

(1979) 11 GUJ CK 0001
In the Gujarat High Court

Dr. B.R. Kulkarni

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 14-11-1979

Acts Referred:

Constitution of India, 1950 — Article 16, 320, 320(3)

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

Citation : (1979) 2 GLR 437

Hon'ble Judges : N.H. Bhatt, J

Bench : Single Bench

Judgement

N.H. Bhatt, J.—This is a petition by one Dr. Kulkarni, challenging the appointment of the respondents Nos. 3 and 4 to the post of the professor of Anatomy at the Government B.J. Medical College, Ahmedabad on the ground that the selection of the respondent No. 3 is contrary to the statutory Rules and is violative of Article 16 of the Constitution and that the selection of the respondent No. 4 in preference to him was without any application of mind on the part of the Gujarat Public Service Commission in so far as the latter body had not taken into account the past record of the respondent No. 4 visa-vis that of the petitioner.

2. A few facts are required to be stated in details in order to comprehend the controversy. The petitioner was appointed as a Junior Lecturer in Anatomy at the B.J. Medical College in the year 1960 and his selection was then ratified by the Gujarat Public Service Commission and so he was substantively appointed on 28-12-61 as such. Thereafter, the petitioner was promoted as an Assistant Professor temporarily from 8-7-64, but on and from 22-11-66, he was appointed regularly because of the retrospective concurrence of the Service Commission accorded to it. He was given his seniority in that cadre of the Assistant Professor with effect from 8-7-74, being the original date of his promotion. According to him, he was the senior-most man in the cadre and despite some initial reluctance on the part of the Government, it was ultimately decided by the Government by its order, Annexure B dated 15-1-73, that the petitioner was senior to the respondent No. 4. The petitioner, who is holder of double post-graduate degrees,

one of M.S. with medicine and another of M.S. with orthopaedic, was temporarily promoted to the post of the Professor in Anatomy on 20-3-73 as per the Government's order, Annexure A. It is specifically stated there that the petitioner's promotion was purely ad hoc and temporary and the said appointment was only for a period of one year. However, it seems that he was continued. Then, the Gujarat Public Service Commission advertised two posts of the Professor of Anatomy, vide its advertisement dated 24-3-75, which was published in the local daily "Sandesh" on 26-3-75. Annexure D is the copy of the said advertisement, which set out the maximum age to be 40 years as on 1-7-75. The petitioner alleged that the said maximum age limit was statutorily prescribed under the 1966 Recruitment Rules, Annexure E to the petition. Pursuant to the said advertisement, the petitioner, the respondent No. 3, the respondent No. 4 and two other persons had made applications as eligible candidates. The post of a Professor in anatomy could be filled either by promotion or by direct selection, the question being left to the discretion of the Government. The Gujarat Public Service Commission interviewed the petitioner, the respondent No. 3, the respondent No. 4 and two others on 9-7-75 for the said two posts. At the interview, one Dr. DeSouza of Topiwala Medical College, Bombay, under whom the respondent No. 3 had been serving since 1971, was invited as an expert by the Service Commission. The petitioner's grievance is that the respondent No. 4 was comparatively less suitable for the post and still he was selected No. 4 was comparatively less suitable for the post and still he was selected by the Commission and placed at Sr. No. 1 of the select list and the respondent No. 3 lacked one of the requisite qualifications, namely, of not being 40 years of age as on 1-7-75, had not only been interviewed, but also had been selected and on the recommendation of the Service Commission, the State of Gujarat had appointed both the respondents nos. 4 and 3 to the said two posts of Professions of Anatomy, with the obvious outcome of the reversion of the petitioner from the said post. The petitioner's grievance unto the respondent No. 3 rests on the alleged want of eligibility on her part in so far as she was about 44 years of age on 1-7-75, the day notified in the advertisement for the purpose of deciding the upper age limit. The petitioner alleged that despite selection of the respondent No. 3 by the Service Commission and placement of the respondent No. 3 at Sr. No. 2 in the select list, the Government had initially showed its reluctance to accept her as a duly appointable candidate, but the Government ultimately gave in, with the result that the impugned order, Annexure F, dated 17-4-76 came to be passed by the Government. By that order, the respondent, No. 3 Dr. (Miss) Dangarwala came to be appointed as the Professor of Anatomy at the B.J. Medical College, Ahmedabad on temporary basis and the reversion of the petitioner followed as a matter of corollary (that temporary character of her holding of the post continues till today because of the interim order passed by this Court). The petitioner's further grievance against the respondent No. 3 is that on comparison of the inter se merits, the petitioner far out-weighted her and he, therefore, alleged that the selection of the respondent No. 3 at the hands of the Service Commission and consequential appointment of hers by the State

