
(1992) 06 GUJ CK 0001
In the Gujarat High Court

Champaklal M. Bhavsar

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 24-06-1992

Acts Referred:

Constitution of India, 1950 — Article 226, 226, 234, 309

Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 — Rule 8(5)

Gujarat Judicial Services Recruitment Rules, 1961 — Rule 5(3A)(a)

Citation : (1993) 2 GLR 1254

Hon'ble Judges : Y.B. Bhatt, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—If the provision regarding relaxation in upper age limit occurring in Rule 8(5) of Gujarat Civil Services (Classification & Recruitment) General Rules, 1967 is not applicable to the case of the petitioner, then is the provision prescribing upper age limit of 45 years as an eligibility criterion for the post of Civil Judge (J.D.) and Judicial Magistrate, First Class contained in Rule 5(3A)(a) of the Gujarat Judicial Service Recruitment Rules, 1961, unconstitutional? This is the principal question to be decided in this petition.

2. The petitioner is serving as clerk in the establishment of High Court of Gujarat. He is M A., LL B. and thus he possessed educational qualifications for being appointed to the post of Civil Judge (J.D.) & Judicial Magistrate, First Class. Considering himself eligible for the post, he applied for the post in response to the advertisement dated November 1, 1989 which was issued by the Gujarat Public Service Commission and published in "Gujarat Samachar" dated November 4, 1989. He appeared at the elimination test. He has succeeded in the test. He was so informed also. However later on, he was informed that since he was aged 50 years on the date of advertisement, i.e., on November 1, 1989 and since he had crossed 45 years of age, he was not eligible for being appointed to the post. On this count, he was not called for interview. Therefore, the petitioner has filed the present petition challenging the constitutional validity of Rule 5(3A)(a) of the Gujarat Judicial Service Recruitment Rules, 1961, which inter alia prescribes

upper age limit of 45 years.

3. Gujarat Judicial Service Recruitment Rules, 1961 are framed under the provisions of Article 234 read with Article 309 of the Constitution of India by the Governor in consultation with the Gujarat Public Service Commission and the High Court of Gujarat. Rule 2(e) defines "service" and it means the Gujarat Judicial Service. As provided under Rule 3, the service consists of two branches, namely, Junior Branch and Senior Branch. The Junior Branch consist;; of Class I comprising the cadre of Civil Judges (Senior Division) and the Judges of the Courts of Small Causes and Class II comprising of Civil Judges (Junior Division) and Judicial Magistrates of the First Class. The Senior Branch of service consists of District Judges, the Principal Judge and the Judges of the Ahmedabad City Civil Court, the Chief Judge of the Small Causes Court, Ahmedabad, the Chief Metropolitan Magistrate, the Additional Chief Metropolitan Magistrate, Ahmedabad and the Assistant Judges. Rule 5 provides for method of recruitment to Class II of the Junior Branch of service. Appointments to the posts of Civil Judges (Junior Division) and Judicial Magistrate of the Firss Class are to be made by direct selection from amongst:

- (i) members of the Bar;
- (ii) members of the staff of the High Court or any Court subordinate to it;
- (iii) members of the staff working as Assistants in the Legal Section of the Legal Department in Sachivalaya;
- (iv) members of the staff of office of the Government Pleader, High Court Ahmedabad; and
- (v) members of the staff of office of the Government Pleader, City Civil Court, Ahmedabad.

The appointments are to be made by the Governor in consultation with the Commission and the Commission is enjoined with a duty to invite the representative of the High Court to be present at the interview that may be held by it for the purpose. Rule 5(3A) prescribes the eligibility criteria which inter alia provides that the appointments shall be made from amongst candidates who are not more than 45 years.

4. Now the petitioner relies upon the provisions of the rules framed under Arf. 309 of the Constiution of India in respect of Gujarat Civil Service, which are called the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 (for short "1967 General Rules"). Rule 8 of the said rules prescribes conditions as to qualifications. Rule 8(5) inter alia provides that notwithstanding anything contained to the contrary in any rules for the time being in force relating to the recruitments to any service or post the upper age limit for the purposes of recruitment prescribed in such rules shall not apply to a candidate who is already in Gujarat Government Service either as a permanent Government servant or as a temporary Government Servant officiating

continuously for six months in a substantive or leave vacancy or in a vacancy caused as a result of deputation of other servants and was within the age limit prescribed for the post at the time of his first appointment in Government Service. Relying upon this provision of 1967 General Rules, it is submitted that the petitioner is admittedly serving in the High Court of Gujarat. His initial entry in the High Court service as clerk was at the time when he was eligible for being appointed to the post. Therefore, it is submitted that he should be granted the benefit of provisions of Rule 8(5) of the 1967 General Rules and he should have been considered eligible for being appointed to the post of Civil Judge (J.D.) and he should have been called for interview.

5. The contention cannot be accepted for the simple reason that "1967 General Rules" are not applicable to Judicial Service for which rules are framed under Article 234 read with Article 309 of the Constitution of India. Judicial Service is altogether a different service. It is not a part of Gujarat Civil Service. The contention that definition of service occurring in Rule 2(vi) of the 1967 General Rules would include even the Judicial Service has no merits. First of all these rules do not apply to Judicial Service. The definition clause in Rule 2(vi) of 1967 General Rules states that "service" means any service under the State Government included in the State Services or subordinate services. This does not include Judicial Service for it is obvious that Judicial Service is not under the State Government. The status of the Judicial Service is determined by the constitutional provisions. In this case the relevant constitutional provision is Article 234 of the Constitution and the rules framed thereunder. Whatever contained in "1967 General Rules" cannot determine the status as well as terms and conditions of Judicial Service. If the argument is accepted, it would amount to saying that the rules framed by the State Government under Article 309 of the Constitution of India can override the constitutional provisions contained in Article 234, and by framing the rules under Article 309 of the Constitution of India, the State Government can encroach upon the field reserved to the High Court under the Constitution. There is nothing to show that 1967 General Rules have been adopted by the High Court of Gujarat or by the Governor in exercise of his power under Article 234 of the Constitution of India. In view of this position, the contention that the petitioner should have been considered eligible and should have been given the benefit of relaxation of age as provided under Rule 8(5) of the 1967 General Rules has no merits and the same is hereby rejected.

