
(1995) 02 GUJ CK 0026

In the Gujarat High Court

Case No : Letters Patent Appeal No. 52 of 1995 with C.A. No's. 332 and 356 of 1995

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, 19, 233

Citation : (1995) 1 GLR 911

Hon'ble Judges : R.K. Abichandani, J;R.A. Mehta, J

Bench : Division Bench

Judgement

Mehta, J.—This Letters Patent Appeal against summary rejection of the Special Civil Application, challenges the action of the High Court on administrative side in selecting and recommending the names for appointment to the posts of City Civil Judges and District Judges in Gujarat by way of direct recruitment. The challenge is based on the following grounds :-

(a) That the selection is arbitrary and denies equality of opportunity to all eligible and equally situated persons because all them have not been invited for consideration;

(b) That under Art. 233 of the Constitution of India, the decision is required to be taken by the Full Court on administrative side and in the present case, the decision cannot be said to have been taken by the Full Court;

(c) That the selection is arbitrary and that the said decision suffers from favouritism and nepotism;

(d) That the learned single Judge has erred in holding that, Arts. 14 and 16 cannot be invoked and extended to a constitutional post (para 26 of the judgment) and that the principles of Arts. 14 and 16 cannot be brought in while considering the recommendations to be made under Art. 233 of the Constitution of India (Para 30) and that the office of the District Judge cannot be considered

to be an employment for the purpose of Art. 16 of the Constitution of India.

2. At the beginning of the arguments, the appellant had raised an objection to the hearing of this appeal by this Bench. We have heard the appellant on that aspect and thereafter the appeal was heard on merits on March 1, 1995 and on the next day also for the full day and at the end of the day, the appellant stated that he had nothing further to add and the matter was adjourned to the next working day, i.e. on Monday, the 6th March 1995; and he made a Civil Application No. 356 of 1995 wherein the same cause has been reagitated and other prayer have been made. He completed his arguments in the first half of the day and in the second half of the day, Mr. Girish Patel, the learned Intervenor in the after made his submissions so also other learned Advocates Mr. Avinash Mankad and P. J. Mehta made their submissions. Today, Mr. H. M. Mehta, learned Senior Advocate has also made his submissions as Intervenor. The submissions of the appellant are at a great length, on all grounds whereas all the other learned Advocates have made their submissions on limited grounds. We will consider all these submissions at appropriate stage.

3. Dealing with the objection to the constitution of this Bench by the learned Chief Justice, the appellant submits that the selection committee is party respondent No. 3 to the petition and the appeal and since the Hon'ble the Chief Justice was the Chairman of the said respondent No. 3 Committee, he has no power to constitute any special bench to hear this Letters Patent Appeal.

4. As per the sitting list in force, Letters Patent Appeals for admission and final hearing are assigned to the First Court only consisting of the learned Chief Justice and another learned Judge. There is no other bench to which the Letters Patent Appeals have been assigned. In the present case, since the learned Chief Justice felt that he may not hear that matter, the question that necessarily arose is as to which Bench that necessarily arose is as to which Bench the matter should be assigned. The next two senior most Judges were also members of the same committee and in these circumstances, the question would arise to which Bench the matter could be assigned. This power exclusively vests in the learned Chief Justice and no one could have assigned this matter to any Bench. It is only the learned Chief Justice who has the power to assign matters and constitute Benches. Since the learned Chief Justice and other two senior most Judges were excluded by reason of the petitioner having chosen to join the selection committee as the respondent No. 3, I am the next senior most Judge and I have been sitting in the Division Bench with Mr. Justice S. K. Keshote. However, when this matter came to be filed and was required to be urgently circulated at the instance of the appellant, Mr. Justice S. K. Keshote was not available for a week. In these circumstances, the present special Bench has been constituted by the learned Chief Justice and the matter has been assigned to this Court. This power is only in the learned Chief Justice and of necessity, the learned Chief Justice has to exercise that power and assign the matter to a Bench and it had been assigned to the Bench of the next senior most Judge available. It is the power,

privilege and prerogative of the learned Chief Justice to assign the work and constitute Benches and no objection can be taken to such orders of the learned Chief Justice.

5. It is further submitted that the practice and procedure is that in the event of a particular Bench being unable to take up the matter for any reason, the same may be placed before the next available Bench and not before any specially constituted Bench. This is factually incorrect and wrong. There is no such practice prevalent. Every time, a bench has not been able to take up the matter for any reason, the office is required to obtain special orders of the learned Chief Justice and there is no such practice prevalent as is alleged by the appellant. There are good and valid reason for not having such practice whereby the matter may automatically go before a particular Bench in the event of some Bench not being able to take up the matter. Such practice can possibly give scope for avoiding/ selecting a particular Bench. The objection is thoroughly misconceived and without any merit and is rejected. Mr. Padival has made it clear that if the matter had come to this Bench as a regularly constituted Bench, he would not have any objection to this Bench hearing the matter. His objection is to be Chief Justice specially constituting a Bench.

6. Similar objections were taken in similar circumstances in Letters Patent Appeal No. 16 of 1993 when another learned Chief Justice had in a case of similar necessity to constitute a special Bench for hearing of the Letters Patent Appeal. Incidentally the present appellant was the learned Advocate appearing for the appellant in that matter. There also, the selection of judicial officer was challenged and the learned Chief Justice himself could not hear the letters patent appeal and it had been assigned to another Bench by constituting a special bench. At that time also, the senior most Judges were the members of the selection committee and the learned Chief Justice had constituted a special Bench consisting of the next available senior most judge (myself) and another learned Judge. In that case, five learned senior most Judges of the Court were made respondents and a similar objection was overruled by the judgment dated January 19, 1993.

7. The main arguments on merits are based on Arts. 14, 16 and 233 of the Constitution of India. It is submitted that for appointment and recruitment in public service including judicial service, the only procedure known to law of giving equal opportunity is inviting applications from eligible persons by public advertisements, and those who are willing to be considered may apply for the same so that no person is denied the opportunity of being considered for the public post. It is submitted that in the present case, there has been no such advertisement and large number of eligible persons have been left out of consideration and, therefore, the entire selection is violative of Arts. 14, 16 and 233 of the Constitution of India.