Government were vitiated by mala fides, and a considerable roll in her selection was attributed to one of the Members popularly known as an expert member of the interviewing committee of the Service Commission viz. Dr. D'Souza. The petitioner filed this petition for the following reliefs:

- (a) quashing and setting aside the appointment of the respondent No. 3 to the post of Professor of Anatomy and the order of reversion of the petitioner at Annexure F to the petition;
- (b) directing the respondent No. 1 to appoint the petitioner to the post of Professor of Anatomy and assign seniority to the petitioner in the post of Professor of Anatomy over the respondent No. 4;
- (c) declaring that the appointment of the respondent No. 4 to the post of Professor of Anatomy is illegal and void.

It is to be noted as a matter of history that the petitioner was placed first in the waiting list and it is, therefore, obvious that if the selection and consequential appointment of the respondent No. 3 is annulled, the petitioner would step in, in the second of the two vacancies for which advertisement had been issued by the Service Commission.

3. Mr. Anand, the learned advocate for the petitioner, raised the following points for consideration before me:

- (a) The respondent No. 3, Dr. (Miss) Dangarwala was not at all eligible for being interviewed because she had already crossed the upper age limit;
- (b) No relaxation even till the respondent No. 3 resumed the office on 20-4-76 had come to be made by the State Government, even if it is assumed that the Government has power to relax the upper age limit;
- (c) When eligible candidates are available, resort to power of relaxation should not and could not be had;
- (d) If power to relaxation and the possibility of relaxation is not set out in the public advertisement inviting applications, such a power could not be exercised even if the Government had such powers;
- (e) Gujarat Public Service Commission had no power to relax the upper age limit and interview the respondent No. 3 in anticipation of the expected relaxation on the part of the Government;
- (f) The respondent No. 3 Dr. (Miss) Dangarwala's selection was the result of bias in her favour, the bias having been brought about by Dr. D'Souza of Topiwala Medical College, Bombay, who was her superior at that college since 1971 and who was, therefore, interested in her appointment;
- (g) The selection of the respondents Nos. 3 and 4 in preference to the petitioner's has been vitiated because all the relevant material pertaining to the three candidates was not there before the commission in order to enable the

commission to have an objective view of the situation;

(h) The selection of the respondent No. 4 was vitiated in so far as his past records about his performance and particularly the adverse reports against him in administrative matters were not placed before the Commission.

4. Before I go to the consideration of various points canvassed by Mr. Anand, further detailed reference to some documents and Recruitment Rules is necessitated. On requisition from the Government, the Gujarat Public Service Commission issued the advertisement, Annexure D to the petition. It was an advertisement for a number of posts of seven different categories. The sixth was the category of Professor of anatomy and the number of posts advertised was two. The advertisement inter alia stated as follows:

...Age: not more than 40 years as on 1-7-75.... Age concessions for Scheduled Caste/Scheduled Tribe candidates, physically handicapped persons, displaced persons, Gujarat Government servants and retired defence service officers according to Government orders. Fee; Rs. 2.50 payable at the time of application. The above gives abridged information of posts etc. Full details and application form supplied on receipt of a large size self addressed envelope with 45 paise postage stamps and crossed Indian Postal order for 50 paise payable to Secretary, Gujarat Public Service Commission....

