asked to suggest the names for consideration. Apart from the High Court Judges, the District Judges were also asked to suggest the names of Advocates for consideration. Thus, in a way, the High Court has sought suggestions of names from a source which is not contemplated in Article 233(2), which is done on the basis of past practice. The demand is to widen the area further and to issue regular

advertisement and to seek applications.

22. The next question is whether in the absence of any such advertisement being issued, the procedure followed can be hit by Articles 14 and 16

of the Constitution. Way back in the case of Banarsi Das and Others Vs. The State of Uttar Pradesh and Others, in the context of Government

employment and Article 16 the Supreme Court observed as follows:

It is open to the appointing authority to lay down the requisite qualifications for recruitment to Government service and it is open to that authority to

lay down such pre-requisite conditions of appointment as would be conducive to the maintenance of proper discipline amongst Government

servants

Article 16 of the Constitution is an instance of the application of the general rule of equality laid down in Article 14, with special reference to the

opportunity for appointment and employment under the Government. Like all other employers, Governments are also entitled to pick and choose

from amongst a large number of candidates offering themselves for employment under the Government.

Again in Govind Dattatray Kelkar and Others Vs. Chief Controller of Imports and Exports and Others, in the context of recruitment from different

sources, the Supreme Court observed as follows in paragraph 12:

Under Article 16 of the Constitution, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any

office under the State or to promotion from one office to a higher office thereunder. Article 16 of the Constitution is only an incident of the

application of the concept of equality enshrined in Article 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and

promotion. It follows that there can be a reasonable classification of the employees for the purpose of appointment or promotion. The concept of

equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of

one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to

the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid

classification.

In S.B. Mathur and Others Vs. Chief Justice of Delhi High Court and Others, the Supreme Court quoted with approval its observations in the case

of Ashok Kumar Yadav and Others Vs. State of Haryana and Others, and then observed in paragraph 19 as follows:

This decision points out that the minimum eligibility qualification has to be kept distinct from the zone of consideration and even if there are a large

number of candidates who satisfy the minimum eligibility requirement, it is not always required that they should be included in the zone of

consideration, it being open to the authority concerned to restrict the zone of consideration, amongst the eligible candidates in any reasonable

manner.

23. In the present case, we are concerned with a post for which a provision is made under the Constitution itself and, as interpreted by the

Supreme Court, the Judges at all level form a part of the authority of the State, but the aforesaid judgments indicate that, even in cases of other

employments under the State where Articles 14 and 16 apply, it is permissible to the authority to lay down pre-requisite conditions conducive to

the maintenance of proper discipline Banarsi Das and Others Vs. The State of Uttar Pradesh and Others, . A preferential treatment to one source

in relation to the other is also permissible if the same is based on differences between the two sources and the differences have a reasonable

relation to the nature of the office to which recruitment is made Govind Dattatray Kelkar and Others Vs. Chief Controller of Imports and Exports

and Others, and it is always open to an authority concerned to restrict the zone of consideration amongst the eligible candidates in a reasonable

manner S.B. Mathur and Others Vs. Chief Justice of Delhi High Court and Others, .

24. Mr. Patel submitted that an advertisement or a notice was a must. How does otherwise one know that the High Court is going to fill the

vacancies in the cadre of District Judge or City Civil Court Judge? He relied upon the observations of the Supreme Court in paragraph 10 of J and

K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., . The Supreme Court was concerned with the recruitment to be

made by the Public Service Commission in that case and the Supreme Court observed that ""when the Rules prescribe direct recruitment, every

eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment.

Inviting applications for recruitment to fill in notified vacancies is consistent with the right to apply for by qualified and eligible persons and

consideration of their claim to an office or post under the State is guaranteed right given under Articles 14 and 16 of the Constitution." That,

however, will not apply in all cases. In fact, as Mr. H.M. Mehta fairly pointed out, in the case of B.S. Minhas Vs. Indian Statistical Institute and

Others, the Supreme Court observed, "of course, we do not wish to suggest for a moment that appointment to every post must be made only after

advertising or publishing the vacancy. That would not be right, for there are quite a few posts at the top level which cannot be and should not be

advertised or published, because they are posts for which there should be no lobbying nor should any applications be allowed to be entertained.

Examples of such posts may be found in the post of Commander of Armed Forces or the Chief Justice or the Judges of the Supreme Court or the

High Court." Then in paragraph 28 of the said judgment, the Court further stated that "there is no provision for publicity in case of the constitutional

posts of the Judges of the Supreme Court and High Courts and Comptroller and Auditor General of India. Rather in the very nature of things, they

cannot be and are not publicised." In my view, the same analogy applies to the appointments to be made under Article 233.

