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

WRIT PETITION LODGING NO. 1137 OF 2018

The National Federation of the
Blind Maharashtra and anr.

.. Petitioners

Vs.

The High Court of Judicature of Bombay

.. Respondent

WITH APPELLATE SIDE
PUBLIC INTEREST LITIGATION NO. 72 OF 2018
(PIL No. 46 of 2018)
(Transferred from Aurangabad Bench)

Sachin Bhaurao Chavan

.. Petitioner

Vs.

The State of Maharashtra and anr.

.. Respondents

Mr. Uday P. Warunjikar for petitioners in OSWPL/1137/2018.

Mr. Mateen Shaikh a/w Shrinivas Kshirsagar i/by Swapnil Tawashikar for petitioner in PIL/72/2018.

Mr. Sudhir Talsania, Sr. Advocate with Mr. Rahul Nerlekar for respondent-High Court in both the matters.

Mr. A. A. Kumbhakoni, Advocate General a/w Mr. A. B. Vaganyi, Government Pleader a/w Mr. A. P. Vanarase, AGP a/w Mr. P. P. More, AAGP for respondent no.1- State in PIL No.72/2018.

CORAM: NARESH H. PATIL &
G. S. KULKARNI, JJ.

RESERVED ON: MAY 02, 2018

PRONOUNCEMENT: MAY 03, 2018.

JUDGMENT [Per Naresh H. Patil, J.] :-

1. Rule, returnable forthwith. By consent of the parties heard finally.

2. The petitioners in Writ Petition Lodging No. 1137 of 2018, namely, the National Federation of the Blind, Maharashtra, pray for following substantive relief :-

(a) Be pleased to call for record and proceedings of the Advertisement dated 28th March, 2018 issued by the Respondent (Exhibit C) and after going through the same and satisfying about the legality, validity and propriety thereof be pleased to issue a writ of mandamus or writ in the nature of mandamus by directing the Respondent to implement the provisions of the PWD Act, 1995 and/or RPW Act, 2016 and be pleased to direct the respondent to consider the candidature of the Petitioner No.2 and other similarly situated persons of the present Petitioner No.1 in pursuant to the advertisement dated 28th March, 2018.”

A Public Interest Litigation No. 46 of 2018 was filed before the Aurangabad Bench of Bombay High Court by Shri Sachin Bhaurao Chavan, which was transferred to the principal seat and is numbered as Public Interest Litigation No. 72 of 2018, was heard along with Writ Petition Lodging No. 1137 of 2018. The petitioner in Public Interest Litigation No. 72 of 2018 prays for following reliefs :-

(A) To quash and set aside the advertisement dated 28-03-2018 issued by the respondent No.2 for filling up posts of Stenographer (L.G.), junior clerk and Peon/Hamal in various District Courts in the State of Maharashtra.

(B) To direct the respondents to issue advertisement afresh for filling up posts of Stenographer (L.G.), junior clerk and Peon/Hamal in the District Courts in State of Maharashtra by providing appropriate reservation to the physically handicapped candidates including visually impaired / blind candidates as per the section 34 of the Right of Persons with Disabilities Act, 2016.

3. The petitioner no.1 in Writ Petition Lodging No. 1137 of 2018 – the National Federation of the Blind, Maharashtra, is a Trust registered under the provisions of the Bombay Public Trust Act, 1950 and Society

registered under the provisions of Societies Registration Act. The petitioner no.2 is a candidate who is 100% blind, who expects opportunity to be provided to compete with other candidates pursuant to the advertisement issued by the respondent. The petitioner no.1 is an organization, which represents the cause of visually impaired persons. According to the petitioners respondent – High Court, on the administrative side, is a State within the meaning of Article 12 of the Constitution of India, 1950.

4. The petitioners submit that under the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short the Act of 1995), reservation was prescribed for the visually impaired candidates to the posts which were identified as per the said Act. It is submitted that under the new Act i.e. The Rights of Persons with Disabilities Act, 2016 (for short the Act of 2016), additional categories of reservations are prescribed for persons with disabilities. The respondent – High Court is bound to comply with the provisions of the Act of 2016. By referring to the advertisement issued on 27/3/2018, published in the local newspaper at District level and on 28/3/2018 published on the official website of the respondent – High

Court, it is submitted that so far post of junior clerk is concerned, only 1% of 'hearing impaired' and 1% of 'one leg affected' has been reserved for the disabled person by the respondent. The petitioner no.1 represents visually impaired persons. The petitioners refer to various orders passed by this court in respect of the reservation to be provided to the disabled persons.