(Emphasis supplied by me)

5. As a matter of fact, the Service Commission has issued a regular notification, which is Annexure A to the affidavit of the respondent No. 3 dated 9-1-79. It is styled as advertisement No. 81. Regarding age, the following statement is made in the notification;

Age: A candidate should not be more than 40 years (45 years in the case of candidates belonging to Scheduled Caste & Scheduled Tribe, 48 years for Orthopaedically handicapped persons, 45 years in case of those who have migrated to India from East Pakistan on or after 1st January 1964, and 50 years in case of such migrants if they belong to Scheduled Caste or Scheduled Tribe. In case of retired Defence service officers, it will be relaxed by 3 years" plus the number of years" service rendered by the candidates in the Defence Service, subject to the maximum age limit of years on 1-7-75. The upper age limit in respect of candidates already in the service of the Government of Gujarat will be relaxed in accordance with the provisions of Gujarat Civil Service Classification and Recruitment (general) Rules, 1967 and may also be relaxed in favour of candidates possessing exceptionally good qualification and/or experience. Orthopaedically handicapped persons should apply in the prescribed form through the employment exchange where they have registered their names as physically handicapped persons or they should forward their application to the commission along with the necessary certificate from the Registered medical practitioner that he is a orthopaedically handicapped person.

6. The Recruitment Rules styled as the "Professor of Anatomy Recruitment Rules, 1969" are to be found at Annexure E to the petition. They are the Rules made by the Governor of Gujarat by virtue of powers conferred on him under Rule 309 of the Constitution of India. Rule 3 of the said Rules is required to be reproduced below:

3. To be eligible for appointment by direct selection to the post mentioned in 2, a candidate must:

(a) be not more than 40 years of age;

Provided that the age limit may be relaxed in favour of a candidate possessing exceptionally good qualification or experience.

Provided further that the upper age limit may be relaxed in case of Gujarat State servants in accordance with the provisions of Gujarat Civil Service Classification and Recruitment (General) Rules, 1967.

Provided further that preference shall be given to a candidate having previous training and experience of research work in Anatomy and who has published original Research work in Anatomy in recognised journals.

7. Over and above the specific Rules pertaining to these posts, there are other Rules also made under the very constitutional power called "the Gujarat Civil Service Classification and Recruitment (General) Rules, 1967. Part 3 of this Rules lays down General provisions regarding recruitment to any service or post. Rule 8, which may be of some relevance to us is reproduced below:

8. Condition as to prescribed qualifications.

(1) Subject to the provisions of these rules, no persons shall be appointed to any service or post, unless he possesses the qualification, if any, prescribed in the rules relating to the recruitment to such service or post (hereinafter referred to as "the prescribed qualifications").

(2) Where the prescribed qualifications include a qualification as to age limit the appointing authority may relax the age limit in favour of candidates belonging to the scheduled castes, scheduled tribes, or other backward classes to the following extent, that is to say;

(a) in the case of a service or post in a subordinate service in respect of which the prescribed age limit does not exceed forty years the age limit may be relaxed to the extent of five years.

(b) in the case of a service or post in a State service in respect of which the prescribed age limit exceeds forty years the age limit may be relaxed to the extent of five years.

(3) If in any case it is considered essential by the appointing authority to appoint to any post a candidate who has crossed the age limit prescribed for the service or post or in the case of any post a candidate possessing the prescribed

qualifications be not available and it is considered by the appointing authority that is necessary to appoint to such post a candidate who does not possess the prescribed qualifications, the appointing authority shall not appoint such candidate, to any such post except with the previous approval of the State Government, where such approval is sought, the appointing authority shall state fully the reasons of making the appointment.

(4) If for the purpose of recruitment to any post, application for appointment to such post are invited by means of a notification or advertisement published in a newspaper or in any other manner than save as otherwise provided in such notification or advertisement, the question whether a candidate applying for such post has crossed the age limit prescribed for such post shall be determined with reference to the first day of the month immediately following the month in which a period of ninety days from the date of the first publication of the notification or as the case may be advertisement expires and accordingly a candidate shall be deemed to have crossed the age limit if he has attained that age limit before the aforesaid first day of the month.

(5) In the case of recruitment to a post, the upper age limit prescribed in the recruitment rules relating to such post, shall, save as otherwise provided in sub-rule (6) not apply to a candidate who is already in Gujarat Government service either as permanent Government service 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 servant and was within the age limit prescribed for the post at the time of his first appointment in Government service.

