

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 8471 of 1993****For Approval and Signature:****THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI**

=====

1 Whether Reporters of Local Papers may
be allowed to see the judgment ?

2 To be referred to the Reporter or not
?

3 Whether their Lordships wish to see
the fair copy of the judgment ?

Whether this case involves a
substantial question of law as to the
4 interpretation of the constitution of
India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the
civil judge ?

=====

SMT. NIRMALABEN J. GAMETI

Versus

THE CHIEF METROPOLITAN MAGISTRATE, AHMEDABAD.

=====

Appearance :

Mr.Mehul S.Shah for MR SURESH M SHAH for Petitioner
None for the respondents

Mr.J.B.Pardiwala, learned advocate for High Court
appeared on request of Court

=====

**CORAM : THE HON'BLE SMT. JUSTICE ABHILASHA
KUMARI**

Date : 28/02/2006

ORAL JUDGMENT

1. Brief facts which led to the filing of the writ petition are that the petitioner herein is a member of the Scheduled Tribe. The respondent No.1 i.e. Chief Metropolitan Magistrate, Ahmedabad issued an advertisement dated 18.8.90 in the News Paper for recruitment to Class III and IV posts and invited applications from eligible candidates for the same, which were to be sent within seven days of the said advertisement. The petitioner, being H.S.C. qualified applied for the post of Clerk in pursuance to the said advertisement. As far as the eligibility criteria was concerned, the petitioner fulfilled all criteria. Regarding the criteria of age, the advertisement stipulated that the age of a candidate should be 18 to 25 years and persons belonging to Scheduled Tribe/Schedule Caste, Handicapped and Ex-servicemen category etc. would be given relaxation in age according to Rules. At the time of the advertisement the petitioner was about 28 years and 3 months of age i.e. above the age of 25 years. However since the petitioner belongs to the category of Scheduled Tribe, as such she was entitled to get the

benefit of the relaxation of age as per the Recruitment Rules for the Recruitment to Class III and IV Services in the Subordinate Judicial Services, 1959 (hereinafter referred to as "the Rules"). The relevant rule with regard to relaxation of age is Rule 13(4), which, as reproduced in the petition, is quoted as under:

"If for the purposes of recruitment to any post applications for appointment to such posts are invited by means of Notification or advertisement published in the news papers 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 the period of 90 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 first day of the month."

2. Since the date of birth of the petitioner is stated to be 19.5.62, the petitioner was within the relaxed age limit at the time of the issuance of the advertisement i.e. on 18.8.90 and on the first day of the month immediately following the month in which the period of 90 days from the date of publication of

the advertisement, the petitioner was about 28 years and 7 months of age. The relaxation admissible to the petitioner being that of 5 years, for the purpose of availing this benefit the petitioner should have been not above 30 years of age at the time of application. Admittedly the petitioner fulfilled this norm.

3. On the basis of the application submitted by the petitioner, she was called for an interview and typing test and ultimately came to be selected. She was placed at Sr.No.20 in the select list prepared by the respondent-authority and she was informed about this fact through a letter dated 30.9.1991. A perusal of this communication reveals that while informing the petitioner regarding her placement at Sr.No.20 in the select list, it has also been stipulated that the future vacancies which may arise would be filled up in a serial-wise manner from this select list.

4. When the time for making appointments from the said select list came, the petitioner was shocked to learn that 5 persons who were figuring below her in

the select list were given appointment as Clerks vide order dated 7.8.93 while petitioner was ignored. These five persons have been arraigned as respondents No.3 to 7 in the present writ petition. The petitioner preferred a representation to the respondent No.1 dated 10.8.93, pointing out that she has a preferential right to be appointed before the respondents No.3 to 7, in view of the fact that her name was placed at a higher serial number in the select list than those of the said respondents and, therefore, she should be given the appointment with effect from a date prior to the date on which the respondents No.3 to 7 were given appointment. In reply to this representation of the petitioner, the respondent No.1 vide, communication dated 13.8.93, informed the petitioner that since she had crossed the age limit on 7.8.1993 when the appointments were given to the respondents No.3 to 7, she cannot be given appointment as clerk. This, in a nut shell, is the precise grievance of the petitioner.