8. Article 14 and 16 of the Constitution of India provide that State shall not deny to any person equality before the law and equal protection of law and that there

shall be equality of opportunity for all citizens in the matters relating to employment or appointment to any officer under the State. Art. 233 is in Chapter VI relating to subordinate Courts and Art. 233 is relating to appointment of District Judges. It reads 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 in Advocate or a Pleader and is recommended by the High Court for appointment."

From the bare reading of the above Article, is clear that in order to be eligible to be appointed as a District Judge, a person should have :

(1) been an Advocate for not less than seven years; and

(2) is recommended by the High Court for appointment.

The appointing authority is the Governor of the State who can make the appointment only in consultation with the High Court. Thus, it is in the process of this consultation by the Governor that the High Court is required to make recommendations to the Government. This constitutional scheme of consultation and recommendation throws considerable light on the nature of the functions which the High Court is required to perform. The provisions for consultation and recommendation is found in various Articles of the Constitution as well as various legislations and this is a well-known concept and the procedure is required to be adopted in various situations under various provisions, such as appointments to Commissions of Inquiry, appointments to various Tribunals, Advisory Boards etc. Such procedure of recommendation and consultation is followed in other situations where the Governor is required to consult different authorities; for example, for appointments of Vice Chancellors of University. The consultee, namely, the High Court or the other authority which is required to make its recommendations, is making the recommendations to the appointing authority which is statutorily required to be advised. The Governor is required to be advised on other matters by the executive and in the matter of appointment of District Judges, he is required to consult the High Court because it has been recognised that the High Court is in proper position to know about the persons to be recommended and the subject of this nature. It is a kind of expert, knowledgeable, reliable and credible agency which can be trusted to make the recommendations and the procedure for the recommendations is left to the authority, namely, the High Court which has to make the recommendations.

9. The Rules of Business of High Court which are contained in the resolution passed by the Full Court Chamber meeting on December 4, 1986 and modified

from time to time provide for administration of subordinate judiciary. It is laid down therein that the functions (other than judicial) which the High Court is required to perform under the Constitution or under any other law in force from time to time shall ordinarily be discharged as indicated therein and a three-tier system has been devised. The matters which are lined in Annexure-A to the Resolution No. 1 are required to be dealt with and decided by the High Court as a whole and the matters which are listed at Annexure-B to the Resolution are to be dealt with and decided by the Standing Committee which is also constituted as per the resolution of the Full Court Meeting. Item 2 and 3 in the list Annexure-A relating to matters for Chamber Meeting read as follows :-

"2. All matters in which the High Court is required to be consulted or in respect of which the High Court is required to give its opinion or advice under the Constitution or under any other law for the time being in force.

3. Consider recommendations made by the Standing Committee."

List Annexure-B is relating to matters for Standing Committee. Item No. 4(a) thereof reads as follows :-

"4(a) Selection of the Judges of City Civil Court, District Judges and Assistant Judges from the Bar for approval by Chamber Meeting."

On reading the scheme of administration along with Art. 233 of the Constitution of India, it is clear that the High Court has evolved a procedure whereby this High Court which is having sanctioned strength of 28 permanent Judges and 8 additional Judges has evolved a procedure for conduct of its business and exercise of power. The Standing Committee has not been given any power of taking any final decision for recommending or selecting persons as Judges for City Civil Court or District Courts from the Bar. Resolution No. 2 which is part of the same scheme and passed on the same day provides that any Judge may fall for any file in respect of any matter assigned to the Standing Committee or to Administrative Judge for perusal and information and any such Judge can make any suggestion or recommendation in the matter and such suggestion is required to be considered in the next meeting. If the subject pertains to the Standing Committee, the matter will be considered by the Standing Committee and if any Judge wants the matter to be further considered by the Chamber Meeting, he has simply to make an endorsement in the file and the matter is then required to be placed before the Chamber Meeting and the decision of the Standing Committee would be subject to the decision that may be taken in the Chamber Meeting and the decision of the Chamber Meeting is required to be implemented. A copy of these rules was made available to the appellant at the hearing of this matter because he had made a complaint that he was not allowed to see there rules. A similar complaint was made two years ago in a similar Patent Appeal. He states that he was not allowed to see the rules even at that time. We may not enter into the controversy about those facts. However, this time we put it on the record that he has been shown these rules.

10. In the present case, the procedure followed has been set out in the affidavit filed by the Registrar of High Court in pursuance of the order of the learned single Judge. The learned single Judge had issued notice to the Registrar to furnish the following information :

"(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."

With respect to point (b), in the affidavit of the Registrar, it is stated as follows :-

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

As per resolutions passed at the Chamber Meeting for administration of subordinate judiciary, subject of selection and promotion of Judges is to be dealt with by Standing Committee and, therefore, the matter was placed before the Standing Committee on 20-9-1994 when it was decided to fill up the vacancies from the members of 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 Hon''ble Chief Justice also requested all the Hon''ble 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 vide decision taken at the Standing Committee Meeting held on 27-10-1994, it was decided to constitute sub-Committee comprising the Hon''ble the Chief Justice and Hon''ble Mr. Justices A. P. Ravani and M. B. Shah to finalise the selection process latest by 15-12-1994. The sub-Committee decided to call all the candidates for personal talks.

On receipt of the names of the candidates, they were called to appear before the sub-Committee for personal talks. The Hon''ble members of the sub-Committee had personal talks with each and every candidate who appeared and interviewed and then prepared a list of selected candidates.

I may respectfully submit that the above refereed procedure followed by the High Court is in practice since inception of this High Court. This practice is followed and inherited from the Bombay High Court as it then was followed. The post of District Judges and City Civil Court Judges is also provided under Art. 233 of the Constitution of India. This Article also lays down eligibility. Consequently, the

incumbent can also be said to be Constitutional functionary."

In the aforesaid background, it is required to be seen whether there is violation of any Constitutional provisions of Arts. 14 16 or 233 of the Constitution of India.