25. In fact, it is material to note that in A. Panduranga Rao Vs. State of Andhra Pradesh and Others, the Supreme Court has, in terms, held that "a

candidate for direct recruitment from the Bar does not become eligible for appointment of District Judges in any State, without the recommendation

of the High Court, exercising jurisdiction in relation to such State. He becomes eligible only on such recommendation under Clause (2) of Article

233." Thus, before the recommendation is made, one may be qualified for being considered, having completed seven years at the Bar, but that

does not give eligibility. The eligibility comes only after the recommendation of the High Court, and deciding eligibility of the person concerned is

the function of the High Court.

26. Mr. H.M. Mehta, the learned Senior Advocate, appearing as Intervenor in support of the petitioner relied upon the judgments of the Supreme

Court in Krishan Chander Nayar Vs. The Chairman, Central Tractor Organisation and Others, paragraph T. Devadasan Vs. The Union of India

(UOI) and Another, (paragraph 15) and Indravadan H. Shah Vs. State of Gujarat and Another, (paragraph 10). He submitted that, as observed

by the Supreme Court in the aforesaid judgments, the right to equality under Article 16(1) is not only to make an application but to be considered

on merits for the post (as in Krishan Chander); the right to equality under the said Article means on every occasion for recruitment, the State

should see that all citizens are treated equally (as stated in Devadasan); and the basic principles which informs both Articles 14 and 16 is equality

and inhibition against discrimination (as stated in Indravadan). Mr. Padival relied upon a judgment of this Court reported in 1979 GLR 614 Kumari

Jayshree v. State to submit that absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is

based. He relied upon another judgment reported in 1983 (1) GLR 398 A.K. Shimpi and Ors. v. State of Gujarat and Ors. to justify laying down

pre-stated norms in accordance with which the suitability ought to be decided. There is no quarrel with these propositions. The point is whether

they can be invoked and extended to a constitutional post and in the light of the earlier discussion, my answer is in the negative.

27. Coming to the other three issues, namely, that the recommendation has to be made by the Full Court, there is no quarrel with the proposition,

and, as stated by me at the outset, in the instant case, the decision has been taken by the Full Court, which is also stated in the reply filed by the

Registrar. As observed by the Supreme Court in High Court of M.P. Vs. Mahesh Prakash and others, "the Chief Justice of High Court, as the

head of the judiciary in the State and in overall control of its administration knows better than most of his brother Judges about his subordinate

Judges. It is his function to appreciate their merits and demerits. He is entitled to record his comments upon them and make his views known

during relevant discussions at a Full Court meeting. Decisions regarding confirmation, promotion, supersession and the like of subordinate Judges

are taken at Full Court meetings. Every High Court Judge is of the same stature, the Chief Justice being the first among equals. Every High Court

Judge is expected to contribute to the discussions of the Full Court and participate in the decisions arrived at. This mode of dealing with the

confirmations, promotions and supersessions of those who man the subordinate judiciary is a sure safeguard against arbitrary or motivated

decisions." Mr. Padival then submitted that the functioning through Committees was impermissible and that decision by the Full Court will mean

participation by all the Judges at all stages. This will not be possible considering the fact that the sanctioned strength of this Court, presently, is 28

permanent Judges and 8 additional Judges. An organization like the Full Court will have to function through its Committees. The only point is that,

the same will have to be under the control of the Full Court. So long as the Full Court does not abdicate its power, any such functioning cannot be

condemned. A similar such situation came up before a Division Bench of the Kerala High Court in *Mary Teresa Dias v. Chief Justice*, reported in

1986 (1) SLR 380. In that case, a Committee was constituted to prepare a list of names suitable to be appointed as District Judges. The opinion

of the Committee was placed before the Full Court on the Administrative side and, after the joint deliberations, the decision of the Committee

became that of the High Court. In paragraph 11 of the judgment, the Division Bench observed as follows:

It will thus be seen that the High Court reserved its power of making the recommendation even when the Committee was constituted. The

Committee was not given authority to make the final decision or make the recommendation on behalf of the High Court. Instead of the

cumbersome procedure of all the Judges of the High Court sitting and interviewing all the candidates or verifying the applications to decide whether

the applications were defective or not and assessing the suitability to be appointed, a convenient method of the preliminary process of selection

being conducted by three senior most Judges of this Court was adopted. In fact this practice has been adopted from 1968 when selection was

conducted for the same post.

Mr. Padival presses into service two judgments of the Supreme Court in the case of *Prem Nath and Others Vs. State of Rajasthan and Others*, .