5. On behalf of the respondent- High Court, a reply is filed by Mr. Atul Madhukar Kurehekar, Registrar (Legal & Research), High Court, Appellate Side, Bombay. The deponent states that the present advertisement was issued to recruit staff in the district courts of the State of Maharashtra. The district courts are not included in the definition of "Government Establishment" under Section 2(k) of the Act of 2016. The deponent states that as against the sanctioned strength of 9131 in the cadre of Junior Clerks only 8479 Junior Clerks are working, thus there is vacancy of more than 652 in the cadre of Junior Clerks. Similarly in the cadre of Peon/Hamal, working strength is around 3978 as against the sanctioned strength of 4687. Thus, there are around 709 vacancies in the cadre of Peon/Hamal. The Hon'ble the Chief Justice was pleased to constitute a Committee of the Hon'ble Judges on 14/12/2016 to initiate the Central On-line Recruitment Process to fill up existing vacancies and future vacancies

of these posts throughout the State of Maharashtra. As per the directions of the Committee, software for the online recruitment process was upgraded with the help of NIC of the High Court of Bombay. It was expected that more than 7 lakh applications would be received. It is further stated that till 6/4/2018, Bombay High Court has received in all 394686 online application forms for all the three cadres. The last date of receiving online application was 10/04/2018. Due to ad-interim order process was stopped and further applications were not submitted.

6. The deponent further submits that there is urgent need of recruitment of these posts considering the huge number of vacancies throughout the State of Maharashtra. The deponent states that present vacant posts are more than 1580. The respondent considered preparing a wait list for around more than 7000 posts which are likely to fall vacant in coming two years. The respondent has taken stand that Act of 2016 is not applicable to the establishment of Courts as Court establishments are not a “Government Establishment” as contemplated under Section 34 read with Section 2(k) of the Act of 2016. The petitioners have misconstrued the provisions of Section 34 of the Act of 2016. The deponent submits that large number of applicants have already been submitted application and it

would not be advisable now to cancel the recruitment process and re-start it which will consume lot of time and will not be in the interest of justice and the institution.

7. The learned counsel Mr. Uday Warunjikar appearing for the petitioners in Writ Petition Lodging No. 1137 of 2018 submitted that High Court on its administrative side is a State under Article 12 of the Constitution of India qua the recruitment in question. It is even covered under the definition of 2(k) of the Act of 2016, which defines “Government establishment”. The High Court administration had made Act of 1995 applicable to the recruitment of staff. Administrative decision was taken to the said effect and a notification was issued by the High Court making the Act of 1995 applicable on 29/11/2004. The counsel referred to orders passed by this court in some of the petitions filed relating to the reservation to be prescribed to physically handicapped persons in judicial services. It is submitted that the Central Government / State Government has not exempted High Court under the provisions of the second proviso to Sub-section (1) of Section 34 of the Act of 2016. The learned counsel referred to the preamble and various provisions of the Act of 2016. It is submitted that on 14/12/2016 a Committee of Hon’ble Judges of the High Court was

constituted for the purposes of issuing instructions and guidance to the Registry in respect of the initiation of the recruitment process. On 27/12/2016 the Hon'ble President of India accorded assent to the Act, namely, the Rights of Persons with Disabilities Act, 2016, which was published in the official gazette by a notification dated 28/12/2016. The appointed date of the New Act was 19/4/2017. The subject advertisement was issued on 28/3/2018. It is submitted that the respondent ought to have first identified posts in view of mandatory provisions of Section 33 of the Act of 2016 and thereafter issued advertisement. The Central Government has already prescribed a preference order / roster. The advertisement issued by the respondent is contrary to the law laid down by the Apex Court, orders issued from time to time in this regard and the Government Resolution issued by the State Government. The counsel further submitted that present recruitment process was issued anticipating future vacancies which are around 2500. The respondent anticipates further vacancies of 5000 to 6000 posts and, therefore, a waiting list would be prepared, which would be taken into consideration in coming two years after the recruitment process gets completed. The counsel, therefore, submits that if an opportunity is denied to the persons affected with disabilities now, then the whole purpose of social welfare legislation would

be lost. Asking the petitioners to wait till the fresh recruitment drive is undertaken in future will be of no use. Therefore, the counsel submits that the present advertisement be quashed and directions be issued to respondent to identify the posts in accordance with the Act of 2016 and then start the recruitment process.

8. In support of his submissions, the learned counsel for the petitioners placed reliance on the following judgments :-

- (a) Dalco Engineering vs. Satish Prabhakar Padhye [(2010) 4 SCC 378].
- (b) Sudeepti Sharma vs. State of Punjab [2013 SCC On line P & H 16263.
- (c) Babita Pathak & ors. vs. High Court of Delhi & ors. [Writ Petition (C) No. 997 of 2011 decided on 22/2/2013].
- (d) Nishant S. Diwan vs. High Court of Delhi [Writ Petition (C) No. 983 of 2014 decided on 25/3/2014].
- (e) Sarika vs. State of U.P. [C.M. W.P. No. 55266 of 2003 decided on 24/2/2005].

