

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.11627 OF 2018

Vivek Babu Patil ... Petitioner  
Vs.  
State of Maharashtra through the Secretary,  
Higher and Technical Education Department  
and others ... Respondents

Mr. Kaustub Gidh, Mr. Kartikeya Bahadhar i/b. Mr. Kranti L. C. for  
Petitioner.

Mr. A. B. Kadam, AGP for Respondent Nos.1, 2 and 3-State.

Mr. Ashutosh M. Kulkarni a/w. Ms. Akanksha Helaskar a/w. Mr. Sarthak  
S. Diwan for Respondent Nos.5 and 6.

**CORAM : UJJAL BHUYAN &  
MADHAV J. JAMDAR, JJ.**

**Heard on : AUGUST 31, 2021**

**Date of Pronouncement : SEPTEMBER 06, 2021**

**Judgment and Order (Oral) (Per Ujjal Bhuyan, J.) :-**

Heard Mr. Kranti L. C., learned counsel for the petitioner; Mr. A. B. Kadam, learned AGP for respondent Nos.1, 2 and 3 i.e., State; and Mr. Ashutosh M. Kulkarni, learned counsel for respondent Nos.5 and 6. None has appeared for respondent No.4, University of Mumbai.

2. By filing this petition under Article 226 of the Constitution of India, petitioner has prayed for the following reliefs:-

- (i) to set aside and quash order dated 07.02.2018 passed by respondent No.2;
- (ii) for directing respondent Nos.3 to 6 to include the name of the petitioner as a permanent aided employee (Junior Clerk) in the aided division of respondent No.6 college;
- (iii) for directing respondent Nos.3 to 6 to consider the case of the petitioner for promotion to the post of Senior Clerk in respondent No.6 college as a physically disabled

employee;

- (iv) for directing respondent Nos.3 to 6 to revise the salary of the petitioner in the post of Junior Clerk as per the Sixth Pay Commission and thereafter to pay the arrears etc.;
- (v) for directing respondent Nos.3 to 6 to fix the working hours of the petitioner in the establishment of respondent No.6 as a physically disabled employee;
- (vi) for a direction to respondent Nos.5 and 6 to allow the petitioner to avail late attendance in the establishment of respondent No.6 as a physically disabled employee;
- (vii) for a direction to respondent No.6 to implement recommendations of the Grievance Committee of University of Mumbai, respondent No.4;
- (viii) for a direction to respondent Nos.5 and 6 to provide the benefit of provident fund to the petitioner;
- (ix) for a direction to respondent Nos.5 and 6 not to deduct professional tax from the salary of the petitioner; and
- (x) for a direction to respondent Nos.5 and 6 to pay the petitioner special conveyance allowance at the rate of 10% of his basic pay together with arrears as a physically disabled employee.

3. Apparently multiple reliefs have been claimed in the present writ proceeding which in the ordinary course the Court would not have liked to entertain but having regard to the fact that the reliefs claimed primarily arise from or are related to the core grievance of the petitioner for inclusion of his name as a permanent aided employee in the establishment of respondent No.6 against the aided division under reservation for physically disabled employee as well as the fact that this Court had entertained the previous writ petition of the petitioner raising the same grievances with positive direction, we accept the writ petition and proceed to deal with the same on the basis of the materials on record.

4. It is stated that petitioner belongs to the Other Backward Class (OBC) community and also suffers from locomotor disability to the extent of 60% as per the Disability Certificate issued by the All India Institute of Physical Medicine and Rehabilitation, Mumbai. Petitioner is also a Graduate in Arts holding Diploma in Computer Software.

5. Petitioner was appointed in respondent No.6 college as a Junior Clerk / Typist *vide* order dated 28.08.1999 and his service was confirmed / made permanent *vide* order dated 20.09.2001.