11. The appellant submitted that the learned single Judge has erred in answering in negative the point whether Arts. 14 and 16 can be invoked and extended to constitutional posts and in holding that the provisions of Arts. 14 and 16 of the Constitution cannot be invoked while considering the recommendations under Art. 233 of the Constitution of India. These observations, if read in isolation, may given an impression that the learned single Judge has negated the application of Arts. 14 and 16 of the Constitution of India to the question of recommendations for appointment to constitutional posts while considering recommendation under Art. 233 of the Constitution. However, if the entire judgment is read, what is held and conveyed is not that Arts. 14 and 16 are not applicable, but what is helps is that there is no violation of Arts. 14 and 16 in the present case. Any administrative decision whether it be of the executive Government or of the administrative side of the High Court, if it is alleged to be arbitrary or violative of Arts. 14 and 16 of the Constitution of India, it is required to be resolved on the judicial side by the High Court and it would not be correct to say that the High Court decision or the recommendation on the administrative side is immune from such challenge. We have proceeded on the footing that Arts. 14 and 16 of the Constitution can be invoked in such cases.

12. The question in the present case is whether the recommendation made by the High Court is in any manner arbitrary or violative of Arts. 14 and 16 of the Constitution of India. We may also indicate that though the post of District Judge is in large measure and quality different from other administrative service or public service and that it is part of the judicial service and judiciary, which is one of the pillars of the sovereign State, it cannot be said that the question of selection and appointment to such post is excluded from the operation of Arts. 14 and 16 of the Constitution of India. It cannot be said to be a service or an employment in the sense of "master and servant" or "employer-employee" relationship when we consider it as one of the pillars of the sovereign Government. Nonetheless, it is public service, public post charged with public duty and application of Arts. 14 and 16 of the Constitution of India to the questions relating to the same cannot be easily assumed to have been excluded.

13. On the question of the procedure for inviting eligible candidates and giving them equal opportunity for competing and consideration, our attention is invited to the Supreme Court judgment in the case of Umesh Kumar Nagpal v. State of Haryana & Ors. 1994 II CLR 4. It was a case regarding appointments on compassionate grounds wherein it is observed that as a rule, appointments in public services should be made strictly on the basis of open invitation of applications and no other mode of appointment is permissible and neither the Government nor public authorities are at liberty to follow any other procedure. Strong reliance has been placed on these observations and it is submitted that in

the present case, there has been no such open invitation and the High Court was not at liberty to follow any other procedure.

14. However, in the same judgment, it is also noted that there are some exceptions carved out in the interest of justice and to meet certain contingencies, one such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. Therefore, it would be difficult to accept the aforesaid propositions as an absolute proposition. The compassionate appointments are in Class III and IV posts for which ordinarily the procedure of open invitation may be required to be followed, but as one goes higher up, different situations and contingencies arise requiring difference procedures and solutions. One cannot reduce all important posts to the ordinary routine of market process and inviting applications and asking the candidates for high posts to stand in queue and compete and face possible rejection. For such high posts, there would be very competent and proper people who would show willingness provided they are invited for consideration or for appointment rather than being asked to apply for the same. The post of the City Civil Judge and District Judge is the highest post in the subordinate judiciary, only a step below the constitutional post of a High Court Judge. If the procedure of inviting applications is followed for these posts, it is very likely to result in excluding many right people who are not only eligible but very competent and suitable for appointment because they would not care of apply. It is a well-known and a hard reality that it is very difficult to attract competent lawyers in Gujarat to join judiciary service even at the superior level of District Judges. They had not only to be invited, but they have to be persuaded. It is in the interest of the Institution itself that such persons are invited and considered for such high posts. If the appointments to these high posts are made by invitation after due process of selection from a zone of consideration rather than by application, it cannot be said to be a mode of recruitment violative of Arts. 14 and 16 of the Constitution of India. A judicial notice can be taken of the fact that many outstanding Judges have been recruited at that level by following this method of appointment and they risen to the High Court and Supreme Court of India and Chief Justice of India and made name not only for themselves, but lent great prestige to the Institution. It is difficult to think that they would have come forward if they were to apply at open invitation for appointment as District Judges. If that system was adopted, the Institution would have suffered loss of talents and competent persons. These posts carry such status and dignity that if they are made open to undergo market processes and if the gates are opened for all by inviting applications for very limited number of posts which might be available from time to time, the selection will not only become very very arduous, but will also leave out the best talent.

15. The appellant referred to the judgment in the case of Prof. A.N. Karia and Others Vs. M.S. University and Others, . In that case, applications were invited by public advertisement for the post of Registrar of the University and one of the persons who had applied for the same was excluded from consideration and was

not called for the interview. Neither the facts of that case nor the conclusions are applicable to the situation that we have in the present case.

16. In the case of *Miss Shainda Hasan v. State of Uttar Pradesh & Ors.* AIR 1990 SC 1481, the question related to appointment to the post of a lady Principal and a Public advertisement was issued. The advertisement contained the minimum requirement of qualification and there was neither any reference to any relaxation nor did the rules provide for any relaxation. This judgment has no application to the facts of the present case.

17. In the case of *S. B. Mathur & Ors. v. Chief Justice, Delhi High Court* 1988 II CLR 713, the distinction between the functions, sources of recruitment and essential qualifications for appointment and zone of consideration was emphasized and it was held that it is not always required that all those who fulfil minimum eligibility should be included in the zone of consideration and it will be open to the authority to restrict the zone of consideration even amongst eligible candidates in any reasonable manner.

18. In the present case, can it be said that the zone of consideration adopted is unreasonable ? According to the appellant, the only valid mode of such consideration would be to throw open an opportunity to all eligible candidates by way of some kind of public invitation and any other mode would be arbitrary and would deny equality of opportunity in the matter of public employment.

The answer is provided by the Supreme Court in the case of *B.S. Minhas Vs. Indian Statistical Institute and Others*, . In that case, the question was regarding appointment of Director of the Indian Statistical Institute. There, the bye-laws provided for public advertisement. The Supreme Court observed as under :-

"Of course, we do not wish to suggest for a moment that appointment to very post must be made only after advertising or publicising 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 publicised, 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. But here Bye-law 2 requires that the vacancy in the post of Director should be publicised and hence we are making the above observation in this paragraph."