5. The questions which arise for determination of

this Court are whether the petitioner, who had already availed of the benefit of age relaxation at the time of applying for the post of Clerk, would be entitled to avail of the same benefit, even though at the time of appointment she was admittedly over-age, taking into consideration the benefit of relaxation already availed of? Even if it is assumed that the select list remained operative till the time appointments were made, whether the petitioner, who had crossed the age limit by that time, had a right to appointment by virtue of her name figuring above the said respondents in the select list? Admittedly the age of the petitioner on 7.8.1993 when respondents No.3 to 7 were offered appointment was over 30 years i.e. beyond the permissible age limit after relaxation of age. It is not the case of the petitioner that respondents No.3 to 7 have also crossed the age bar when their appointments were made.

6. I have heard Shri M.S.Shah, learned counsel for the petitioner at length, and have gone through the

available material on record. No reply has been filed by the respondents. Shri M.S.Shah, learned counsel for the petitioner has very forcefully submitted that the action of the respondent No.1 in not giving appointment to the petitioner even though her name was above the respondents No.3 to 7 in the select list, amounts to a violation of Articles 14 and 16 of the Constitution of India and is clearly arbitrary and discriminatory. He submits that the petitioner was entitled to avail of the benefit of Rule 13(4) of the Rules at the time of issuance of the advertisement, in pursuance of which she applied for the post of Clerk. Since she was entitled to such relaxation, her application was considered and she was called for interview and typing test and, thereafter, selected. She was duly informed about her placement at Sr.No.20 in the select list and also that in future, this select list would operate serial-wise as and when vacancies arose and appointments were made. It is, therefore, clear that the select list was very much alive and she,being placed above the respondent Nos.3 to 7 in the said

list, was entitled to be offered the appointment before the said respondents. This fact was totally ignored and the persons below her in the list have been given appointments. Had the respondent-authority cancelled the select list then the petitioner would have had no right to agitate but since they have chosen to operate it, then a right has accrued in her favour and she should have been offered appointment before the respondents No.3 to 7.

7. The second contention raised by the learned counsel for the petitioner is that the question whether the petitioner is falling within the permissible age limit has to be seen at the time of issuance of the advertisement and making of the application and not at the time of actual appointment. Since the petitioner was admittedly within the relaxed age limit at the time of issuance of advertisement and making of the application and even at the time of placement in the select list, then the fact that she became over-age at the time of making appointments, should not come in her way. In

other words, the relaxation once given, as per Rules, should apply till the date of appointment.

8. The third contention raised by the learned counsel for the petitioner is that having been duly selected and placed on the select list and having been informed that this select list would operate in order to fill up the future vacancies, the petitioner was legitimately expecting that she would get appointment. By ignoring her at the time of giving appointment to the respondent Nos.3 to 7, all her legitimate expectations have been shattered and great injustice has been done to her. According to the learned counsel for the petitioner, this is a fit case in which a direction should be given to give appointment to the petitioner forthwith, from a date prior to 7.8.93, which was the date on which respondent Nos.3 to 7 have been given appointment.

9. In support of the above contentions Shri M.S.Shah has relied upon **1991(2)GLH (U.J)3 Kamla Singh Bengali v. Gujarat Public Service Commission)**

and 1993(2) GLH 635 (Popatbhai Ramjibhai Moghariya v. District Judge, Surendranagar). In 1991(2)GLH (U.J)3 Kamla Singh Bengali v. Gujarat Public Service Commission) (Supra) the facts were totally different as the petitioner, who was a Doctor was selected and appointed as a Gynaecologist Class I on 12.10.88 after facing an interview. On the appointment being challenged, the Court held that since the petitioner was eligible on the date of receipt of application, therefore, he was interviewed, selected and appointed and the latter date of appointment does not render him to be ineligible for that appointment. In the report of this case there is no mention of the relaxation being given on account of belonging to any specified category as in the present case or of any rule how that relaxation is to be computed. In the case in hand, the petitioner has been given the benefit of relaxation since she belongs to the S.T.category as per rules, and having availed of such relaxation has crossed the age limit at the time of appointment. The ratio of the judgment in **Kamla Singh Bengali v. Gujarat Public Service Commission) (Supra)**