(6) The provisions of Sub-rule (5) shall not apply to a Government servant when recruitment to a post is done through competitive examination or by direct selection for which experience has not been prescribed as one of the qualifications for such post;

Provided that a Government servant who was within the age limit when appointed to a post requiring medical, engineering or agricultural degree or diploma qualification shall be eligible for relaxation in age in accordance with Sub-rules (5) if he subsequently applies for the same post, when it is to be filled by direct selection through the public service Commission.

(7) In the case of a service or post, if under the regulations made under the proviso to Clause (3) of the Article 320 of the Constitution of India, it is not necessary to consult the commission and no special academic qualification relating to age have been prescribed it shall be in the discretion of the Head of the Department to recruit to such service or post such person as may appear to him to be suitable for the duties attached to such service or post for a period of six months or till the recruitment rules for the post or service are framed, whichever is earlier.

(8) Where the qualifications prescribed for any service or post include a

qualification as to practical experience for a given period and applications are invited for such service or post, the period of practical experience shall be computed with reference to the last date fixed for the receipt of such application.

8. In this case, certain facts are either admitted or are incontrovertible. The Government was intimated of the selection of the respondents nos. 4 and 3 by the Public Service Commission. The Government, however, was not amenable to the selection of the respondent No. 3 and had in that connection written two letters, one in October and other on 20-12-75, pointing out to the commission that the respondent No. 3, being not an existing Gujarat government Servant, the relaxation of the upper age limit was not to the liking to the Government. The fact of these two letters having been written by the State Government to the Service Commission is treated as established for want of any denial on the part of the State. At the time of hearing, Mr. M.B. Shah, the learned assistant Government, was fair enough to concede before me that such letters were in fact received by the Service Commission as addressed by the Government. It is also an admitted fact that Service Commission insisted on its recommendation. It is no longer in controversy before me that what Service Commission does is only recommendation after selection and the actual appointments are made only by the State Government. The fact remains that ultimately the State Government gave in. The contention of the petitioner was to the effect that at no time the State Government had relaxed the upper age limit in the respondent No. 3's case till the impugned order, Annexure F, came to be passed on 17-4-76. It would prima facie appear to anyone that the fact that the Government protested against her appointment on the ground that she had crossed the upper age limit and the fact that Government ultimately gave in, would be inevitably suggestive of the relaxation on the part of the Government. Still, in order to satisfy my judicial conscience, I had requested Mr. M.B. Shah appearing also for the State Government and the Commission, to produce before me for perusal the original record of the Government and the said record showed that the State Government was addressed one letter by the Service Commission and ultimately the State Government, after consulting its General Administration Department, popularly known as "GAD", agreed to appoint the petitioner. The letter which was written by the Service Commission to the Government was invited by me to be placed on the file of this special civil application and the said letter refers to the Government's letter dated 16-10-75 and ultimately the view of the commission is reiterated there. The commission by that letter brought it to the notice of the Government that under the relevant Recruitment Rules, it is within the competence of the State Government to relax the upper age limit and that the commission recommended to the Government that the respondent No. 3 was found by the commission possessed of exceptional qualifications and experience and that recommendation presented a fit case for such relaxation. The Government's file thereafter speaks of the decision to appoint Dr. (Miss) Dangarwala, the respondent No. 3, and it is, therefore, inevitable in this context to infer that there was relaxation of the upper age limit in her case by the

Government. This file, which was perused by me, was made available by me to Mr. Anand, the learned advocate for the petitioner. It is, therefore, evident that the State Government, the respondent No. 1 herein, had relaxed the upper age limit in the case of the respondent No. 3, of course after her selection by the Service Commission, but before he appointment.