Even though it was a case of appointment of a Director of the Institute where the bye-law itself provided for public advertisement, the Supreme Court had to emphasize that such requirement of public invitation should not be mechanically and indiscriminately extended to all the posts; higher the post, higher the status and higher the dignity, greater is a need to offer consideration or even appointment only by invitation. That would be in keeping with the dignity and status of such post and would enable the concerned authority to find out and invite the best talent available who otherwise would keep away from the process of selection if it was by way of public advertisement.

19. Mr. H. M. Mehta, learned Senior Advocate and Mr. Girish Patel, learned Advocate submitted that there can be a combination of the methods; there can be public advertisement inviting applications and in addition, the authority may also consider other persons who have not applied. It may or may not be possible to combine two such different methods. But not adopting such combined mode cannot be said to be arbitrary. There is no certainty that such combined mode if adopted, it would work better. It may or it may not be better in certain respects; but that would not make the existing good method illegal or arbitrary. It is not enough to contend that the existing system is capable of improvement. The appellant has to show and prove that the existing system is not only good but is arbitrary and irrational. The very fact that this method has worked so well and satisfactorily over years and produced best of the Judges shows its strength and merit. This method has been evolved from time to time and changes and modifications have been made at different times and in future also, there may be changes with new situations, new suggestions and needs, but that would be no ground to condemn the present mode and system as illegal or arbitrary. The learned single Judge has rightly held that the observations of the Supreme Court in Minhas case (supra) apply to the appointments to be made under Art. 233 of the Constitution.

20. The language of Art. 233 of Constitution of India clearly supports this kind of method of selection by invitation. The High Court is called upon to make recommendation to the Governor who is required to consult the High Court in the matter of appointment of District Judges and only on such recommendation of the High Court a candidate becomes eligible for appointment. Article 233 of the Constitution of India provides the condition of eligibility. One of time is seven years of standing as an Advocate and the second one is the recommendation of the High Court. Therefore, the recommendation of the High Court is a condition of eligibility.

21. As seen from the affidavit filed by the Registrar in response to the information called for by the learned single Judge, the procedure is to call for suggestions of names of eligible and willing Advocates from State-wide dignitaries concerned with administration of justice in the State and in each district. The District Judges were requested to suggest such names. Each High Court Judge was also requested to suggest the names. The District Judges are the eyes and ears of the High Court in the District. A sincere and genuine attempt is made to get suggestions from all persons in the Judiciary, in the High Court and under the High Court. It can always be argued and it is argued in the present case also that the dignitaries suggesting the names can be expanded so as to include the Government Pleaders, Presidents of Bar Associations and the Presenting Officers of Different trade unions. The argument can always be extended to all levels and all authorities but a line has to be drawn somewhere. When the High Court has consulted all the District Judges covering all the districts in the State and all the High Court Judges, it cannot be said that the line has been arbitrarily drawn. It is a matter of common knowledge that before any

person or authority suggests any name, he goes through a mental process of considering several names and even informally discussing with several persons whom the dignitary considers useful for the process. It is only after undergoing this process that the names are suggested. In such very broad based consideration, it is highly unlikely that any competent lawyer of seven years standing would miss the eye of the District Judge or some other Judge. It cannot be said that this system is irrational and arbitrary. The High Court is called upon to make recommendation and the High Court makes a sincere and bona fide recommendation by as wide consultation and suggestions as possible consistent with the object of inviting names for consideration. However, we make it clear that the procedure followed this time is not the only procedure. It may be different and short. If a suitable person is sighted and persuaded to accept the appointment and the House also agrees to the same, the High Court will be fully justified in recommending such name. It may not be an exact simile to compare a public officer with a purely family affair, but it does highlight the necessity of such short procedure. If the family head is looking for the best match for a young one, he would be on a look out for a proper match (matrimonial and may in some cases and may not be in large majority of the cases will be resorted to). If a proper match is found, it will be immediately seized and will not be allowed to be lost while considering the other eligible persons in the world. The best guarantee against the arbitrariness is the high authority and institution in whom the Constitution has reposed faith and in which the people also, by and large, have faith. When such high institution takes a decision to make recommendations in the interest of the institution, there is very little scope for anyone to allege arbitrariness and no scope whatsoever on the procedural or technical grounds as in the present case.

22. The appellant submitted that in all other High Courts, there are rules for inviting applications by public advertisement for appointment as District Judges. A bare averment is made and no material has been produced on record except one advertisement from Himachal Pradesh. In one or two judgments, reference has been made to such requirement in rules of Kerala High Court, but this averment that all other High Courts have such rules is not substantiated and in the absence of any material, we are not prepared to accept this averment more particularly in view of the fact that the petitioner has made patently incorrect averments in the petition. At page 49 of the paper-book, there are additional submissions made by the petitioner by way of an affidavit dated 30-1-1995. At page 51, the petitioner has stated as follows :-

"The petitioner further respectfully states and submits that in fact while Mr. Justice Sundaram Nainar Sundaram came to be appointed as Chief Justice of this Hon"ble High Court and when the said Hon"ble Chief Justice was there at Gujarat High Court during the period between 15th June 1992 to 13th December 1993, on coming to know the rules and the procedure adopted by the Chief Justice of the Bombay High Court, as aforesaid, Mr. Justice R. A. Mehta came to be deputed to the Bombay High Court and in fact Mr. Justice R. A. Mehta was pleased to visit

the Bombay High Court and so as to understand the scheme of the rules already framed by the Hon''ble Bombay High Court and also to ascertain as to how effectively such a procedure/rules can be made applicable to the High Court of Gujarat etc. etc.