9. Mr. Mateen Shaikh, the learned counsel appearing for the petitioner in PIL No. 72 of 2018, adopted the argument advanced by

Mr. Warunjikar, learned counsel appearing for petitioners in Writ Petition Lodging No. 1137 of 2018. The learned counsel submits that disabled persons must be provided with equal opportunity to participate in the public employment otherwise it would amount to discrimination.

10. Mr. Sudhir Talsania, the learned Senior Counsel appearing for the respondent – High Court, submitted that High Court is not covered by the definition of Government Establishment as defined under Section 2(k) of the Act of 2016. Neither the Act of 1995 nor the Act of 2016 is applicable to the services of judiciary or judicial establishment / High Court / District Courts services. This has been a consistent stand of the respondent. The learned counsel referring to Parts IV, V and VI of the Constitution of India submitted that the respondent – Institution is covered under Part VI of the Constitution of India. Provisions of Articles 233 to 236 were referred by the learned counsel. While referring to Article 229 of the Constitution, it was submitted that appointment of officers and servants of the High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the court as he may direct. The respondent High Court being a constitutional establishment, the provisions of Section 2(k) of the Act of 2016 cannot be made applicable, even if the Central or the

State allocate funds for running the courts and/or its establishment. They are independent of the Government. Even the ministerial staff of the court is included in the definition of judicial service, according to the learned counsel. Therefore, the mandate of provisions of Sections 33 and 34 of the Act of 2016 is not applicable.

11. The learned Senior Counsel submits that the respondent had adopted in past application of certain provisions of the Act of 1995 to the recruitment of staff. This was on the choice of the respondent – Institution and the Act cannot be imposed by a mandate of law to be adopted and implemented by the respondent. The respondent would take appropriate decision in respect of the application of the Act of 2016. As and when such a decision is taken on the administrative side, further steps will be taken accordingly. The learned counsel referred to the advertisement, the number of applications received till now, the vacancy position and dire need to recruit persons, otherwise the functioning of the district courts would get affected. In the view of the learned Senior Counsel the petition (WPL No. 1137/18) is vague and silent on many vital issues. The petitioner no.2 did not participate in the selection process and both, the writ petition and the PIL, deserve to be dismissed. The learned Senior

Counsel, in support of his argument, placed reliance on the following judgments :-

- (a) State of Bihar vs. Bal Mukund Sah [(2004) 4 SCC 640].
- (b) Government of India and anr. vs. Ravi Prakash Gupta and anr. [(2010) 7 SCC 626].
- (c) Union of India and anr. vs. National Federation of the Blind and ors. [(2013) 10 SCC 772].

12. The State of Maharashtra is made party to the PIL No. 72 of 2018. The learned Advocate General has made submissions on behalf of the State. The learned Advocate General referred to a written summary of his submissions. The learned AG submits that the issue raised herein is as to whether the High Court in its administrative side is a “State” within the meaning of Article 12 of the Constitution. By referring to judgments in the case of Dalco Engg. (P) Ltd. (Supra), Naresh Shridhar Mirajkar vs. State of Maharashtra [(1973) 4 SCC 225], Dashrath vs. High Court of Judicature [2016 (6) Mh.L.J. 74], Rune vs. District and Sessions Judge, Tis Hazari [(2014) 14 SCC 50], the learned AG submitted that it is possible to contend that the High Court on its administrative side may be considered a State, but not on its judicial side within the meaning of Article 12. If it is so,

then the High Court on its administrative side would, therefore, fall within the definition of “ Government establishment” as defined under Section 2(k) of the Act of 2016. In such an eventuality, the High Court on its administrative side ought to carry out the provision of the Act, which is a piece of a social welfare legislation.

13. On the issue as to whether the writ of mandamus would lie against the High Court in view of the provisions of Article 229 of the Constitution of India to comply with the provisions of the Act of 2016, the learned AG submitted that such a writ of mandamus would not lie against the Chief Justice to legislate and frame rules under Article 229, to include reservations (*Shamrao Tamgade vs. State of Maharashtra – 2006 (6) Mh.L.J. (FB) 524*). The learned AG, on the basis of the judgment of Hon'ble three Judges' Bench of the Supreme Court in the case of *Renu vs. District and Sessions Judge, Tiz Hazari (Supra)*, submitted that even under the Constitution the power of appointment granted to the Chief Justice under Article 229(1) is subject to Article 16(1) which guarantees equality of opportunity for all citizens in matters relating to employment. In the facts, the learned AG submitted that a mode adopted in the case of *C.G. Govindan vs. State of Gujarat [(1998) 7 SCC 625]*, may be adopted by

allowing the present recruitment process to continue while the High Court on administrative side would take appropriate decision and would also identify posts and by keeping reservation for persons with disabilities, initiate fresh recruitment process to fill in strictly in terms of the Act of 2016. The learned AG placed reliance on the following judgments :-