9. Mr. Anand for appreciable reasons was critical of the stand taken by the Service Commission in the affidavit filed by its Secretary, one Mr. Mehta. The Service Commission arrogated to itself the power to relax the upper age limit, but Mr. Shah for the Commission could not lay his finger on any such provision of law, which would clothe the Commission with such an authority. Lest the Commission should be acting arbitrarily, I put a question to Mr. Shah regarding the modus operandi of the commission and Mr. Shah under instructions from the officer of the Commission, stated that in appointments to posts where there is a provision of relaxation of upper age limit, the commission by way of abundant caution, invites such ostensibly age barred applicants for interview. Mr. Shah stated that an affidavit to this effect will be filed by him in due course. On this assurance being given by Mr. Shah, I proceed on the assumption that it has been the practice of the Commission to invite even those applicants, who have become ostensibly time-barred in respect of the age, if the relevant Rules of Recruitment contain a provision for relaxation of the age bar. If it be so, the fact that the commission invited the respondent No. 3 for being interviewed cannot be found fault with. It is, therefore, not possible for me draw an inference that something fishy about the respondent No. 3 being called for interview, though I do not approve of the Commission's stand that they had got power to relax the upper age limit and that they had interviewed her in exercise of that right. This assertion made on behalf of the commission flows from the ignorance of the provisions of law and it to be left at that stage.

10. This brings us to the controversial question regarding the illegality or otherwise or the propriety or otherwise of the selection of the respondent No. 3 to the post in question. The petitioner's grievance in this connection is two pronged. Firstly, Mr. Anand contended that the advertisement that was issued was misleading and deprived at least some otherwise eligible aspirants of the opportunity to apply for the post in so far as the advertisement, Annexure D, specified only four possible cases of relaxation, but did not refer to the Government's power to relax the upper age limit in the case of exceptionally qualified or experienced candidates. According to the petitioner, had the advertisement, Annexure D, further elaborated that not only the members of the Schedule Caste and Scheduled Tribe and physically handicapped persons, displaced persons and Gujarat Government servants and retired Defence Service officers, but the exceptionally bright people also stood the chance of their upper age limit being relaxed, at least two known persons had missed the bus. One of such man is Fe. Bhibagkar, Assistant Professor of Anatomy in the Municipal Medical College, Ahmedabad and some such other person also is said to be one of such aspirants. In this connection, the regular notification issued by the

Commission and duly advertised in the Government Gazette deserves to be specifically noted in the context of Annexure D. This public advertisement itself sets out that full details and application form were available from the office of the Gujarat Public Service Commission and that the advertisement was only the abridged information of the posts, etc. This was a sufficient notice or intimation to the intending candidates or aspirants to be on their guard and watch, if they were in any way interested in the post. It is to be noted with pertinence that no such man has ever come forth to make grievance of his having been wronged or injured because of the non-mention of the specific relaxation. Mr. Anand state that he had with him some affidavits of such aspirants, but for the reasons best known to him, the petitioner has kept these affidavits in his brief case and so no note can be taken thereof. All that can be said at best is that there is a possibility of some aspirants having not taken notice of this opening, if they had hurriedly and cursorily read the public advertisement, Annexure D, I use the words "hurriedly and cursorily" deliberately because the public advertisement, Annexure D, itself mentions that full details regarding the post, etc. could be had from the Public Service Commission office and that the advertisement was only the abridged or abbreviated information. If the drafter of the advertisement who had mentioned four circumstances providing for relaxation of age limit had also mentioned simultaneously the fifth occasion of relaxation in the case of exceptionally qualified people, it would have been better. I wish that on future occasions, the Gujarat Public Service Commission becomes more careful in such matters. The question and the moot question that remains for my decision is whether this slip, innocent and inadvertent, can furnish a cause of action to the petitioner to make grievance of the nature he has ventilated in this petition. To me it appears that any wary aspirant of the post, who is presumed to be in know of the relevant statutory Rules and who will also be in know of the authenticated notifications issued by the Government in its own Gazette, would read the advertisement between lines and would then at once be led to the further inquiry. I am not impressed, by the argument of Mr. Anand that there were some such aspirants for the post, who missed the opportunity to apply and consequently, there was breach of the principle of equal opportunity to all aspirants enshrined in Article 16 of the Constitution of India. As far as the petitioner is concerned, he has no personal cause of grievance to be made in that regard, because he had already made an application and had taken his chace of being selected, and it is too late in the day for him now to plead the cause of other nebulous intending aspirants for the post. The first prong of attack, therefore, on the selection of the respondent No. 3 based on the invidious discrimination is unsustainable.