6. For reference may be made to a Division Bench judgment of This Court in the case of *Indravadan H. Shah Vs. State of Gujarat and Another*, It was a case in respect of a Judicial Officer (Civil Judge (S.D.)) already in service. He was not considered eligible for being appointed to the post of Assistant Judge as he had reached the age of 48 years. This is so because Rules 6(4)(i) and 6(4)(iii) of the 1961 Rules inter alia provided that a candidate should not have reached the age of 48 years and he should have continued in the select list prepared in accordance with the appropriate provisions of the Rules for being promoted to

the post of Assistant Judge. In that case also a contention was raised that the provisions contained in Rule 8(5) of 1967 General Rules would be applicable to the case of the petitioner therein and there would be no age bar. The contention was negated on the ground that 1967 General Rules would not be applicable to the cases covered by specific Rules of 1961.

7. We are in agreement with the conclusion arrived at by the Division Bench in the case of *Indravadan Shah (supra)* as far as the non-applicability of the provisions of Rule 8(5) to the cases covered by the 1961 Rules concerned. It is true that the aforesaid decision of This Court in the case of *Indravadan Shah (supra)* has been reversed by the Supreme Court as far as the fixation of upper age limit in respect of promotion to the post of Assistant Judge from amongst the members of lower Judiciary is concerned. See *Niranjan and Co. P. Ltd. Vs. Commissioner of Income Tax, West Bengal and Others*, . However, as far as the non-applicability of the provisions of 1967 General Rules and particularly Rule 8(5) thereof is concerned, the Supreme Court has not disturbed the decision of This Court.

8. The Learned Counsel for the petitioner has submitted that Rule 5(3A)(a) prescribing the upper age limit of 45 years as an eligibility criterion for being appointed to the post of Civil Judge (J.D.) and Judicial Magistrate First Class is unreasonable and arbitrary and hence violative of Article 14 of the Constitution of India. In support of this submission reliance is placed on the decision of the Supreme Court in the case of *Indravdan Shall (supra)*. In that case the Supreme Court has struck down the provisions of Rule 6(4)(i) and Rule 6(4)(iii)(a) of 1961 Rules which prescribed upper age limit of 48 years as an eligibility criterion for being promoted to the post of Assistant Judge from amongst the Civil Judges (J.D.) and Civil Judges (S.D.). It is true that the Supreme Court has struck down the upper age limit fixed in the 1961 Rules in so far as it prescribed that being eligible to be promoted to the post of Assistant Judge one should not have reached the age of 48 years. But the decision is not applicable to the facts and circumstances of this case for the reason that the Supreme Court has not dealt with the provision with regard to eligibility criteria prescribed in 1961 Rules as regards the upper age limit at the time of initial recruitment. Before the Supreme Court it was a case of discrimination between two classes of candidates, i.e., one the members of Bar, i.e., direct recruits and another members of Judicial Service. If a member of the Bar even after reaching the age of 48 years could be considered eligible for being appointed to the post of Assistant Judge, it was not understood as to how a candidate already in Judicial Service would become ineligible on reaching the age of 48 years. On the contrary, the Supreme Court held that with coming of age and experience, a Judicial Officer becomes more suited and well equipped to perform and discharge the higher duties and responsibilities attached to the higher post of Assistant Judge and that of District Judge. It was in the context of the classification made in the Rules, the Supreme Court observed that there was no nexus with the object sought to be achieved by introducing age restriction as regards the promotion to the post of Assistant

Judge from amongst the members of the Gujarat Judicial Service (Junior Branch) as provided in Rule 6(4)(i) and Rule 6(4)(iii)(a) of 1961 Rules. On the basis of this decision, constitutional validity of the provision of the Rule prescribing upper age limit of 45 years at the initial stage of recruitment cannot be assailed.

9. In the instant case the constitutional validity of the upper age limit is 45 years. Except forceful assertion that it is irrational, unreasonable and arbitrary, nothing is pointed out as to how the criterion of 45 years of upper age limit is irrational, unreasonable or arbitrary. It is for the petitioner to demonstrate that the upper age limit criterion fixed in the Rule is arbitrary, unreasonable and/or irrational. Since the petitioner has not been able to point out anything, it is not necessary to call upon the other side to show the reasonableness of the same. Even so, if one were to examine the reasonableness of the upper age limit criterion, it can be said that in any service when a person is recruited, he would be required to undergo some training and gain experience before he gets fully equipped to perform the duties assigned to the post. The superannuation age in respect of the Judicial Service (Junior Branch) is 58 years of age. If candidates who have crossed the age of 45 years are also recruited in Judicial Service they would have a shorter span of service to render. By the time they gain experience to deal with serious and complicated cases, they would be nearer to the exit gate. Moreover it may be after completion of 50 years of age one may become entitled to voluntary retirement. All these situations may create several complications and the State would not be in a position to get the maximum benefits out of such persons recruited at the advanced age of over 45 years. However, it is not necessary to demonstrate the reasonableness of this criterion. In our opinion, it cannot be said that the upper age limit of 45 years fixed in the 1961 Rules is in any way unreasonable, arbitrary, or irrational so as to call for interference in exercise of our power under Article 226 of the Constitution of India.

10. No other contention is raised There is The substance in the petition. Hence rejected. Rule discharged.