

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.1784 OF 2015

Mr. Sushil K. Sonawane

Petitioner

Vs

1. Maharashtra Public Service
Commission & Ors

.. Respondents

Mr.Abhijeet A. Desai a/w Ms V.L. Maindad, Advocate for
Petitioner.

Mr. J.S.Saluja, A.G.P for Respondents no.1 and 2.

Mr.Sudam Kale, Advocate for Respondent No.3.

Mr R.S.Datar, Advocate for Respondent No.4.

CORAM : RANJIT MORE & R.G.KETKAR,JJ.
RESERVED ON : 30/09/2015.
PRONOUNCED ON: 14/10/2015.

ORDER: (PER R.G.KETKAR,J.)

1. Heard Mr. A.A.Desai, learned counsel for the petitioner, Mr J.S.Saluja, learned A.G.P. for respondents no. 1 and 2, Mr. Sudam Kale, learned counsel for respondent no.3 and Mr. R.S.Datar, learned counsel for respondent no.4 at length. Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

2. By this Petition under Section 226 of the Constitution of India, the petitioner has, inter alia, prayed for issuing appropriate writ or directions to respondents no. 1 and 2 to consider the categories of disabled specified under Section 33 of the Persons

with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, 'Act') for the posts of Judicial Magistrate, First Class and/or Civil Judge, Junior Division, to be appointed by the first respondent and for providing 3% reservation of these posts; for issuing appropriate writ or directions to respondents no.1 and 2 to grant facilities to the physically challenged including by granting one hour extra time with or without writer to those physically challenged appearing for examinations conducted by respondents no.1 and 2; for declaration that such directions be retrospective in nature and shall come into operation retrospectively on coming into force the Act. The relevant and material facts giving rise to filing of this petition, briefly stated, are as follow.

3. The petitioner is a practicing Advocate. He has obtained Sanad from the Bar Council of Maharashtra and Goa on 2.8.2008 and since then he has been practicing as Advocate. The petitioner is physically challenged and suffers from 'cerebral palsy' on the left side and to that effect, Civil Surgeon, Thane had issued certificate on 28.1.1980. On 7.12.2013, the petitioner has addressed a letter to the Secretary of Bar Council of Maharashtra and Goa requesting them to consider reservations and other facilities to be provided to the physically challenged candidates during J.M.F.C. examinations. Respondent no.3, by its letter dated 12.2.2014, in turn referred the matter to respondent no.4

-Registrar General, High Court, Bombay for necessary action. The petitioner has also addressed letters dated 20.6.2013 to respondent no.4, Hon'ble Mr. Justice A.S.Oka and Hon'ble Chief Justice of India for providing reservation under section 33 of the Act and other facilities.

4. It is the case of the petitioner that in view of the provisions of the Act and in particular Section 33 thereof, disable is ought to be treated on par with other reserved categories and not to be given reservation for posts to judicial appointments. Respondents no.1 and 2 have not provided 3% reservation for posts of Judicial Magistrates, Civil Judge, Jr. Dn., which is per se illegal and arbitrary.

5. The petitioner further contended that by letter dated 17.4.2011 addressed to the first respondent, he requested additional one hour time for writing examinations. By letter dated 4.5.2011, respondent no.1 informed the petitioner that there is no rule for giving extra time to physically handicapped persons, who do not take the help of writer. However, those who take the help of writer, 20 minutes per hour is granted as extra time by the first respondent. The petitioner pursued his grievance. However, till date no decision was taken by respondent no.1 in that regard. The petitioner has, therefore, instituted the above petition under Article 226 of the Constitution of India.

6. The petitioner has filed additional affidavit dated 3.8.2015

and relied upon certain guidelines/Government Resolutions and Circulars issued by various authorities from time to time. On the same day, after hearing both sides, this Court directed the respondents to allow the petitioner additional time of minimum one hour for examination of three hour duration in ensuing examinations for the posts of Civil Judge, Junior Division and Judicial Magistrates First Class to be conducted by the M.P.S.C hereafter. This Court directed the respondents to file affidavit in reply within two weeks.

7. In pursuance thereof, on behalf of respondent no.4 Mr. Shrinivas B. Agarwal (Legal and Research), High Court, Appellate Side Bombay, has made affidavit dated 19.8.2015. It is contended that the issue regarding reservation of vacancies for appointment of physically handicapped persons on the establishment of the High Court of Bombay and its Benches at Nagpur, Aurangabad and Goa-Panaji and also on the establishment of the District Courts in the State of Maharashtra had come up for consideration earlier. By Resolution dated 2.5.1998, the Government decided to reserve 1% vacancies each for the blind, deaf and the orthopedically handicapped in Class III and IV services of the Government. A request was made by the Government for remarks of this Court on the feasibility of the reservation for appointment of class of persons with disability on the establishment of High Court and other Courts. The said issue

was discussed in the meeting of the Hon'ble Administrative Judges held on 3.9.1998 and following decision was taken.

“Discussed.

