

made by the employee is based upon his belief and not his personal knowledge. From further information it would always be open to him to show that the statement made was incorrect and his date of birth was in fact different from the one earlier stated by him. However, if he has entered into the service fraudulently by misstating his date of birth the question of estoppel would arise and he would be debarred from challenging the correctness of his date of birth. For instance, a man may not be of age to enter a particular service but by wrongly giving his age he may secure employment. Later on he would certainly be estopped from saying that he was of a younger age than the one stated by him at the time of his entry into service. Short of such a fraud or misrepresentation there is no rule of estoppel which would debar him from claiming and proving that the date of birth earlier given at the time of his entry into service was not the correct one. As in the present case even if the appellant would have given his date of birth as found out correct now he would have certainly been recruited in the service. Moreover, the date of birth, apart from its bearing on the eligibility of a person for a given service would not be ordinarily a part of the contract of service. The date of birth is nothing but a representation as to the age of the person concerned. The claim for the change of the date of birth thus would not amount to a change of condition of contract of service and as such the question of estoppel by contract would not be attracted to such a situation.

(4) For the reasons recorded above, this appeal is allowed, the cross objections dismissed and the judgment and decree of the learned District Judge modified so as to restore the decree of the trial Court. No costs.

N.K.S.

Before D. S. Tewatia & Surinder Singh, JJ.

SURINDER NATH JOSHI,—Petitioner

versus

THE PUNJAB PUBLIC SERVICE COMMISSION

AND OTHERS,—Respondents.

Civil Writ Petition No. 6084 of 1983.

July 24, 1984.

Constitution of India 1950—Article 320—Punjab Dental Education Service (Class-I) Rules, 1977—Rule 7—Maximum age limit prescribed for recruitment—One of the applicants overage but

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applying for the post—Before selection by the Public Service Commission is made, rule amended increasing the maximum age limit—Government requiring the Commission to re-advertise the post in light of the amended rules—Commission—Whether bound by such a direction—Issuance of the direction by the State Government—Whether undermines the independence of the Commission.

Held, that there is no constraint that the Government shall make an appointment of an officer either because there are vacancies or because a list of candidates had been prepared and is in existence even if the list had been prepared by the Public Service Commission. If the Government is not bound to appoint a person who had even been selected by the Public Service Commission, there could not be any bar against the Government to reconsider the matter of appointment before the selection had been made by the Commission. Even otherwise it is for the employer to decide about the qualifications for eligibility of a certain post to be filled in by him. If at a given time the Government, for a *bona fide* reason, desires to effect a change in the requirements of eligibility, it is not for the Public Service Commission to oppose any such change on the ground that it would undermine their independence. In the absence of any allegations of *mala fides*, there is no justification for the Commission not to comply with the fresh requisition made by the Government for re-advertising the post.

(Para 5).

Petition under Article 226 of the Constitution of India praying that a writ of Certiorari, Mandamus or any other suitable writ, direction or order be issued :—

- (i) *summoning the complete records of the case ;*
- (ii) *quashing the orders at Annexure P. 2 ;*
- (iii) *directing the respondents to consider the claims of the petitioner in pursuance to the advertisement dated 21st January, 1983 for the post of Assistant Professor Dentistry ;*
- (iv) *the Hon'ble Court may also grant any other relief deemed just and fit in the circumstances of the case ;*
- (v) *Costs of the petition may also kindly be awarded.*

J. L. Gupta, Senior Advocate, Rajiv Atma Ram, Rakesh Khanna, Subhash Ahuja, Advocates, with him, for the Petitioner.

H. S. Riar, DAG (Punjab), for Respondents Nos. 2 & 3.

J. S. Chahal, Advocate, for respondent No. 1.

JUDGMENT

Surinder Singh, J.

(1) An unnecessary controversy between the employer, i.e. State of Punjab (Respondent No. 2) and the Punjab Public Service Commission (Respondent No. 1), at the cost of the candidate i.e. the petitioner has led to the filing of the present Writ Petition under Article 226 of the Constitution of India with a prayer for the issue of a Writ of Mandamus. The facts may be briefly noticed. Respondent No. 1 at the behest of respondent No. 2 advertised one post of Assistant Professor in Dentistry by means of an advertisement dated January 21, 1983. Apart from the basic academic qualifications and the requisite experience as a Senior Lecturer in Dentistry, the advertisement stipulated that candidates must be less than 40 years of age on February 23, 1983. For the candidates belonging to the Scheduled Castes and Backward Classes the maximum age limit was prescribed as 45 years. The advertised post of Assistant Professor in Dentistry is borne on the cadre of Punjab Dental Education Service (Class I), which service is governed by the Punjab Dental Education Service (Class I) Rules, 1977 (hereinafter referred to as 'the 1977 Rules'). Rule 7 of the said Rules debars a person more than 40 years of age from being recruited as an Assistant Professor.

(2) It transpires (and this is the case of Respondent No. 1 itself, as mentioned in Paras 9 and 10 of their written statement) that the above-mentioned post was advertised in pursuance to the letter of Punjab Government dated March 11, 1981. The post was advertised first in 1981 and then twice in 1982 but no candidate was found eligible/suitable. Ultimately the post was again advertised in January, 1983, in response to which some applications were received including an advance copy of the application sent by the petitioner, the original having been sent through proper channel i.e. Punjab Government. A material fact which requires notice is that by means of Gazette Notification dated December 7, 1983 (Copy Annexure P. 1) the Punjab Government amended the 1977 Rules. As per the amended rules the maximum age limit for direct recruits was raised to 45 years in case of employees of the Punjab Government and the other State Governments or the Government of India. It is not disputed that though at the time of submitting his application to the Government for the post in question, which was advertised earlier, the petitioner was above the age of 40 years but being below the age of 45 years he became eligible for being considered for appointment by virtue of the amended rules.