6. Respondent No.6 college began to receive grant-in-aid from the State Government from the year 2012. Resultantly respondent No.6 college was divided into aided and unaided divisions. Though petitioner's service was made permanent, his appointment was not shown against government approved aided post whereas other non-teaching employees (some even appointed after the petitioner) were shown against government approved aided posts.

7. Petitioner's representation before the college authorities highlighting above grievance did not elicit response. He, therefore, filed application before the Grievance Committee of respondent No.4 University. The Grievance Committee constituted under section 57 of the Maharashtra Universities Act, 1994 duly considered the grievance raised by the petitioner and recommended that he be granted pay-scale as per the Sixth Pay Commission, entitled to the benefit of provident fund and also granted promotion to the post of Senior Clerk. Such recommendations of the Grievance Committee were accepted by the Management Council of respondent No.4 and were duly communicated to respondent No.6 by the Registrar of respondent No.4 on 31.08.2012. Be it stated that in the said communication respondent No.6 was informed that if it was not agreeable to the above decision of the Management Council, it could inform respondent No.4 about the same

failing which it would be construed that the decision of the Management Council was acceptable to respondent No.6.

8. Petitioner has stated that the above decision of the Grievance Committee as accepted by the Management Council of respondent No.4 has not been assailed by respondent Nos.5 and 6. Therefore, such decision has attained finality. Notwithstanding the same, grievance of the petitioner continued to remain unaddressed.

9. In such circumstances, petitioner approached this Court by filing Writ Petition No.9459 of 2013 which was disposed of by this Court *vide* order dated 13.11.2017. This Court after summarizing the grievance of the petitioner and the stand taken by the authorities observed that it was not impressed by the stand taken by the Management as well as by the State. Drawing the attention of the respondents to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short “the 1995 Act” hereinafter), this Court expressed that it did not see how the petitioner could be denied the relief. However, without expressing any definitive opinion at that stage this Court directed respondent No.2 to take a decision in the matter after giving due opportunity of hearing to the petitioner. It was further directed that while taking such decision respondent No.2 should obtain the views of the Commissioner for Persons with Disabilities appointed under the 1995 Act.

10. Following the order passed by this Court, petitioner submitted a detailed representation dated 04.12.2017 to respondent No.2 who thereafter granted hearing to the petitioner. However, by the order dated 07.02.2018 respondent No.2 held that there were seven aided posts in total in Group ‘C’ cadre of respondent No.6 college. Referring to government resolution dated 04.08.2011, it was stated that no post was available for persons with disability. Though petitioner became eligible for 100% grant but since his appointment as non-teaching staff was

made at the level of respondent No.6 college, it was declared that respondent No.6 college was responsible in this regard. Not a single post was vacant out of the total seven sanctioned aided posts in Group 'C' cadre in respondent No.6 college. Therefore, petitioner could not be accommodated in the aided posts.

11. Aggrieved by the said decision, petitioner has preferred the present writ petition assailing the legality and validity of the impugned order dated 07.02.2018, an English translation of which has been placed before us, and seeking the other reliefs as indicated above.

12. This Court had issued notice on 15.10.2018 whereafter the parties have exchanged affidavits.

13. Respondent Nos.1 to 3 in their common affidavit in reply have justified the impugned decision taken. That apart, it is pointed out that there are four posts of Junior Clerk in respondent No.6 college out of which one post each is reserved for Scheduled Castes (SC) and Scheduled Tribes (ST). In the two unreserved posts of Junior Clerk, two persons are already working, namely, Shri. Vilas Patil and Shri. Nelson Patil. However in the reply affidavit, reference has been made to the opinion rendered by the Commissioner for Persons with Disabilities according to whom if there is no post available for the petitioner to be accommodated in the aided post of Junior Clerk / Typist then the Management could accommodate the petitioner by creating a supernumerary post from the date when the posts under the aided division were created. However, considering the fact that there is no post vacant out of the total seven sanctioned aided Group 'C' posts in respondent No.6 college, petitioner could not be accommodated in the aided division. Justifying the impugned decision it is contended that the same was passed by respondent No.2 after hearing the petitioner as well as respondent No.6 college and the Management.