- (a) Government of India, through Secretary and anr. vs. Ravi Prakash Gupta and anr. [(2010) 7 SCC 626].
- (b) Syed Bashir-Ud-Din Qadri vs. Nazir Ahmed Shah and ors. [(2010) 3 SCC 603].
- (c) Dalco Engineering Private Ltd. vs. Satish Prabhakar Padhye and ors. [(2010) 4 SCC 378].
- (d) Riju Prasad Sarma and ors. vs. State of Assam and ors. [2015) 9 SCC 461].
- (e) Renu and ors. vs. District and Sessions Judge, Tis Hazari Courts [(2014) 14 SCC 50].
- (f) Shamrao Shripat Tamgade vs. State of Maharashtra and ors. [2006(6) Mh.L.J. 524].
- (g) C.G. Govindan vs. State of Gujarat and ors. [(1998) 7 SCC 625].
- (h) P. Kasilingam and ors. vs. P.S.G. College Technology and ors. [1995 Supp (2) SCC 348].
- (i) Dashrath Keshavji Pande and ors. vs. High Court of Judicature at Bombay [2016 (6) Mh.L.J. 74].

14. We have perused the record placed before us, considered the submissions advanced. We have perused the relevant provisions of the Constitution of India, the Act of 1995 and the Act of 2016 and the various decisions cited before us.

15. The first submission advanced by the learned Senior Counsel appearing for the respondent – High Court is that neither the provisions of the Act of 1995 nor the Act of 2016 are applicable to the respondent needs to be addressed. The learned Senior Counsel submitted that the High Court / District Courts services / staff services are not included and covered under the definition of Section 2(k) of the Act of 2016. This submission we find is not consistent with the administrative decisions taken by the respondent, as also the judgments/orders passed by this court while dealing with such identical issues in petitions, which were disposed of, which we note hereunder.

16. The minutes of Administrative Judges' meeting held on 28/10/2004 reads as under :-

“Subject No.11: Question of reservation of vacancies for the appointment of Physically Handicapped persons on the establishment of High Court at Bombay and its Benches at Nagpur, Aurangabad and Goa-Panaji and also on the establishment of District Courts in the State of Maharashtra.

Decision

Discussed.

Having reconsidered the earlier decision dated 3rd September, 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. “

(Emphasis supplied)

Consequently, notification was issued by the High Court of Judicature at Bombay on 29/11/2004, which reads as under :

“NOTIFICATION

No X.2319/71. - In exercise of the powers conferred by Article 229 r.w. Article 235 of the Constitution of India, the Honourable the Chief Justice is pleased to direct 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.”.

Bombay, dated 29th November 2004

R.C. CHAVAN,
Registrar General”

17. Further a notification was published in the Government Gazette, notifying that the Hon'ble Chief Justice is pleased to make applicable the Disabilities (Equal Opportunities, Full Participation and Protection of Rights) Act, 1995 in recruitment to the post under Group C and D in the High Court and its Benches and subordinate courts in Maharashtra, issued on 20/11/2009 by the Registrar General of the High Court of Judicature at Bombay. It would be appropriate to note the said Resolution, which reads as under:-

“NOTIFICATION

No.Rule/X-2319/71

- Read.- (1) Government Resolution, General Administration Department No. SRV.1077/3576/1433/16-A, dated 23rd May, 1978.
- (2) Government Resolution, General Administration Department No. SRV. 1081/CR-15/16-A, dated 7th September 1982.
- (3) Persons with Disabilities (Equal Opportunities, Full Participation and Protection of Rights) Act, 1995 (No.1/1996).
- (4) Government Circular, General Administration Department No. SRV. 1098/M. No. 12/16-A, dated 2nd May 1998.
- (5) High Court Notification No. X-2319/71, dated 29th November 2004.

Preface.- The persons with Disabilities (Equal Opportunities, Full Participation and Protection of Rights) Act, 1995 (No.I of 1996) came into force from the date 7th February, 1996. Pursuant to the said Act, the Hon'ble Chief Justice is pleased to make applicable the said Act to appointments in Class III and IV in Judiciary throughout the State of Maharashtra, By the Circular dated 2nd May 1998, the Government has issued instructions to keep reservation for (1) Blind Persons, Persons affected with low vision (2) Hearing Impairment (3) Locomotor disability or cerebral palsy in the Government Service at the time of direct recruitment. Accordingly, the issue was under consideration of keeping reservation for the disabled persons on the posts in Group “C” and “D” in High Court and Subordinate Courts in Maharashtra.”