11. Mr. Anand's alternative contention was that apart from the petitioner being personally not aggrieved by the mistake in the advertisement, Annexure D, as compared to the elaborate notification to be found at Annexure A appended to the affidavit of the respondent No. 3, the selection and ultimate appointment of the respondent No. 3 is to be struck down as illegal for want of compliance with

the principles of equality. It cannot be gainsaid that such public appointments, if made in defiance of the statutory Rules, can be declared null and void and inoperative and a suitable writ would follow as a matter of course. The question, however, that would pose itself would be; can it be said that the selection of the respondent No. 3 is against any statutory Rules? The only Rules that can be pressed into service are the 1966 Rules, which are quoted above. The substantive portion of Rule 3, Clause (a) no doubt lays down that the appointee to the post may not be more than 40 years of age, but this direct and operative mandate of the Rule is diluted by the three provisos to that section. In other words, the three provisos are to be read as exceptions to that Rule, fixing the upper age limit. Whosoever applies or who is an aspirant for the post, is expected to know that in consonance with the first, second and third provisos, and in consonance with 1967 General Rules, relaxation of the upper age limit is there statutorily provided for. As said above, the Service Commission itself takes judicial notice of such possibilities of relaxation in a variety of cases and, therefore, Service Commission invites all such intending candidates, without anticipating in advance that the age bar would never be relaxed. In this context, therefore, it is difficult to say that non-mention of the fifth possible occasion of relaxation in the advertisement, Annexure D, goes to vitiate the selection of the respondent No. 3. As far as the statutory Rules are concerned, they amply protect the selection of the respondent No. 3 and it, therefore, cannot be said that the selection of the respondent No. 3 is contrary to or is in defiance of any statutory provision.

12. Mr. Anand, however, in this connection invited my attention to the judgment of D.A. Desai J. as he then was, in the special civil application No. 650 of 1973 decided on 21, 24, 25 of September 1973. He pressed into service certain observations from the judgment to support his submission. As Mr. Anand has placed heavy reliance on the ratio of this judgment, the judgment deserves to be closely examined.

13. In that case, there were five petitioners. The appointment of the respondent No. 2 there as a Senior Architect in the General State Service Class I under Public Works Departments was brought under fire on the ground that his appointment was contrary to the Recruitment Rules of 1966 in so far as he had not attained the minimum age on the relevant date as required by the Recruitment Rules for the post and that the appointment was made in violation of Article 16 of the Constitution. A public advertisement was issued by the Public Service Commission, calling upon the aspirants to the post to submit their applications on 13-9-72. The advertisement mentioned that the candidate for the post should not be less than 35 years of age and not more than 45 years of age on 1-12-72. The respondent No. 2 there made the application, even though he had not completed the requirement minimum age of 35 years on 1-12-72, he falling short by only four days. He had therefore, after the advertisement, approached the State Government, which in its turn, had requested the commission to communicate its views to the Government. The commission

seems to have agreed and the respondent No. 2 was interviewed along with the petitioners nos. 2 to 4 there. The respondent No. 2 having been selected, unsuccessful aspirants, that is petitioner nos. 2 to 5 there, and one additional person, the petitioner No. I made a common cause and filed the above-said writ petition. The contention of the petitioner No. I there was that had the Government power to relax the lower limit of 35 years and had it been made known to the invitees, he would have been the first person to offer himself as one of the candidates and this having been not done, the very foundation of equal treatment enshrined in Article 16 of the Constitution was rudely shaken and with this prayer, the doors of this Court were knocked. The learned Judge in the course of his learned and elaborate judgement, ultimately concluded as follows:

(1) Appointment to the post implies to entire process of appointment commencing from occurring of the vacancy and inviting applications by advertisement and culminating into recommendation by the recommending authority and appointment by the appointing authority. The whole process is a process of appointment;

(2) There is no power in the commission to relax any of the requirements of the rules. Therefore, the view of the commission in this matter is meaningless.