The petitioner further respectfully states and submits that after return of Mr. Justice R. A. Mehta from the Bombay High Court with details and particulars and the methods adopted by the Hon''ble Bombay High Court for recruiting the posts of District Judges/City Civil Judges by way of direct recruitment, during the entire tenure of the aforesaid Hon''ble Chief Justice Sundaram Nainar Sundaram, the said rules and the procedure came to be discussed at length in the Full Court of the Hon''ble High Court of Gujarat and it was felt by almost all the Hon''ble Judges that the procedure adopted by the Hon''ble Bombay High Court is the most effective procedure whereby most deserving and positive candidates can be selected and accordingly, the Full Court of Gujarat High Court has passed a resolution to adopt the said rules/procedure for future implementation as and when direct recruitment on the posts of District Judges/City Civil Judges required to be made and the same has been accepted and approved by the Hon''ble Chief Justice Sundaram Nainar Sundaram being the Chairman of the Full Court and Mr. Justice C. K. Thakkar who is having vast knowledge on administrative law was also requested to look into the modalities of adopting those rules and in fact Hon''ble Mr. Justice C. K. Thakkar after devoting sufficient time and considering various principles and guidelines has also supported the said rules in the meeting and thereafter the Hon''ble Judges of the Full Court have accepted the same to implement and follow the same method as is being adopted by the Bombay High Court while seeking to recruit candidates for the posts of District Judges/City Civil Judges.

The petitioner further respectfully states and submits that to the best information and knowledge of the petitioner, even though the said rules and the procedure has been accepted by the Full Court with a conscious decision to implement the same for future appointments on the cadre in question, after such adoption of the said rules of the Full Court, on two occasions direct recruitment to the post of City Civil Judges and District Judges have been held and candidates have been appointed. However, the said procedure accepted and adopted by the Hon''ble Full Court has not at all been followed though the said rules/procedure has been made part of the rules of business and even during the present interviews which have taken place on 16th and 23rd December 1994 wherein, as per the assertion of respondent No. 2 - the Registrar, 52 candidates have been recommended and interviewed and selected by the Sub-Committee consisting of three Hon''ble Judges, the procedure and method followed by the Hon''ble Bombay High Court as adopted in Full Court meeting of this Hon''ble Court has not at all been followed.

The petitioner further respectfully states and submits that, therefore, the petitioner calls upon the respondents herein to forthwith produce before this

Hon''ble High Court the decision of the Full Court to follow the procedure/rules and the method followed by the Bombay High Court, as referred hereinabove, while recruiting candidates to the posts of District Judges/City Civil Judges and the petitioner also calls upon the respondent No. 2 herein as to why the same has not been implemented and as to why departure has taken place.

The petitioner further respectfully states and submits that as aforesaid, after adopting the said procedure/rules and method of recruitment to the posts of District Judges and City Civil Judges of the Bombay High Court by the Hon''ble Full Court of this Hon''ble High Court and after having accordingly modified/substituted the Rules of Business there are no changes made by the Full Court in the said Rules of Business, therefore also, the decision of selecting three candidates for the posts of City Civil Judges and four candidates to the posts of District Judges, whose names have been recommended for approval to the Governor of Gujarat on 17th January 1995 cannot be sustained in the interest of law and hence the same is required to be quashed and set aside by this Hon''ble High Court."

23. At the hearing of this appeal, it was pointed out to Mr. Padival that these averments are not correct and Mr. Padival states that there is no affidavit-in-reply and these averments are not denied and the Court ought to have accepted these averments and ought not to import the personal knowledge of the Bench. We had pointed out to him that these averments were not correct and have no basis and we had asked the appellant to produce the material or disclose the source of his knowledge or information on the basis of which he has made this affidavit. Since my name was mentioned, I told him that I had not been deputed to Bombay High Court to collect the rules and to know the procedure adopted by the Bombay High Court nor had I done so. I had pointed out that I had not seen the Bombay High Court Rules at all and I had not brought those rules and they were never placed for consideration before the Chamber meeting and, therefore, there was no question that all the Judges had held that the procedure adopted by the Bombay High Court was the most effective procedure. Mr. Padival had even gone to the extent of stating that Full Court of Gujarat High Court had passed a resolution to implement the said procedure in future. We had pointed out that there was no such resolution, no such rules and there was no consideration by the Gujarat High Court and there was no such request or reference to Hon''ble Mr. Justice C. K. Thakkar and he had also not undertaken any such exercise as is referred to by Mr. Padival in his affidavit and there was no acceptance and in fact no such question of acceptance by the Full Court had arisen. We are amazed at the sheer originality and audacity of this story and imagination of the appellant, but when it comes to stating on oath before the Court, it is a very serious matter and this is nothing but recklessness and irresponsibility. In spite of our repeated questions, the appellant has failed to indicate any basis or source of his information and knowledge for making those averments. It is, therefore, clear that he has made these averments recklessly and without any sense of responsibility and without any regard for the truth. It is impossible to rely on the

word of the appellant when he says that all other High Courts have rule of public advertisement for appointment of District Judges.

24. The appellant submitted that as far as Gujarat High Court is concerned, the averment made by the Registrar in his affidavit that the procedure followed by the High Court is in practice since the inception of the High Court and this practice is followed and inherited from the Bombay High Court, is incorrect and the appellant has submitted that for filing a false affidavit in judicial proceedings, action should be initiated for perjury. It is a prayer in the Civil Application No. 356 of 1995, viz. prayer 8(c) and it is submitted that on one occasion in 1980, a public advertisement was issued for selection of District Judges though none was selected and appointed. This has been pointed out by the appellant in para 11 of the appeal memo. Merely because one unsuccessful attempt of recruitment was made by a public advertisement in the long history of 35 years and if the Registrar had failed to refer to the same, it cannot be said that there is any false affidavit or that he had made any deliberate false statement. In fact, even if that unsuccessful attempt once made is taken into consideration, the fact of practice since the inception of the High Court remains true and no fault can be found from the said averment of the Registrar. In fact, the Registrar could have and ought to have referred to that incident in support of the case that the method followed by the High Court has not only been found to be successful and satisfactory, but the other unsuccessful attempt made had proved the validity and rationality of the present system. According to Mr. Padival, a candidate who failed to get selected in response to the advertisement in 1981 was selected in 1991 after ten years without advertisement and on invitation.