Resolution.- (1) While making appointments by direct recruitment to the posts in Group “C” and “D” Cadre in High Court and 3 Benches and Subordinate Courts in Maharashtra 3% reservation should be kept for the disabled persons in the categories viz. (1) 1% to Blind Persons- Persons with low vision (2) 1% to Hearing Impairment (3) 1% to Locomotor Disability or cerebral Palsy at the time of direct recruitment to the reserved posts as shown in the Statement guidelines enclosed herewith.

(2) While appointing disabled candidates to the Posts of Clerk and Peon in the Cadre viz Group 'C' and 'D' by direct recruitment as per Guidelines and below mentioned conditions should be fulfilled: -

(A) The disabled candidate must hold qualification as per the provisions of the Recruitment Rules in respect of the concerned Posts.

(B) For the disabled candidates, it shall be necessary to comply with the criteria pertaining to physical ability that have been prescribed in the statement enclosed herewith.

(C) Minimum Percentage of disability should be 40%.

(D) For the Appointment to the Post in Group 'C' and 'D', it shall be necessary to declare such candidate able by the Medical Board consisting of Experts in the concerned subject from the view point of physical ability taking into account the duties and responsibilities of the said post. The concerned

candidates will be considered for his appointment only after his ability is established.

(E) For the categories viz. The persons with low vision, hearing impairment and locomotor disability or cerebral palsy, appointment will be made by keeping reservation in the direct recruitment upto in all 3% in the proportion of 1% for each category.

(3) As per the criteria mentioned in Paragraph No.1 and 2 herein above, disabled persons shall be appointed by direct recruitment to the Posts in Group 'C' and 'D' who shall have to do the work as per duty lists (Guidelines and duty lists of the High Court, Original Side, Appellate Side and Subordinate Courts are enclosed herewith).

(4) The rules / guidelines prepared by Government be followed, if same are not inconsistent with the rules/ guidelines prepared for Group 'C' and 'D'.

(5) These guidelines are issued with the direction of Hon'ble Lordships.

Mumbai.

Dated 20th November 2009

A.I.S. CHEEMA,

Registrar General.”

18. In Writ Petition No. 1784 of 2015 which was decided by the Division Bench on 14/10/2015, the petitioner therein had sought direction to consider application of provisions of Section 33 of the Act of 1995 for the post of Judicial Magistrate, First Class and/or Civil Judge, Junior

Division. In para 9 of the said order, the Division Bench observed as under:-

“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 reconsidered the earlier decision dated 3rd September, 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.”

19. We find in the record charts showing the identification of various posts done by the respondent. It seems that the identification made by the State Government has been adopted by the respondent – High Court. A Office Memorandum of Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, North Block, New Delhi dated 15/1/2018 is placed on record, which prescribed cycles of 100 points roster for effecting reservation. The Central Government had by way of notification published Rules, namely, the Rights of Persons with Disabilities Rules 2017 which extend to the whole of India.

20. The question as to whether the High Court is a “State” within the meaning of Article 12 of the Constitution is settled one. The Apex Court in the case of H. C. Puttaswamy and ors. vs. Hon'ble Chief Justice of Karnataka High Court, Bangalore and ors. **[AIR 1991 SC 295]** observed as under :-

“The Judiciary is the custodian of constitutional principles which are essential to the maintenance of rule of law. It is the vehicle for the protection of a set of values which are integral part of our social and political philosophy. Judges are the most

visible actors in the administration of justice. Their case decisions are the most publicly visible outcome. But the administration of justice is just not deciding disputed cases. It involves great deal more than that. Any realistic analysis of the administration of justice in the Courts must also take account of the totality of the Judges behaviour and their administrative roles. They may appear to be only minor aspects of the administration of justice, but collectively they are not trivial. They constitute, in our opinion, a substantial part of the mosaic which represents the ordinary man's perception of what the Courts are and how the Judges go about their work. The Chief Justice is the prime force in the High Court. Article 229 of the Constitution provides that appointment of officers and servants of the High Court shall be made by the Chief Justice or such other Judge or officer of the Court as may be directed by the Chief Justice. The object of this Article was to secure the independence of the High Court which cannot be regarded as fully secured unless the authority to appoint supporting staff with complete control over them is vested in the Chief Justice. There can be no disagreement on this matter. There is imperative need for total and absolute administrative independence of the High Court but the Chief Justice or any other Administrative Judge is not an absolute ruler. Nor he is a free wheeler. He must operate in the clan world of law, not in the neighbourhood of sordid atmosphere. He has has a duty to ensure that in carrying out the administrative functions, he is

actuated by same principles and values as those of the Court he is serving. He cannot depart from and indeed must remain committed for the constitutional ethos and traditions of his calling. We need hardly say that those who are expected to oversee the conduct of others must necessarily maintain a higher standard of ethical and intellectual rectitude. The public expectations do not seem to be less exacting.”