Considering the provisions of the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the Rules thereunder, the definition of 'establishment' would not cover appointments of judicial posts. However, while making appointments to judicial posts, the spirit behind the said enactment will be kept in mind and other things, being equal preference will be given to a person with disability. Government be informed accordingly.”

8. It is further contended that 'Apang Vikas Manch' had instituted Writ Petition No.117 of 1998 for implementation of provisions of the Act and this Court had directed the Government to take search of suitable posts for physically handicapped persons and to submit a report of Expert Committee and requested for information on certain points. The subject was discussed in the meeting of the Hon'ble Administrative Judges held on 24.6.1999 and it was resolved that considering the nature of work required to be performed by the staff of the High Court and the Subordinate Courts, there was no scope to denote posts for disabled persons, however, while making selection of candidates for being appointed in judiciary, the spirit behind the said enactment will be kept in mind and other things being equal, preference will be given to a person with disability. Reliance was also placed on the order dated 3.10.2000 passed by this Court (Coram: A.P.Shah (as learned Chief Justice then was) and

A.M.Khanwilkar (as His Lordship then was), JJ. In Writ Petition No.5151 of 2000 and it was contended that Section 33 of the Act would apply only to the establishments covered by Section 2(k) of the Act and no other organization. In that order, it was held that on plain reading of Section 33, it would appear that the posts of Civil Judge, Jr. Dn or Judicial Magistrate, First Class do not fall in the definition of 'establishment' and provisions of Section 33 have no application in so far as the appointments of Civil Judge or Judicial Magistrate are concerned.

9. It is further set out that in a meeting of the Hon'ble Administrative Judges Committee held on 28.10.2004, earlier decision dated 3.9.1998 was reconsidered and following decision was taken whereby the provisions of the Act are made applicable to the appointments in Class III and Class IV services in the judiciary throughout the State of Maharashtra.

“Discussed.

Having considered the earlier decision dated 3.9.1998 on the subject, it was decided that the provisions regarding reservation of vacancies contained in the Persons with Disability (Equal Opportunities, Protection of rights and Full Participation) Act, 1995 be made applicable to appointments in Class III and Class IV services in the Judiciary throughout the State of Maharashtra. Registry to take follow up action.”

Accordingly, Notification dated 29.11.2004 was published in the Maharashtra Government Gazette on 23.12.2004 by which the provisions of the Act were made applicable to appointments in

Class III and Class IV services in judiciary throughout the State of Maharashtra. In substance, it is contended that the provisions of the Act do not apply for appointments to the posts of Civil Judge, Jr. Dn., and/or Judicial Magistrate First class.

10. In support of this petition, Mr. Desai relied upon the following:

1. Maharashtra Public Service Commission, Rules of Procedure 2014 (for short, "2014 Rules") and in particular Rule 8 thereof.;
2. Union of India Vs National Federation of the Blind, (2013) 10 SCC 772;
3. Decision of Delhi High Court dated 25.3.2014 in the case of Nishant S. Diwan Vs High Court of Delhi, Writ Petition (C) 983/2014, C.M.Nos 1973/2014 and 1974/2014 (Coram : S.Ravindra Bhat Vs. R.V. Easwar, JJ.);
4. Allahabad High Court decision in the case of Sarika Vs. State of U.P, (2005) 4 ESC 2378;
5. Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 and also Notifications/Rules of other High Courts in support of his contention that the High Court is under obligation to identify posts which can be reserved for persons with disabilities as contemplated by Section 32 and reservation of posts in High Courts as contended by Section 33 thereof.

11. On the other hand, the respondents submitted that the provisions of the Act are made applicable only to the appointments in Class III and Class IV services in judiciary throughout the State of Maharashtra. In other words, the provisions of the Act are not made applicable for appointments to the posts of Civil Judge Jr. Dn., and/or J.M.F.C. It is further contended that the High Court does not fall in Section 2(k) which defines the expression 'establishment'. The said issue is no longer res judicata in view of the order dated 3.10.2000 passed by this Court in Writ Petition No.5151 of 2000.

12. We have considered the rival submissions made by the learned counsel appearing for the respective parties. We have also perused the material on record. As noted earlier, by order dated 3.8.2015, this Court directed the respondents to allow the petitioner additional time of minimum one hour for examination of three hour duration in the ensuing examination for the post of Civil Judge, Junior Division and Judicial Magistrate First Class to be conducted by M.P.S.C. hereafter. In view of the order dated 3.8.2015, prayer clause (b) stands granted.

13. The question, therefore, is whether reservation can be made for appointments to the posts of Civil Judge, Junior Division, and Judicial Magistrate First Class, as contemplated by Section 33 of the Act. As noted earlier, the provisions of the Act are made applicable only to appointments in Class III and Class IV

services in judiciary throughout the State of Maharashtra. In other words, provisions of the Act are not made applicable for appointments to the posts of Civil Judge, Junior Division and J.M.F.C. which are admittedly Class-I posts.

14. Chapter VI consists of Articles 233 to 237 which deal with subordinate Courts. Article 233 lays down that appointments of persons to be, and the posting and promotion of, district Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Article 234 lays down that appointments of persons other than district Judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 reads thus :

“235. Control over subordinate courts:- The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.”