25. At this stage, we may also deal with one serious allegation made by the appellant in the petition and repeated in the appeal. In paras 11 and 14 of the petition, the petitioner had submitted that the decision to recruit the candidates so selected suffers from favouritism, nepotism and/or red-tapism. The learned single Judge had taken a serious view of this allegation and it is observed in his judgment that the statements made in paras 11 and 14 were scandalous and would have invited appropriate action and Mr. Padival has expressed his regrets and sought to delete those paragraphs and necessary amendment was carried out forthwith and thereafter the learned single Judge had passed an order calling for certain information from the 2nd respondent. At the hearing of this appeal, Mr. Padival has chosen to repeat and reiterate these allegations. In Para 12 of the appeal memo, it is submitted that the learned single Judge ought to have quashed the impugned decision since the said decision suffers from favouritism and nepotism. He has further stated that if the Division Bench calls for the details with regard to the said favouritism and nepotism, the appellant craves leave to furnish the same at the time of hearing if the appellant is given the list of selected candidates. He had also stated that he knew all the names and in fact, he stated that matter is of a public knowledge. However, he states that for the sake of not further maligning the Institution, he would not like to give particulars. We had clearly told him that it is not for the court to advise him what

to produce and what not to produce in support of his allegations; if he chooses to make the allegations, he has to prove and make goods those allegations or not to make allegations recklessly. However, he has chose to do nothing to prove and allegation or to withdraw the same. It is really unfortunate that heaving withdrawn the allegations before the learned single Judge and having expressed regrets before the learned single Judge, he has chosen to repeat the same allegations in the appeal memo as well as in the course of arguments without bothering to make them. This is nothing but a blatant and direct way of maligning the judicial Institution without any basis and without any material. The learned single Judge was absolutely right in calling this statement as scandalous and Mr. Padival was right when he realised his mistake and withdrew those allegations and tendered his regrets. However, he has again chosen to repeat the same in the appeal memo as well as in the arguments. These allegations apart from being utterly reckless and most irresponsible, make a fantastic reading that the highest dignitaries of the judicial administration not only the Chief Justice and the two senior most Judges of this Court, but all the Judges of the Full Court are party to favouritism, nepotism and amenable to all such extraneous influences and considerations. This is the grossest kind of mass maligning of the highest Institution of Administration of Justice in the State and it is most unfortunate that a person who has been a practising Advocate of this Court has chosen to make such reckless allegations. We are pained at these allegations and shocked at the audacity of the appellant. However, in order that the issues raised in this appeal and their consideration do not get clouded by this side issue, we have this issue at this stage without prejudice to any action that may be taken in the matter, if though the proper and in the hope that in future, the appellant and everyone concerned with this kind of litigation show a sense of responsibility and regard for truth. We outright reject the allegations of nepotism and favouritism in the selection process undertaken by the Full Court as the allegations are wholly baseless and product of an immature suspicious mind.

26. The next contention is that there is breach of Art. 233 of the Constitution of India because in this case, according to the appellant, the Full Court has not discharged its constitutional function and duty of taking the decision. It is submitted that under Art. 233, it is the High Court which is required to make recommendation and according to the appellant, the information furnished by the 2nd respondent-Registrar clearly shows that the decision was taken by the sub-committee of the Standing Committee. There is no doubt that the decision to recommend the names is to be taken by the High Court. However, the High Court can have its own internal procedure for taking the decision and conducting the business. The High Court is looking after the administration of subordinate judiciary by framing its Rules of Business by its resolution as pointed out earlier. These rules clearly bring out that in the matters in which the High Court is required to be consulted, the matters is placed before the Chamber Meeting; so also the recommendations made by the Standing Committee are to be brought to the Chamber Meeting (Full Court). The Full Court by the resolution has entrusted

the task of selection of Judges of the City Civil Court and District Judges from the Bar for approval by the Chamber Meeting. It is, thus, clear that as back as in 1986, the Chamber (Full Court) was fully conscious that there are matters where the High Court is required to be consulted or required to give its opinion or advice under the Constitution or any other law and in such matters, the Chamber has, therefore, retained the power to give its opinion and make its recommendations. At the same time, it was realised that for a large body like a Full Court, it was not possible to go through a long and arduous process of calling for names, consider each one and have personal talk with each one and undergo the process and, therefore, that was left to the Standing Committee, but the Standing Committee was not authorised or delegated the power to make the final recommendation which is required to be made not only by Art. 233 of the Constitution of India, but also by the Chamber itself, by a Chamber Meeting, i.e., the Full Court.

27. The Standing Committee of seven members constituted its own sub-committee of three members including the Chief Justice and two senior most Judges to go through the process and thereafter the matter was considered by the Standing Committee. The Standing Committee had made its recommendation to the Full Court and the Full Court had, after due deliberation and consideration, approved the same.

28. The appellant submitted that what was placed before the Chamber was the list of names recommended and not the full record of the selection and consideration of all the 52 candidates and he referred to the observations of the learned single Judge in para 32 of the Judgment wherein it is observed that the entire material concerning the interview 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. The said observations read as under :-

"Needless to state that the entire material concerning the interviews and the opinion of the Committee members are 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."

Relying on the observations, the appellant submitted that the entire material concerning the interview was required to be placed before the Full Court and it was not placed before the Full Court. It is submitted that the learned single Judge ought to have, therefore, allowed the petition instead of observing that these are the observations for consideration of the Full Court. As pointed out earlier, resolution No. 2 of 4-12-1986 regarding the Rules of Business provides that any Judge can call for any file at any time and have his say or suggestion on it considered by the Standing Committee and also by the Chamber (Full Court) and the decision of the Full Court has to be implemented. Every Judge has an access to all the record. It is matter of common sense and practicability that for a Full Court Meeting of 25 Judges, it is physically impossible and impracticable to circulate all the papers of such selection and consideration of 52 candidates. It is

also a matter of common knowledge and common sense that all the records in respect of every agenda item are kept ready and available at all meetings and it is available to any member of the Full Court whoever needs it and, therefore, it is wholly incorrect to assume that such record was not placed before the Full Court merely because the entire record was not individually circulated to every Judge separately.