In the case of Riju Prasad Sarma and ors. vs. State of Assam and ors. (Supra), the Apex Court observed as under :-

“67. On the related issue of the scope of Article 12 and whether for the purposes of issuance of writ, judicial decisions by the judiciary can be included in State action, we are in agreement with the submissions advanced by Mr. Rajeev Dhavan that definition of “the State” under Article 12 is contextual depending upon all the relevant facts including the provisions concerned in Part III of the Constitution. The definition is clearly inclusive and not exhaustive. Hence omission of judiciary when the Government and Parliament of India as well as the Government and Legislature of each of the States has been included is conspicuous but not conclusive that judiciary must be excluded. The relevant case laws cited by Mr. Dhavan are :

- (i) Pradeep Kumar Biswas v. Indian Institute of Chemical Biology.
- (ii) Naresh Shridhar Mirajkar v. State of Maharashtra
- (iii) Poonam v. Sumit Tanwar.

68. Hence, in accordance with such judgments holding that the judgments of the High Court and the Supreme Court cannot be subjected to writ jurisdiction and for want of requisite governmental control, judiciary cannot be a State under Article 12, we also hold that while acting on the judicial side the courts are not included in the definition of the State. Only when they deal with their employees or act in other matters purely in administrative capacity, the courts may fall within the definition of the State for attracting writ jurisdiction against their administrative actions only. In our view, such a contextual interpretation must be preferred because it shall promote justice, especially through impartial adjudication in matters of protection of fundamental rights governed by Part III of the Constitution.”

21. In the case of Renu and ors. vs. District and Sessions Judge, Tis Hazari Courts (Supra), the Apex Court observed as under :-

“29. Thus, in view of the above, the law can be summarised to the effect that the powers under Article 229(2) of the

Constitution cannot be exercised by the Chief Justice in an unfettered and arbitrary manner. Appointments should be made giving adherence to the provisions of Articles 14 and 16 of the Constitution and/or such rules as made by the legislature.

30. In today's system, daily labourers and casual labourers have been conveniently introduced which are followed by attempts to regularize them at a subsequent stage. Therefore, most of the times the issue raised is about the procedure adopted for making appointments indicating an improper exercise of discretion even when the rules specify a particular mode to be adopted. There can be no doubt that the employment whether the Class IV, Class III, Class II or any other class in the High Court or courts subordinate to it falls within the definition of "public employment". Such an employment, therefore, has to be made under rules and under orders of the competent authority.

34. We would like to make it clear that the High Court is a constitutional and an autonomous authority subordinate to none. Therefore, nobody can undermine the constitutional authority of the High Court, and therefore the purpose to hear this case is only to advise the High Court that if its rules are not in consonance with the philosophy of our Constitution then the same may be modified and no

appointment in contravention thereof should be made. It is necessary that there is strict compliance with appropriate rules and the employer is bound to adhere to the norms of Articles 14 and 16 of the Constitution before making any recruitment.”

(Emphasis supplied)

In the case of Shamrao Shripat Tamgade vs. State of Maharashtra and ors. (Supra), the Full Bench of this Court, in para 24 observed as under :-

“24. Hence the power of the Chief Justice is neither absolute nor unfettered. However no Court under Article 226 of the Constitution of India has the power to direct the Chief Justice to frame or formulate rules or make appointments for a particular purpose since that would mean impinging on the discretion of the Chief Justice. In other words although the Court has every power to examine the constitutional validity of rules framed under Article 229 of the Constitution of India, but it cannot issue directives to the Chief Justice to frame rules for the benefit of a certain section of society. To put it in other words, no Writ of Mandamus would lie against the Chief Justice to legislate rules under Article 229 of the Constitution of India.”

22. The afore-stated authorities/observations of the Apex Court clearly indicate that on the judicial side, the courts are not included in the definition of “State”, but while dealing with the employees or taking decisions in administrative capacity, the courts would fall within the definition of “State” under Article 12. Writ jurisdiction gets attracted in respect of the administrative decisions and actions only.