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(3) The grievance of the petitioner is that in spite of his eligibility under the amended rules, his application for the post was not forwarded by the Punjab Government to respondent No. 1 as the former had written to respondent No. 1 by means of letter (Copy Annexure P. 5), that the respondent-Public Service Commission should re-advertise the post to enable the candidates above the age of 40 years and up to 45 years to apply for the post. Respondent No. 1 however did not comply with the requisition made by the Government by means of the said letter. The stand of respondent No. 1 in this behalf, as indicated in their written statement, is that the age limit of 40 years had been prescribed in the relevant rules on the basis of which the post had been advertised by the respondent and the amended rules being not applicable retrospectively the respondent 'found it inappropriate to accept the belated revised proposal of respondent No. 2'. It is further mentioned in the written statement of respondent No. 1 that they had decided to go ahead with the interview of the candidates fixed for January 25, 1984. As regards the petitioner, it is stated that as he had sent only an advance copy of his application and the original application had not been forwarded to them by the State Government, his (the petitioner's) application was rejected.

(4) Mr. H. S. Riar, learned Deputy Advocate-General, Punjab, has reiterated the stand of the State as contained in their written statement that the State Government had amended the Service Rules by means of amendment dated December 5, 1983, which came into force with effect from December 7, 1983. Thereafter the Government by means of letter Annexure P. 5 had requested respondent No. 1 to re-advertise the post fixing the upper age limit as 45 years in view of the amendment in the Rules. It was further contended that the action of the State Government in this behalf was quite legal and in accordance with the Service Rules. As against the said contention, Mr. J. S. Chahal, counsel for respondent No. 1 submitted that as the post had been previously advertised on the basis of the earlier requisition, no fresh directions for re-advertising the post could be issued by the Punjab Government on the basis of the amendment in the Rules, especially when the said amendment was not designed to have retrospective effect. The learned counsel also termed the action of respondent No. 2 in issuing a direction for re-advertising the post as 'an encroachment upon the independence of the Commission'.

(5) What has the petitioner to say? His learned counsel has naturally taken support from the stand of the Punjab State. He has also placed reliance on the relevant provisions of the Constitution of India i.e. Article 320(1) which relates to the functioning of the Public Service Commissions. The relevant provision is extracted below :

320.—FUNCTIONS OF PUBLIC SERVICE COMMISSIONS. (1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointment to the services of the Union and the services of the State respectively.”

Counsel also made a reference to the latter part of sub-Article (3) of Article 320 to emphasise that a duty had also been cast upon the Public Service Commission to advise on any matter so referred to them. The contention on the basis of the said provision of the Constitution is that the Public Service Commission has only an advisory capacity and the State Government was not bound to accept the advice so given. Counsel sought support from *The State of Haryana v. Subhash Chander Marwaha and others*, (1), wherein it was held by their Lordships of the Supreme Court that there is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates had been prepared and is in existence. The list in the said case had been prepared by the Haryana Public Service Commission. In the light of this dictum, it was rightly contended by the counsel that if the Government was not bound to appoint a person who had even been selected by the Public Service Commission, there could not be any bar against the Government to re-consider the matter of appointment before the selection had been made by the Commission, as in the present case. We are at one with the learned counsel in regard to the above contentions. Even on first principles, it is for the employer to decide about the qualifications for eligibility of a certain post to be filled in by him. If at a given time the Government, for a *bona fide* reason, desires to effect a change in the requirements of eligibility, it is not for the Public Service Commission to oppose any such change on the ground that it would undermine their independence. As already noticed, admittedly interviews had not been taken place so far, for selection

(1) 1973(2) S.L.R. 137.

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to the post in question. In the absence of any allegations of *mala fides*. We see no justification for respondent No.1 not to comply with the fresh requisition made by the Government for re-advertising the post. As already noticed, the post was advertised first in 1981 and then twice in 1982, but no eligible/suitable candidate was available on those occasions. These facts are indicative of the *bona fides* of the Government in making a fresh effort by raising the maximum age limit so as to attract better talent.

(6) In view of what has been discussed above, the Writ Petition is accepted and for the purpose of enforcing the statutory duty cast upon respondent No. 1 under Article 320 of the Constitution of India, a Writ of Mandamus is issued to the said respondent to comply with the fresh requisition made by the State Government to re-advertise the post of Assistant Professor of Dentistry with the modification in regard to the maximum age limit i.e. 45 years, as stipulated under the amended Services Rules. As the matter of selection has been hanging fire for the last three years, it is hoped that respondent No. 1 shall do the needful with due promptitude. In regard to the prayer on behalf of the petitioner for issuance of a direction to the respondents to consider his claim for the post of Assistant Professor Dentistry, no such direction is necessary as it is averred in the written statement of the Government that the application of the petitioner shall be forwarded to the Commission as and when the post is re-advertised. In the peculiar circumstances of the case, we make no order as to costs.

D. S. Tewatia, J.—I agree.

N.K.S.

Before J. V. Gupta, J.

JAGDISH LAL AND ANOTHER,—Appellants.

versus

SURENDER KUMAR AND OTHERS,—Respondents.

Execution Second Appeal No. 240 of 1984

July 24, 1984

Code of Civil Procedure (V of 1908)—Section 47 and Order 21, Rules 97, 99, 101 and 103—Decree for possession of immovable property—Execution of—Decree holder filing a petition under Order 21 Rule 97 alleging obstruction by the judgment-debtor—Judgment-debtor in reply claiming fresh tenancy and seeking dismissal of the