is, therefore not applicable to the facts and circumstances of the present case since in that case the question whether relaxation availed at the time of application extended upto appointment, did not arise. In 1993(2) GLH 635 (Popatbhai Ramjibhai Moghariya v. District Judge, Surendranagar) (Supra) the petitioners were found eligible in the selection test and interview for the posts of Section Officers and were placed in the select list in the year 1985. No appointments were made till 1989 due to a ban on recruitment by the State Government. When appointments were made the petitioners were denied appointment on the ground that they had become over age and persons junior to the petitioners in the select list were given appointment. In this background this Court held that that since the advertisement did not contain any recital to the effect that the crossing of the age limit at the time of real appointment would disqualify the selectees from appointment, the petitioners therefore had reasonable hope of being appointed and directions were given to appoint them with retrospective effect.

These two cases turn upon their own peculiar facts, which are different to the facts and circumstances of the present case. The ratio laid down therein is not applicable to the facts of the case in hand.

10. In the present case, the advertisement clearly mentions the age limit and also prescribes the relaxation as per Rules for certain categories as mentioned therein. Admittedly, the petitioner has already availed of that relaxation as per Rules. Rule 13(4) of the Rules also refers to the age relaxation in reference to the date of advertisement. This too had been availed of by the petitioner. Therefore, the facts of the present case are totally dissimilar from those obtaining in 1993(2) GLH 635 (**Popatbhai Ramjibhai Moghariya v. District Judge, Surendranagar**) (Supra) and, therefore, the ratio of that case will also not be applicable in the facts and circumstances of the present case.

11. On a request being made by this Court, Shri J.B.Pardiwala, Advocate, who appears for the High

Court, has assisted the Court and brought to my notice the decision of a Division Bench of this Court in L.P.A.No.347/2000 (**Anil V.Kale v. District Judge**) alongwith other L.P.As, in which the Division Bench has discussed at length the very same question. Mr.Pardiwala has also made certain clarificatory submissions, the crux of which is to the effect that in that particular case, the petitioners had applied for the posts of Bailiffs in response to an advertisement. Having been selected, their names were included in the select list but they were not offered appointment, because after 7 years of finalization of the selection, the names of the appellants were deleted from the select list on the ground that they have become over age. Some aggrieved persons filed writ petitions against the deletion of their names, which were allowed by this Court. Upon this, other similarly situated persons also filed writ petitions. These were rejected on the ground of delay and laches. Against this decision of the Hon'ble Single Judge, the above-noted LPA came to be filed.

12. Mr.Pardiwala submitted that the main question for determination in the L.P.A. was whether the learned Single Judge had rightly dismissed the Special Civil Application of the appellant on the ground of delay and laches when a co-ordinate Bench had already adjudicated upon the rights of similarly situated persons and allowed their claim. What further weighed with the Division Bench was that in the intervening period, no rights of any third party had accrued, because no fresh selection was made by the respondents therein for the posts of Bailiffs. Also, vacant posts of Bailiffs were available, against which the appellants could be appointed, without prejudicially affecting the rights of any other person. In these peculiar facts and circumstances, the Division Bench directed that the appellants be given appointment as Bailiffs. However, discussing the legal position in depth, the Division Bench reinforced the same to the effect, that merely because the name of a person figured on the select list does not give him any right for appointment. However, apart from the above factors, what further

weighed with the Division Bench was that the High Court, on the administrative side, had taken a decision in a Chamber meeting held on 28.4.94 and issued instructions contained in letter dated 5.1.1995, to the effect that a candidate who was within the prescribed age limit at the time of making application on the last date prescribed thereof, for recruitment to Class III or IV posts in subordinate courts, shall be deemed to be within the prescribed age limit at the time of preparing select list, if otherwise found fit, and also at the time of getting appointment.