23. We are not convinced with the submission of the learned Senior Counsel appearing for the respondent – High Court that it is the choice of the respondent to adopt the Act of 2016 and make it applicable. So far the Act of 2016 has not been made applicable by the respondent. In view of the administrative decisions taken in the years 2004 and 2009, and consequent issuance of notification as stated above, which has been taken note of by the Division Bench of this Court, it is crystal clear that the respondent had made the provisions of the Act of 1995 applicable to the services (non judicial post) in the judiciary. In fact, the notification issued by the High Court on 20/11/2009 stipulates that the Hon'ble Chief Justice was pleased to make applicable the Act of 1995 for appointments in Class III and IV in judiciary throughout the State of Maharashtra. Reference was also made to Circular dated 2/5/1998 issued by the Government to

keep reservation for the disabled persons on the posts in Group “C” and “D” in the High Court and Subordinate Courts in Maharashtra. Significantly, the advertisement in question also has made provision for reservation to persons suffering disability as noted above. All this indicates a clear acceptance of the applicability of the provisions of the law framed by the Parliament for the disabled category of candidates.

24. Thus the issue as raised by the learned Senior Counsel that the High Court is not a “Government establishment” attracting provisions of Section 2(k), we are of the clear opinion that in view of the aforementioned decisions taken by the Administrative Committee, the notification issued, applying the Act of 1995 qua the recruitment of Group “C” and “D” posts and further the inclusion of the Court under Article 12, we find that the submission advanced in respect of the High Court not falling under the definition of Government establishment and consequently non applicability of provisions of Section 2(k) is not sustainable.

25. The learned Senior Counsel for the respondent submitted that as posts are not identified, the provisions of Section 34 of the Act of 2016 cannot be implemented. In fact, the Apex Court had already ruled on this

issue and it was observed that reservation under the Disabilities Act has to be vacancy-based, certainly the posts are required to be identified to fill in vacancies. There must be a post in existence to enable the vacancy to occur. Just because the identification exercise has not been done, we find that the benefit accruing to the persons under the Act, which is a piece of social welfare legislation, cannot be denied to deserving persons. We may refer to the judgment of the Apex Court in the case of Union of India and anr. vs. National Federation of the Blind and ors. (Supra). The Apex Court in para 48 observed as under:-

“48. Adhering to the decision laid by the Constitution Bench in R.K.Sabharwal, the High Court held as follows : (National Federation of the Blind case, SCC p. 458, para 16)

“16. The Disabilities Act was enacted for protection of the rights of the disabled in various spheres like education, training, employment and to remove any discrimination against them in the sharing of development benefit vis-a-vis non-disabled persons. In the light of the legislative aim it is necessary to give purposive interpretation to Section 33 with a view to achieve the legislative intendment of attaining equalisation of opportunities for persons with

disabilities. The fact that the vacancy-based roster is to be maintained does not mean that 3% reservation has to be computed only on the basis of vacancy. The difference between the posts and vacancies has been succinctly pointed out in the Supreme Court decision in R.K. Sabharwal vs. State of Punjab, wherein it was held that the word “post” means an appointment, job, office or employment, a position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation. Therefore, in our opinion, 3% reservation for disabled has to be computed on the basis of total strength of the cadre i.e. both identified as well as unidentified posts.”

26. In the case of Justice Sunanda Bhandare Foundation vs. Union of India and anr. **[(2017) 14 SCC 1]**, the Apex Court observed in paras 24 and 25 as under :-

“24. We have referred to certain provisions only to highlight that the 2016 Act has been enacted and it has many salient features. As we find, more rights have been conferred on the disabled persons and more categories have been added. That apart, access to justice , free education, role of local authorities, National fund and the State fund for persons with disabilities have been created. The 2016 Act is noticeably a sea change in the perception and requires a march forward look with regard to the persons with disabilities and the role of the States, local authorities, educational institutions and the companies. The statute operates in a broad spectrum and the stress is laid to protect the rights and provide punishment for their violation.

25. Regard being had to the change in core aspects, we think it apposite to direct all the States and the Union Territories to file compliance report keeping in view the provisions of the 2016 Act within twelve weeks hence. The States and Union Territories must realise that under the 2016 Act their responsibilities have grown and they are required to actualise the purpose of the Act, for there is an accent on many a sphere with regard to the rights of those with disabilities. When the law is so concerned for the disabled persons and makes provision, it is the obligation of the law executing authorities to give effect to the same in quite

promptitude. The steps taken in this regard shall be concretely stated in the compliance report within the time stipulated. When we are directing the States, a duty is cast also on the States and its authorities to see that the statutory provisions that are enshrined and applicable to the cooperative societies, companies, firms, associations and establishments, institutions, are scrupulously followed. The State Governments shall take immediate steps to comply with the requirements of the 2016 Act and file the compliance report so that this Court can appreciate the progress made.”