In that case, under relevant Rule No. 13, as held by the Supreme Court in paragraph 5 thereof, there was no provision empowering the High

Court to modify the list prepared by the Committee either by substituting others in the list whom the High Court considers more suitable or by

withdrawing or deleting any one of those selected by the Committee. The Supreme Court, therefore, held the relevant rules to be inconsistent with

the mandate of Article 233 and, therefore, invalid. That is not the position in the present case nor was it so in the matter before the Division Bench

of Kerala High Court. The other judgment pressed into service by Mr. Padival is in the case of Chandra Mohan v. State of U.P. AIR 1966 SC

1987. In that case, the Supreme Court had an occasion to consider the U.P. Higher Judicial Service Rules. Thereunder, the Governor prescribed

the qualifications and the Selection Committee appointed by him selected the candidates and the High Court had to recommend from that list. The

consultation with the High Court was, therefore, an empty formality. Certainly, the facts in the present case are quite different.

28. Mr. Padival then also pressed this judgment into service to submit that under Article 233, the consultation was only with the High Court and

none other. He submitted that, in the instant case, the relevant rules are bad, inasmuch as, they are framed in consultation with the Public Service

Commission, which is not the authority contemplated under Article 233. In this submission, Mr. Padival has lost sight of the fact that the relevant

rules are composite rules for appointment, etc. to the Senior Branch as well as the Junior Branch of judiciary. While making these rules, to the

extent they deal with the Junior Branch, consultation with the Public Service Commission is necessary as also with the High Court, which these

rules specifically state at the outset. Rule 6(2)(i)(b) which deals with the appointment to the post of District Judge and Rule 6(2)(ii)(a) which deals

with the appointment to the post of Judge of the City Civil Court, Ahmedabad, do not state anything more than what is stated in Article 233 nor do

they state anything less. The requirement of Article 233 is fulfilled in its entirety in the said rules. Nothing is added and nothing is subtracted. In that

view of the matter, it cannot be said that the rules are, in any way, bad for the reasons as alleged.

29. The last submission of Mr. Padival was that the method of interviews was not an appropriate one. That many candidates have reported that

their interviews were a formality and that the questions asked to all the candidates were not uniform. In this connection, the observations of a

learned single Judge of this Court on the use of interview in the case of A.K. Shimpi v. State of Gujarat can be profitably looked into. In the said

judgment reported in 1983 (1) GLR 398 in paragraph 123, the learned Judge has observed: ""In the case of services to which recruitment has

necessarily to be made from persons of mature personality, interview test may be the most suitable way, subject to the basic and essential

academic and professional requirements being satisfied."" One cannot dispute that the persons to be interviewed for District Judges' appointment are

persons with mature personality. The Committee is supposed to form its opinion and general impression after holding necessary talks and

interviewing the candidates concerned. No amount of written examination or any panel discussions can help in this. It is the assessment of merit and

the capability of the person to become a good District Judge, which is to be borne in mind by the Committee. There is bound to be some element

of discretion in such a method, but where there are no personal interests, such a discretionary element has got to be permitted. As held by the

Supreme Court in *Lila Dhar Vs. State of Rajasthan and Others*, ""it is for the interviewing body to choose the appropriate method of marking at the

selection to each service. There cannot be any magic formulae in these matters and Courts cannot sit in judgment over the methods of marking

employed by interviewing bodies unless it is proven or obvious that the method of marking was chosen with oblique motive.

30. In the light of the discussion above, I cannot hold that the principles of Articles 14 and 16 can be brought in while considering the

recommendations to be made under Article 233 of the Constitution of India. The procedure which is being followed is being followed for number

of years in this Court and it is as inherited from the Bombay High Court. Mr. Mankad submitted that the Bombay High Court itself has changed its

own method now and in number of other High Courts, applications are being invited for the appointments to be made under Article 233. Whether

that should be so done will be a matter for the Full Court to consider. Having looked at the scheme of the relevant provisions, I cannot hold that

the petitioner or any other Advocate has a right to seek an appointment to the post of District Judge. The persons have to be invited under the

scheme by the High Court and then to be recommended after appropriate deliberations and decision of the Full Court. The District Judges exercise

significant sovereign functions. They are pillars of the State itself and, hence, their offices cannot be construed to be an employment under the

State for the purposes of Article 16 of the Constitution.

31. There is another aspect of the matter. I repeatedly asked Mr. Padival as to whether any suggestions have been made or any representations

have been given to the present Chief Justice (B. N. Kirpal, C.J.), who has taken over as Chief Justice some times in December 1993, but no such

representation was brought to my notice. However, Mr. P.J. Mehta, Advocate, pointed out that he had made a representation, but having looked

into it, I do not find any suggestions for improvement governing the present controversy. Any suggestions for improvement are always welcome,

but if one insists on a right and a mandamus, that has got to be established and, in my understanding, the petitioner has failed to establish the same.