13. Admittedly this decision had come into force with effect from 28.4.94. The appellants in the LPA could not get the benefit of this decision since their names had already been deleted from the select list, having become over age. Moreover, their petitions had been dismissed by the learned Single Judge on the ground of delay, which was their main grievance, as similar petitions had been allowed by a co-ordinate Bench. Therefore, in the facts and

circumstances of the present case, the decision of the Division Bench in the LPA will not apply to the present case, since the respondents No.3 to 7 were offered appointments on 7.8.93 i.e. before the said decision was taken by the High Court on the administrative side on 24.8.94. Moreover, in the present case the right of 3rd parties i.e. respondent Nos.3 to 7 have also accrued since they were given appointments, as they fulfilled the eligibility criteria as on 7.8.93, when the petitioner had already become overage. Pointing out these distinguishing features, Mr. Pardiwala submitted that the ratio of the above judgment, therefore, will have no bearing on the facts and circumstances of the case in hand.

14. Having carefully considered the arguments advanced and law cited by the learned counsel for the petitioner and the submissions made by Mr.J.B.Pardiwala, and after perusing the entire material on record, I am of the considered opinion that the impugned action of the respondent No.1 in

not offering the appointment to the petitioner because she had crossed the age limit, after availing the relaxation for the same, is neither arbitrary nor violative of her fundamental rights. A conjoint reading of the advertisement dated 18.8.90 as well as Rule 13(4) reproduced (supra) makes it very clear that the relaxation of age allowed to certain categories therein was in relation to the age limit as on the date of making application for the post advertised. The method of calculation for determination of age is also prescribed in Rule 13(4) of the Rules. Neither the advertisement nor the rule stretches this relaxation to the date of actual appointment. It only gives relaxation to persons belonging to certain categories who were not falling within the prescribed age limit for the general category as on the date of advertisement. Admittedly, the petitioner availed of this relaxation at the time of making application. The petitioner was also within the prescribed age limit after relaxation at the time of placement of her name in the select list as is evident from communication dated 30.9.91 which shows

her name to have been placed at Sr.No.20 thereof. This communication also stipulates that the select list will be taken into consideration while making the appointments against future vacancies. However, it nowhere says that the persons, who are not eligible by reason of not fulfilling the criteria of age as on the date of appointment will also be offered such appointment even though there are other persons on the list who fulfill the same (Emphasis supplied). As the petitioner had already availed of the benefit of age relaxation at the time of making of the application, therefore, it cannot be said that that benefit has not been extended to her. Neither it can be stretched to mean that this benefit should apply to the date of appointment even though the petitioner was over age at that time and appointment was given to eligible persons. It can be possible that between the date of application and the date of appointment there is an intervening gap of many years in which no recruitment had been made. In this case, the advertisement was issued on 18.8.90, petitioner was informed about her placement in the select list

on 30.9.91 and the actual appointment of respondents No.3 to 7 came to be made on 7.8.93. Therefore, there is a gap of about 3 years between the date of advertisement and the date of appointment. It is not the case of the petitioner, and neither is there any material on record to show, that the respondents No.3 to 7 were also over age but still they were offered appointment. Had that been the position, then the plea of arbitrariness, discrimination and violation of Article 14 of the Constitution of India raised by the petitioner, would have some force. However, in the absence of any such material or ground taken by the petitioner it can only be assumed that the respondents No.3 to 7 were within the prescribed age limit when they were offered appointments. Therefore, their appointment did not suffer from any legal infirmity. In the interregnum their vested rights for seniority and promotion have also fructified.