Article 236 deals with the topic of 'interpretation' of the

expressions 'district Judge' and 'judicial service'.

15. In exercise of the powers conferred by Articles 233, 234 and the proviso to Article 309 of the Constitution of India read with Article 235 and in supersession of all the existing Rules, orders, or instruments made in that behalf, the Government of Maharashtra after consultation with the M.P.S.C. and the High Court of Bombay made the Maharashtra Judicial Service Rules 2008, (for short, '2008 Rules') regulating the recruitment to the Maharashtra Judicial Service. Chapter III deals with recruitment. Rule 3 thereof deals with constitution of service. Rule 6 thereof deals with recruitment by nomination. In so far as the controversy in hand is concerned, Rule 6(1)(d),(e) reads thus:

“6. Recruitment by Nomination- (1) xx xx

(d)(i) The Recruiting Authority shall hold written examinations in Civil Law and Criminal Law, carrying 100 marks each, having duration of 3 hours each, respectively, for the post of Civil Judge, Junior Division and for the post of District Judge to be filled up by nomination;

(ii) The medium of written examination for the post of Civil Judge, Junior Division shall be either Marathi or English. The candidate shall specifically mention in his application form about his choice of medium. Choice once given shall not be allowed to be changed subsequently in any case;

(iii) The medium of written examination for the post of District Judge shall be English.

(e) The candidate applying for being appointed by nomination who secures not less than 50 marks in each paper and not less than 60% of marks in aggregate shall be eligible for viva-voce carrying 50 marks:

Provided that the Scheduled Castes and Scheduled Tribes candidates who secure not less than 45% marks in

each paper and not less than 50% of marks in aggregate shall be eligible for the viva-voce:"

16. Perusal of the 2008 Rules indicates that reservation is not prescribed while recruiting to the Maharashtra Judicial Service. Rule 6(1)(e) lays down that the candidate applying for being appointed by nomination who secures not less than 50 marks in each paper and not less than 60 % of marks in aggregate are eligible for viva-voce. Proviso thereto lays down that the Scheduled castes and Scheduled Tribes candidates who secure not less than 45 % marks in each paper and not less than 50 % of marks in aggregate are eligible for the viva-voce. Save and except this concession, there is no reservation for recruitment to the Maharashtra Judicial Service.

17. Mr. Desai relied upon 2014 Rules. In our opinion, in view of the 2008 Rules, Rules of 2014 are not applicable. In the case of **State of Bihar Vs. Bal Mukund Sah**, (2000) 4 Supreme Court Cases 640, the Apex Court held that the provisions under Articles 233, 234 and 235 for the recruitment to the posts of District Judges and other judicial officers posts, fall in different part of the Constitution and these provisions stand on their own and are independent of Part XIV which deals with services under the Union and the States. Article 309 on its express term is made subject to other provisions of the Constitution and is circumscribed to the extent to which from which general field of

operation carved out a separate and exclusive field for operation by the provisions of Article dealing with subordinate judiciary as found in Chapter VI of Constitution. Articles 233 and 234 provide for a complete Code and thus rule making power of the Governor as well as other powers of States legislature on the subject are excluded. Relying upon the separation of powers between legislature, executive and judiciary, the Apex Court has held that the independent judiciary is a basic structure of the Constitution and the High Court alone can recognise vacancies and the reservation even if provided by the State Act under Article 16(4) of the Constitution. The reservation in judiciary service by the State without consulting the High Court or without concurrent recommendation of the High Court is an encroachment on such exclusive powers. Mr. Desai was not in a position to demonstrate that for the posts of Civil Judge, Junior Division/J.M.F.C., reservation is prescribed in the Rules or by High Court, Bombay. As the High Court has prescribed reservations only in Class III and IV posts in judiciary throughout State of Maharashtra and has not prescribed reservations for appointments to the posts of Civil Judge, Junior Division, and Judicial Magistrate First Class, it is not possible to grant relief in terms of prayer clause (a) of the petition.

18. That apart, in the case of Hemant Sadanand Surve Vs State of Maharashtra, Writ Petition No. 5151 of 2000 decided by

A.P.Shah (as the learned C.J. then was) and A.M.Khanwilkar, J. (as His Lordship then was), the posts of Civil Judge, Junior Division and Judicial Magistrate do not fall in section 2(k) which defines expression 'establishment'.

19. In the light of the aforesaid discussion, reliance placed by Mr. Desai on the decisions of Union of India (supra) as also decision of Delhi High Court dated 25.3.2014 in the case of Nishant S. Diwan (supra) and Allahabad High Court's decision in the case of Sarika (supra), does not advance the case of the petitioner.

20. In the light of the above discussion, Petition partly succeeds. Rule is made absolute in terms of prayer clause (b), with no order as to costs. It is made clear that in case the petitioner applies for relief in terms of prayer clause (b) of the petition in future, the concerned authority shall decide the same keeping in mind the order dated 3.8.2015 passed by this Court.

(R.G.KETKAR, J.)

(RANJIT MORE,J.)

CERTIFICATE

Certified to be true and correct copy of the original signed order.