(3) But apart from all this, I would rest my judgment on the fooling that the Government had no power to relax the requirement as to minimum age and no such relaxation could have been made.

(4) Examining, therefore, the appointment of the second respondent and keeping in view of the fact that there was no power to relax the qualification as to minimum age and even if such a power be presumed, representation made by the advertisement indicated that there was no such power and that some more candidates did not come forward including petitioner No. I, appointment of second respondent is made in violation of the statutory rules as also of Article 16 and guarantee of equality in the matter of appointment to public officer is denied to petitioner No. I.

14. To me, therefore, it appears that that case was decided against the State Government and the respondent No. 2 there essentially and primarily on the ground that the State Government had no power to relax the lower age limit and that even if the State Govt, had such power, it having been not brought to the notice of the general public that such power was thought to be decided, the petitioner No. I and other prospective candidates in that case were deprived of the opportunity, and thus there was no equality of opportunity, which is enshrined in Article 16 of the Constitution of India. It is, therefore, evident that the learned Judge in that judgment laid down the principle that the Government had no power to relax the lower age limit of 35 years and therefore, the appointment order was held to be illegal. The other observations made in that judgment will be obiter observations. All that the learned Judge in that judgment

has stated is that the petitioner No. 1 there was a specific instance before the court speaking of the obvious discrimination practised against him in so far as the petitioner No. 1 was deprived of the opportunity available to him. Incidental observations no doubt are there speaking of what should be the character of the advertisement and how it should be made public, but the question that clearly arises before me here was not there in that case and, therefore, the judgment in question cannot be of any assistance to us in this question.

15. The above discussion, therefore, would dispose of the first, second and fifth of the contentions advanced by Mr. Anand before me. Even the fourth contention stands disposed of on my interpretation of the public advertisement, Annexure D, as being only a compendium of the notification, Annexure A to the affidavit of the respondent No. 3, and in these circumstances, it cannot be said that the advertisement is the be all and end all of the appointment process.

16. This brings me to Mr. Anand's contention that power of relaxation should not be resorted to as long as eligible candidates are available. The statutory Rule 3 which deals with the qualification of age with the exceptional situations dealt with there does not warrant such a condition as is pleaded by Mr. Anand. The idea in all such appointments is to have the best talent available. The first proviso speaks of this anxiety on the part of the Governor making the Rules. It lays down that if the screening authority comes across a candidate possessing exceptionally good qualifications and/or experience, it may screen him and the appointing authority on being apprised of the availability of such an exceptionally qualified candidate may select the candidate and recommend relaxation of the upper age limit. Thus this particular contention has no force in it.

17. This brings me to the challenge based on the comparative merits or demerits of the petitioner vis-a-vis the respondent No. 3. The petitioner in his petition and in his two affidavits-in-rejoinder has tried to picture himself superior to the respondent No. 3 in many respects and the respondent No. 3 as far below the standard. It is beyond the province of this court's powers to decide in a technical matter of selection as to who is superior to whom. It would be hazardous for the courts of law to decide this particular claim of the petitioner vis-a-vis the respondent No. 3 or the respondent No. 4. In order to safeguard the various principles of good administration based on the rule of law, an independent body like the Service Commission is made the creature of the Constitution and such a body manned by the persons of position, prestige and accredited impartiality is entrusted with this nice and delicate job of weighing the merits of the intending candidates and judging who is better than whom. The Service Commission in its discretion invites some experts to assist it and at the time of this particular interview, the august body was assisted not only by Dr. Desouza but also the respondent No. 5, both of whom can be said to be medical experts. Deliberating on the expert advice, the Commission ordinarily takes its own decision, which is within its rights and which is its responsibility. Except in the rare cases of gross mala fides or in the case of patent acts of bias or