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29. Strong reliance has been placed by the appellant on the judgment of the Supreme Court in the case of Prem Nath and Others Vs. State of Rajasthan and Others, . In that case, the question that was considered by the Supreme Court was whether the Rajasthan High Judicial Service Rules, 1955 framed under Art. 309 of the Constitution of India were ultra vires Art. 233 of the Constitution of India. These rules were not framed by the Rajasthan High Court but by the Government. The Supreme Court held that a selection was made by the selection committee and not by the High Court as a whole and there was no provision empowering the High Court to modify the list. The Supreme Court found that the only function entrusted to the High Court under the Rules was to transmit the two lists prepared by the Committee under Rules 13 and 22. The Supreme Court observed that there was no provision in the Rules empowering the High Court before submitting the lists to the Governor to vary those lists even if the High Court were to disagree with the selections made by the Committee and the Supreme Court observed that obviously, the Committee was not the High Court and the High Court was only a transmitting authority and the consultation as provided in Art. 233 is the consultation with the High Court and not with any other authority such as the selection committee appointed under the Rules and, therefore, the rules were clearly inconsistent with the mandate provided for in Art. 233 and were, therefore, invalid. Similar was the situation in the judgment in the case of Chandra Mohan v. State of Uttar Pradesh AIR 1966 SC 1987.

30. In the present case, the rules for mode of selection process are not framed by the Governor under Art. 309 of the Constitution of India. The Rules of Business are framed by the Full Court. While framing the rules, all matters where the High Court is required to be consulted as also where there are recommendations of the Standing Committee have been retained with the Full Court. By the same resolution, selection for the direct recruitment of Bar members of the cadre of District Judges which is entrusted to the Standing Committee is for the limited purpose of making recommendations to the Full Court and the final decision is expressly left to the Full Court which is required to consider such recommendations of the Standing Committee. In the Chandra Mohan case (supra), the selection committee was constituted by the Governor; in Prem Nath case (supra), the selection committee was constituted by the rules framed by the Governor. In the present case, not only the standing committee is constituted by the Full Court, but the subjects have been assigned to the Standing Committee by the Full Court and with express provision that the

matters which require consultation of the Full Court have to be placed before the Full Court and it is the Full Court which has to take the final decision. Therefore, it is clear that in the present case, the situation is entirely different from the one which was found by the Supreme Court in Prem Nath case (supra) and Chandra Mohan case (supra). Neither of these judgments lay down as to how the Full Court is to discharge its functions. The Full Court is free to devise methods for proper and effective management of the subordinate Courts. These decisions of the Supreme Court cannot be construed to hold that the Full Court cannot adopt the method of processing the recommendations through smaller committee. By very nature of things, it is impossible that Full Court can handle the preliminary and processing part of the recommendations to be made. It is of necessity and for efficient functioning of Full Court and proper discharge of duties by the Full Court that this method is devised while retaining the final control with itself and taking the final decision by the Full Court itself. Merely because no changes have been suggested by the Full Court and the names suggested by the Standing Committee have been approved by the Full Court, it cannot be assumed that the Full Court has not taken the final decision. The Full Court is not and has not acted as a mere transmitting agency but has after due deliberations approved the suggested names and made its own recommendations to the Governor.

31. In the case of Mary Teresa Dias v. Chief Justice & Ors. 1986 (I) SLR 380, the Kerala High Court had an occasion to consider the question of the Full Court taking the decision under Art. 233 of the Constitution of India after the committee made its recommendations. In that case also, there was a committee constituted to prepare a list of candidates suitable for the post of District Judge after interviewing the candidates and considering all relevant particulars. Three senior most Judges of the High Court constituted the committee and they expressed their opinion and placed before the Full Court on administrative side. There was a joint deliberation and when the majority of the Judges decided to accept the majority decision of the committee, it became the decision of the High Court and it was held that High Court had not given its power to the committee to make the final decision or make the recommendation on behalf of the High Court.

32. Another case from Kerala had gone to the Supreme Court and it is in the case of State of Kerala Vs. Smt. A. Lakshmikutty and others, . In para 3 of that judgment, the Supreme Court considered that the Full Court had constituted a committee of three senior most Judges to prepare a list of 15 candidates for the posts of District Judge and one of the 15 candidates was Mary Teresa Dias, District Government Pleader and Public Prosecutor of Ernakulam Belonging to Latin-Catholic community. The committee by majority of 2 : 1 held that she was not suitable for appointment and accordingly deleted her name and drew up a panel of remaining 14 candidates. The panel of 14 names submitted by the committee was approved by the Full Court and this decision of the committee was not held to be vitiated in any manner. The decision in Chandra Mohan's case (supra) was also referred to and considered. It is, thus, clear that Supreme Court

has not laid down any proposition that under Art. 233 of the Constitution, when the High Court is required to be consulted or when the High Court is required to make recommendation, the entire process must be undertaken by the Full Court. The only requirement is that the final recommendation must be of the Full Court. The High Court in the present case has not abdicated its function to the committee and has duly discharged its duties. Therefore, the contention that there is violation of Art. 233 of the Constitution of India must fail.

33. A reference was also made to the Supreme Court judgment in the case of Supreme Court Advocates-on-Record Association and another Vs. Union of India, . In that case, the Supreme Court was considering the question of proposals for appointment of Judges of High Courts and the question was whether the executive had got the right of proposing a candidate for judgeship. The Supreme Court observed in para 230 that in the context of the plurastic society of India where there are several distinct and differing interests of people with multiplicity of religion, race, caste and community and with the plurality of culture brought together and harmonised by the Constitution makers by assuring each section, class and society "equality of status and opportunity" it is inevitable that all people should be given equal opportunity in all walks of life and brought into the mainstream so that there may be participation of all sections of people in every sphere including the judiciary. The Supreme Court considered that the chief Justice even after consulting his senior colleagues may not have sufficient opportunity to evaluate the merit and suitability of the most deserving and working as legal practitioner other than those who have appeared before him or whose names have been brought to his notice by his consultees, but the Government may be in a position to know the candidates and bring the names of such persons to the notice of the Chief Justice. It is, thus, seen that though the Supreme Court was conscious of equality of opportunity even in the matter of appointment of Judges of the High Court, the process was left to the consultation between the executive and the Chief Justice who in turn was required to consult his two senior most colleagues. The Supreme Court was conscious that this process may leave out some suitable and fit person from consideration, but it would not vitiate the process. The safeguard in the whole process is that the Constitution has rightly and safely trusted by leaving the matter to the highest judicial authority in the State. When such authority honestly and objectively takes the decision, merely because there is a remote possibility of some candidate not having been considered would not vitiate the process of selection, recommendation and appointment.