15. Even if the select list remained operative till the time of making appointments, merely by virtue of

the fact that the name of the petitioner figured above respondents No.3 to 7, no right to appointment accrues in favour of the petitioner. In this regard the Hon'ble Supreme Court has held in **(2002) 5 SCC 195 (S.Renuka and others v. State of A.P. and another)** that "It is settled law that no right accrues to a person merely because a person is selected and his or her name is put on a panel. The petitioners have no right to claim an appointment." This principle of law has also been enunciated in **(2003)5 SCC 373 (State of A.P. And others v. D. Dastagiri and others)**. The relevant paragraph is reproduced herein-below:

"In the absence of publication of select list, the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list. The State Government had a right to take a policy decision either to have prohibition or not to have prohibition in the State. If pursuant to a policy decision taken to impose prohibition in the State there was no requirement for the recruitment of Constables in the Excise Department, nobody can

insist that they must appoint the candidates as Excise Constables. It is not the case of the respondents that there was any mala fides on the part of the appellants in refusing the appointment to the respondents after the selection process was complete. The only claim was that the action of the appellants, in not appointing the respondents as excise Constables, was arbitrary. In the light of the facts, when it was open to the Government to take a policy decision, the respondents cannot dub the action of the respondents as arbitrary, particularly, when they did not have any right as such to claim appointments. In the absence of selection and publication of select list, mere concession or submission made by the Government Pleader on behalf of the appellant State that the cases of the respondents would be considered for appointment in the existing vacancies cannot improve the case of the respondents. Similarly, such a submission cannot confer right on the respondents, which they otherwise did not have."

16. As far as the argument that the petitioner had legitimate expectations regarding appointment is concerned, the same cannot, by itself, give the petitioner any enforceable right if there is no legal entitlement or eligibility for the same.. As is evident from the above decisions of the Supreme Court, no right accrued in favour of the petitioner by virtue of her name figuring above the respondents

No.3 to 7 in the select list. Even otherwise, the petitioner had crossed the age bar, whereas it is not her case that the respondents No.3 to 7 were not eligible. This contention, therefore cannot be accepted in the totality of circumstances discussed hereinabove.

17. In the present case, no malafides have been alleged against the respondent No.1 in not giving appointment to the petitioner. However, the respondent No.1 vide letter dated 13.8.93 has categorically communicated to the petitioner that the appointment could not be given to her since on the date when respondents No.3 to 7 were appointed she had already crossed the prescribed age limit. No other point has been urged before me.

18. Although this writ petition has been filed in the year 1993, it has come up for hearing after about 12 years. The intervening rights of respondents No.3 to 7 have strengthened and there is no averment or supplementary pleading to the effect that the

petitioner has not been gainfully employed in the intervening period. It stands to reason that the petitioner, being an educated person and holding certain qualifications for the post for which she had applied, must have utilised the same in order to gain employment during these intervening years. The prayer of the petitioner that direction be issued to give her appointment with effect from a deemed date prior to the appointment of respondents No.3 to 7 i.e. 7.8.93, therefore cannot be accepted, looking to the factual and legal position as discussed hereinabove. Even otherwise, I am of the considered opinion that the petitioner has already availed of the benefit of age relaxation at the time of applying for the post in question, in pursuance to the advertisement. This age relaxation of 5 years cannot be stretched indefinitely, if appointments are made at the time when the petitioner has become ineligible. Besides this, there is no allegation that the respondents No.3 to 7 were over age at the time when appointments were offered to them. Therefore, their appointments can not be said to be illegal.

Since the petitioner was clearly not within the prescribed age limit at the time when appointments came to be made, even after having availed the benefit of relaxation, the action of the respondent No.1 in not offering her appointment cannot be said to be illegal. Moreover, the petitioner also does not reap the benefit of the decision, on the administrative side, taken by the High Court in its Chamber meeting held on 24.8.1994, which has been brought to light by Shri J.B. Pardiwala, and which has been discussed in L.P.A.No.347 of 2000, and hereinabove.

19. This court is grateful for the assistance rendered by Shri J.B. Pardiwala, advocate, which has gone a long way in clarifying certain issues having a direct bearing on this case.

20. For the reasons stated hereinabove, no relief, as prayed for, can be granted to the petitioner. The writ petition is, therefore, dismissed. Notice is discharged. Interim relief, if any, stands vacated.

There shall be no order as to costs.

(Smt.Abhilasha Kumari,J)

arg