partiality, going to the root of the edifice of upright administration of the process of selection in consonance with justice and rule of law, this Court does not tinker with the decision of such impartial and august administrative institutions, like the Public Service Commission. This Court possesses neither capacity nor competence to sit in judgment over such decisions. In the vital and wider interests of the general public, such decisions are rightly left to their province and unless, as said above, gross and apparent cases are brought to the notice of this court, crying aloud against the throwing to winds of the known norms of impartial dispensation of their duties, this Court cannot be expected to sit with golden scales and decide whether their judgments are sound or not. In short, it is left to the good sense and capacity of the public Service Commission to decide whether the respondent No. 4 and respondent No. 3 were superior to the petitioner or not. In this connection, the respondent No. 3 tried to place before me her allegedly superior merits. The respondent No. 4 on the other hand tried to show him better off and the petitioner on the third had tried to depict them in unfavourable colours and tried to highlight his professed merits. I am not in a position to say on perusal of this material that apparently and that to on the face of the record, there are any glaring and striking draw-backs in the assessment made by the Service Commission. On this short ground, I say that petitioner has failed to show that the selection of the respondent No. 3 and the respondent No. 4 was mala fide or was tainted. It is too much to say that relevant material must not have been brought to bear by the Service Commission. All relevant considerations must have been brought to bear on their mind by the members of the Commission, when they took upon themselves the serious and delicate job of making selection to a post of some importance. It is easy to sit in postmortem of such functions but it is equally difficult to make them good in a court of law where the scope of examination is limited and well-hedged. It is in this context that I say that the petitioner has failed to make good his submission that the respondent No. 3 had been selected because of the supervening influence of Dr. DeSouza, one of the two expert advisers of the commission, or that the selection of the respondent nos. 3 and 4 was arbitrary because the petitioner's past record vis-a-vis that of the respondents nos. 3 and 4 had not been considered by the Commission. It can be judicially noticed that whenever a sitting Government servant is an applicant before the Service Commission, they invariably insist on the transmission of the confidential report of the concerned employee before he is tested on the anvil of interview. It is, therefore, difficult to believe that the Service Commission had not considered the alleged past warnings administered to the respondent No. 4 by the Gujarat Government or that the respondent No. 3 had not been confirmed by the Government earlier in 1971 and she had then resigned and left for Bombay. The job of selecting a candidate is a nice job, nice in the sense that it calls for a very penetrating capacity to look into the factors both pro and con. The very constitution of the commission envisages and presupposes the existence of such qualities in the members of the Commission, who ultimately take the decision on their own and as their own, and such decision ordinarily must be presumed to be unbiased and impartial. Whoever makes an

allegation that there is something fishy, is under heavy onus both to plead and prove such factors running counter to the ordinary presumption. The Supreme Court's judgment in the case of Shri Parvez Qadir Vs. Union of India (UOI), lays good guidelines on this question. The rest of the points, that is points nos. 6, 7 and 8 canvassed by Mr. Anand for the petitioner, therefore, are held as not substantiated.

18. One facet of the case remains to be examined. The issuance of a writ at the hands of the High Court is a matter of discretion of this Court and it is not a matter of right of any citizen. The petitioner was the colleague of the respondent No. 3 and also of the respondent No. 4 for a number of years as he has stated in his petition. Though there is nothing positive on record to show that the petitioner knew of the respondent No. 3 have been about 44 years of age at the time she applied for the post, it would be reasonable in the circumstances of the case to believe that in all probability he might be knowing the possible age of the respondent No. 3. Apart from this, he took his chance at the interview. As all the five candidates were interviewed on the same day, he must have known that the respondent No. 3 was one of such candidates. He took his chance and after having failed in his attempt to get through with flying colours as he expected to do, he has now invoked the constitutional provisions to meet his personal ends. In these circumstances, it appears to me that he does not deserve to be entrusted with the writ even if this be a case for that. If the petitioner could have established that he was misled by the advertisement, the matter perhaps would have assumed a different complexion and colour. As far as the petitioner is concerned, he having lost the chance, cannot be permitted to agitate the question purely from selfish point of view in the manner he has done. At this instance, the court even otherwise would be loath to grant the discretionary prayer and on this ground also, I am inclined to reject his prayer.

The result is that the petition fails and is dismissed. Rule is discharged with no order as to costs. The interim order granted by this court, directing the State Government to treat the appointment of the respondent No. 3 as temporary until the decision of this petition by this Court, shall be operative for a period of one month from to-day, to enable the petitioner to have further recourse in accordance with law.