27. The Parliament realised the national need of the rights of the persons with disability and commitment to the Convention of the United Nations General Assembly, repealed the 1995 Act and present Act of 2016 was enacted. This Act of 2016 was brought into existence to give effect to the United Nations Convention.

28. In the case of Govt. of India vs. Ravi Prasad Gupta (Supra), the Apex Court observed in para 29 as under :-

“29. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein

can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the ct, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of person suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.”

29. In view of the preamble of the Act of 2016, the statement of objects and reasons and the view expressed by the Apex Court in the case of National Federation of the Blind and Justice Sunanda Bhandare Foundation, we find that the Act of 2016, being a piece of social welfare legislation, which confers rights on physically handicapped persons, must

be implemented in its letter and spirit. The provisions must be liberally construed so that the object in passing and enacting law is achieved. It is true that in the subject advertisement and the advertisement issued during the hearing of these petitions by the Registry of the Aurangabad Bench of this Court certain reservations, as applicable under the old Act of 1995, to some extent, have been made. But the Act of 2016 has expanded the list of disabilities which would cover and confer benefit on large section of persons suffering the disabilities as prescribed in the schedule under Clause (zc) of Section 2 under caption “specified disability”. The Act of 2016 was in operation for near about a year prior to issuance of subject recruitment advertisement. It seems that exercise on the administrative side in respect of identification of the posts could not be carried out in accordance with the provisions of the Act of 2016.

30. We may note that we had adjourned the hearing of these petitions for the learned Senior Counsel to take instructions as to whether the respondent-High Court on administrative side would take decision qua providing reservation of 4% seats in the present recruitment drive as per the requirement of the Act of 2016, by identifying the posts. A separate special recruitment drive could be undertaken later on qua the said posts.

The learned Senior Counsel submits that on this proposal no statement could be made as High Court on the administrative side is yet to take a decision.

31. In the facts, we find that in case a solution is not carved out at this stage, then the benefit flowing from the provisions of statute may not be available to the deserving persons for a considerably long period as the present recruitment drive includes even proposed vacancies of near about more than 7000 posts which may accrue in coming two years' period for which a wait-list is likely to be prepared. At the initial stage, the Registry pointed out that 1580 are lying vacant, but on the date of hearing of the petitions we are informed that around 2482 posts are lying vacant.

32. We are conscious of the fact that keeping the posts vacant in the courts is not going to serve any purpose as the same would affect effective functioning of the courts. We are informed that more than 3.5 lakhs candidates have already filed applications. In case the recruitment process itself is quashed and set aside, it may disturb the recruitment process and may cause prejudice to the candidates who have so far submitted on-line applications. Conscious of the situation, we have to

find a balanced solution to the emerging issue. We find that in the facts scenario, the recruitment process shall be allowed to continue with a rider that the respondent – High Court shall keep 4% seats/posts vacant in the subject recruitment drive and these seats shall be filled in after the respondent-High Court takes a decision on the administrative side on identification of posts. Thereafter by a special drive, recruitment process could be initiated for filling up vacancies for persons who are covered under the provisions of Act of 2016. Such an approach will not only benefit the candidates in general but protect the legal rights of the candidates, who find themselves deprived of in getting benefits of the Act of 2016.

33. We accordingly pass following order :-

ORDER

- (a) Both the Writ Petition and Public Interest Litigation are partly allowed.
- (b) The respondent – High Court shall not fill in 4% of the posts in the subject recruitment process which are required to be reserved for the persons with disabilities under the Act of 2016.

(c) After the respondent – High Court, on the administrative side, takes a decision, posts be identified so that the reservation as prescribed under the Act of 2016 could be made applicable as per identification of the posts. A fresh recruitment drive be undertaken thereafter at the earliest.

(d) Subject to the above directions, the ad-interim relief granted by this court on 6/4/2018 stands vacated. The recruitment process in respect of the subject advertisement would continue.

34. Rule is made absolute in the above terms.

(G. S. KULKARNI, J.)

(NARESH H. PATIL, J.)

35. After the pronouncement of the judgment, Mr. Warunjikar, the learned counsel appearing for the petitioners in Writ Petition Lodging No. 1137 of 2018, on instructions, prays for continuation of ad-interim relief granted by this court on 6/4/2018 for a period of eight weeks. Mr. Talsania,

the learned Senior Counsel appearing for the respondent-High Court submits that the court administration is in need of additional staff. Therefore, the prayer made by the learned counsel for the petitioners be rejected.

36. In the facts, we are not inclined to grant the prayer made by the learned counsel for the petitioners. The prayer is accordingly rejected.

(G. S. KULKARNI, J.)

(NARESH H. PATIL, J.)