There is no doubt that as observed by the Law Commission earlier, measures to extend the field of selection are called for. In paragraph 65 of the

Supreme Court Judgment in Supreme Court Advocates-on-Record Association and another Vs. Union of India, the Supreme Court has recorded

with anguish the painful statement of Mr. M.C. Setalwad, Ex-Attorney General and Chairman of the 14th Law Commission, that the Commission

during its visits to all the High Court centres heard bitter and revealing criticisms about the appointment of Judges. That continues to be so as of

now. It is, therefore, necessary to consider measures whereby the zone of consideration can be appropriately widened. As such, presently, the

District Judges are also requested to suggest names. The Full Court may as well consider whether along with the District Judges, persons in the

same cadre occupying posts such as President of the Industrial Courts and Co-operative Tribunals etc. should also be requested to make

suggestions. The Full Court may as well consider whether the District Judges when transferred from place A to place B could suggest names from

the earlier districts as well. The last but not the least, the Full Court may as well consider suggesting to the District Judges to invite applications and

forward them to the High Court for its consideration. The High Court may invite the Rules of other High Courts and seek their views and

experiences. These are only suggestions for the consideration of the Full Court, it will be ultimately for the Full Court to consider whether to extend

the present method of selection and, if so, in what manner. The present petition, undoubtedly, impresses the need for doing the same.

32. The other aspect which is also to be borne in mind, as observed by the Supreme Court, is that it is the Full Court which is supposed to make the recommendations. It will, therefore, be appropriate for the Full Court to consider whether for these selections specific Committees should be constituted by the Full Court or whether specific additional members ought to be appointed over and above the first three senior most Judges, including the Honourable Chief Justice. The High Court must also keep in mind that proper representation to the meritorious Advocates coming from Scheduled Castes, Scheduled Tribes, Backward Classes, Minorities as also to lady Advocates is given. Needless to state that the entire material concerning the interviews and the opinion of the Committee members is required to be placed before the Full Court, whose decision in the matter has to be final. These again are observations for the consideration of the Full Court.

33. The petitioner has also made a prayer for a direction to the respondents to frame necessary Rules under Article 233 read with Article 309 of the Constitution. In my view, in view of the distinction between Articles 233 and 234 and in view of the similarity between the terminology used in Articles 233 and 217(1), such a direction to frame Rules cannot be issued. There is no provision for framing any such Rules contemplated under Article 233 and, hence, no direction, in that behalf, can be given. It will be, however, for the High Court to consider if it deems it fit to frame such Rules. In that case, on the Full Court forming such opinion, it will have to take up the matter with the Governor of the State to take the necessary action, but that is for the Full Court to decide and, in my view, no case is made out to issue a mandamus in that behalf.

34. If the number of persons to be appointed is five, it is no use interviewing 1000 persons. In fact, that is criticised by the Supreme Court in the case of Ashok Kumar Yadav and Others Vs. State of Haryana and Others, as something that will lead to undesirable practices with the suggestion that the number can be reasonably restricted. How that is to be done is for the appointing authority to decide. Widening the zone of consideration and reasonably restricting it are, in a way, diametrically opposite requirements, which are to be properly reconciled. That is by and large achieved in the present system and it cannot be seriously faulted.

35. One may say that the present system is not ideal and one may continue to suggest and strive to improve it. But there is no reason to condemn it altogether so long as it is within the constitutional parameters. There may be a few Advocates who may feel that they ought to have been considered and ways and means to consider maximum number of such persons (if not all) ought to be evolved. Improvement is a continuous process. Most systems are not perfect, including the present one. But the attempt should be to move towards perfection and at the same time, it cannot be lost sight of that the present system has also worked well by and large. The High Court Judges and the District Judges put together know (by and large) as to who are the persons worth considering. Factors to be considered are merit, capability and integrity. They are to be assessed in the generality and there cannot be a mathematical formula to decide the suitability when the number of persons to be appointed is very small. Leaving the decision to the High Court Judges, in such a situation, cannot be seriously faulted.

36. Ways and means to include some more good candidates are necessary to be considered. But that does not mean that the candidates suggested by all the Judges of the High Court and District Judges for consideration are not good. They are also substantial in number. When the best amongst these are selected and recommended, the attempt is to attain the best in the interest of the institution.

With the aforesaid observations, the petition is dismissed. Notice discharged.