34. The appellant submitted that the entire record of selection is required to be placed before the Court at the hearing of this matter. The appellant made an oral request and that request is repeated in the Civil Application No. 356 of 1995. He has also relied upon the judgment of the Supreme Court in the case of Hari Datt Kainthla and Another Vs. State of Himachal Pradesh and Others, and more particularly para 26 which reads as follows :-

"26. Before we conclude it must be pointed out that where the Government acts on the recommendation of the High Court and the action of the Government is challenged by way of a 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. In this case, the appellants in their writ petition requested the High Court to produce the proceedings which culminated in the recommendation of the High Court to the Governor for appointment of respondents 3, 4 and 5 as DSJ/ADSJ. No action appears to have been taken on this request because no such record appears to have been produced before the High Court. Such silence militates against fair adjudication of the issues. Just and fair adjudication must not only inform the administrative side of the High Court but in order to put its record beyond the slightest pale of controversy, it must avoid any secrecy in this behalf consistent with public interest."

The judgment was referred to before the learned single Judge also and while issuing notice, conscious of those observations, the learned single Judge had issued specific directions to the respondent No. 2-Registrar to furnish the information on points (A) to (D) and that information has been furnished by way of an affidavit. Even otherwise, there cannot be and there has not been any objection for producing the record before the Court and the Court will never feel shy of producing the record and there is no secrecy about it. The transparency in administrative function is a healthy thing. However, that should not be made an instrument of a finishing inquiry and fishing adventure. The appellant has first to make out a case that production of such papers is necessary to enable the Court to decide the question in controversy and do complete justice. Para 2 of the Civil Application enumerates 11 items regarding which directions are sought for production for record. A long list of documents asked irrespective of their importance and relevance clearly proves the fishing adventure. There is not a single material on which any actual or prima facie foundation is made so as to call upon the other side to produce the record. This tendency of calling for records indiscriminately without laying the foundation cannot be countenanced or encouraged. Hence, this request has to be rejected. Rules of Business have been made available and shown to the appellant. The rest of the informations called by the learned single Judge has been placed on record by the affidavit of the 2nd respondent, a copy of which was duly served on the appellant.

35. Mr. H. M. Mehta, learned senior Advocate has indicated a possibility that since only the High Court Judges and the District Judges in the Gujarat are consulted, there is a clear possibility of a lawyer practising in other States being necessarily excluded from such recommendations. He drew an analogy from the case of Kaushik Jagmohan Upadhyaya Vs. State of Gujarat, . In that case, Rule 5(3)(b) of the Gujarat Judicial Service Recruitment Rules, 1961 was declared ultra vires because it had prescribed that in order to be eligible for appointment, a person must have practiced before the Gujarat High Court or the Court

subordinate to that High Court. It was submitted that what has been struck down in that case is being done and practised in the present case without any such written rule and it is submitted that what cannot be done by prescribing the rule cannot be done by unwritten ten rule or practice. It is true that the recommendations are made of the persons who are practising in this High Court or in the Courts subordinate to this High Court. However, from that, it is not possible to conclude that the lawyers practising in other High Courts are held ineligible. Of necessity, the recommendations can be made by the persons who are in a position to suggest and recommend a person. If any Judge of this High Court or any District Judge is in a position to recommend any such name, they are free to do so and it cannot be said that there is any written or unwritten prohibition against suggesting and considering such names.

36. All the contentions raised in the appeal fail and hence the appeal is dismissed summarily. Civil Application Nos. 332 and 356 of 1995 are also dismissed.

However, before parting with the judgment, we must record our deep concern about one grave and disturbing feature. The hearing of this appeal had taken place on 1-3-1995 and it was heard from 2-45 p.m. to 4-45 p.m. and was kept for further hearing on 2-3-1995. On that day, at 4-00 p.m., Mr. N. D. Nanavati, learned Government Pleader had come to the Court on having received some information from his learned friend that Mr. Padival was tape-recording the proceedings. He raised his objection to the same since it was being done without the knowledge and permission of the Court. We asked Mr. Padival whether he was doing so and he stated that he had been recording the proceedings and that he had done so even before the learned single Judge. We inquired whether he has taken anybody's permission and he stated that he had not taken permission from anybody, neither from this Court nor from any other Court. When we asked him the purpose for which he was tape-recording, he gave reply that it was being recorded for the pleasure of enjoying his vice. When we inquired whether he had in the past tape-recorded such proceedings in any other court or in any case, he stated that he had done it only in this case. On the objection being raised, he immediately stopped the recording and sent away the tape-recorder.

Though the Court proceedings are open to public, the Court proceedings are within the control and regulation of the Presiding Judge and if anyone wants to undertake this kind of the tape-recording, he cannot do that without seeking the permission of the Court and without disclosing the legitimate purpose for which the recording is made. There are serious dangers and potential mischiefs in secret tape-recording of the Court proceedings. Since such tape-recordings are easily manipulable and capable of being abused. If there is a legitimate purpose, the person can certainly make a written request to the Court disclosing the purpose and satisfying the Court about its legitimacy and the Court can take appropriate safeguards if the permission is to be granted. A safeguard can be that the master copy of the tape may be retained with the Court so as to prevent any tampering or manipulation. If the Court is not satisfied about the legitimacy

and reasonableness of the request, the Court may reject the request. If after the Court refuses the permission or apprehending that the Court is likely to refuse permission, secret tape-recording is done, it is a serious breach of the Court discipline which would be fraught with many dangers to the administration of justice and may amount to undue interference in the course of the proceedings of the Court and administration of justice. Since the High Court on the administrative side is a respondent in this matter, we in judicial self-restraint, leave this issue at this stage by expressing our strong disapproval to this kind of tape-recording in Court without the knowledge and permission of the Court.