14. Respondent Nos.5 and 6 have also filed a common reply affidavit. Here also similar stand has been taken. Additionally, it is stated that most of the prayers sought for by the petitioner have already been worked out and the petitioner is enjoying the benefits of the same. Regarding the main grievance of the petitioner it is stated that there are in all seven aided Class III category posts approved by the State Government and as per the government policy, 3% quota has been sanctioned for persons with disabilities. Since no post is available for persons with disabilities at present, petitioner could not be accommodated. In respect of promotion, it is stated that there are two aided posts of Senior Clerk which are already filled up. Therefore, there is no vacancy in the post of Senior Clerk to effect promotion of the petitioner. Respondent Nos.5 and 6 have stated that petitioner is being paid revised pay-scale under the Sixth Pay Commission and that petitioner is already availing the benefit of late attendance in respondent No.6 college which is available to persons with disabilities, though strictly speaking the government resolution in this regard is applicable only to employees working in government departments within Mumbai City. In so far as provident fund is concerned, it is stated that respondent No.6 college has already enrolled the petitioner with the provident fund authority in the year 2007 pursuant to which provident fund account number has been allotted to the petitioner. Respondent No.6 college has been depositing the employer's contribution to provident fund and also deducting the employee's contribution from the monthly salary of the petitioner. That apart, special conveyance allowance at the rate of Rs.500.00 per month is being paid to the petitioner with effect from May, 2010. Regarding non-deduction of professional tax from the salary of the petitioner, it is stated that petitioner being a physically disabled employee, he is exempted from such payment. No such deduction has been made by respondent No.6 college.

15. Petitioner has filed rejoinder affidavit to the reply affidavit filed by respondent Nos.5 and 6 wherein reliance has been placed on

government resolution dated 04.03.2002 which sets out the procedure for reservation of posts for persons with disabilities by providing a separate 100 point roster where roster points 1, 34 and 67 are earmarked for persons with disabilities. It is, therefore, contended that since the first roster point is earmarked for persons with disabilities, case of the petitioner ought to have been considered against the said point. Regarding lack of promotional avenues it is stated that Government of Maharashtra has issued government resolution dated 01.04.2010 providing for assured career progression in the event of stagnation. As per the said scheme, in the event of an employee not getting promotion after twelve years of service, he will be entitled to a higher pay-scale. It is also stated that by a subsequent government resolution dated 16.07.2013 benefits available to employees working in the government departments in Mumbai have been extended to government employees serving in other districts of Maharashtra. In addition to the above, averments have been made contesting the statements made by respondent Nos.5 and 6 in their common reply affidavit as to grant of other benefits to the petitioner. It is further stated by the petitioner that recommendations of the Grievance Committee of respondent No.4 particularly regarding provident fund dues and grant of promotion to the post of Senior Clerk have remained unimplemented.

15.1. Petitioner has also filed rejoinder affidavit to the reply affidavit of respondent Nos.1 to 3.

16. However it is the sur-rejoinder filed on behalf of respondent Nos.5 and 6 which has considerably narrowed down the controversy in the present writ proceeding. In paragraph 4 of the sur-rejoinder it is stated that there are total eight Class III category aided posts and that the contention made by the petitioner in this regard is correct. Earlier statement made by the respondents that there are only seven Class III category aided posts is not correct and that was made out of inadvertence. Clarifying the matter further it is stated in paragraph 5 that

there are seven aided posts of Clerk in respondent No.6 college plus one aided post of Librarian Clerk in the said college; thus, there are total eight aided posts of Clerk i.e., Class III category aided posts in respondent No.6 college. Responding to the contention of the petitioner that as per government resolution dated 04.03.2002, roster points 1, 34 and 67 are earmarked for persons with disability, it is stated that another government resolution dated 04.08.2011 has been issued by the State Government clarifying the position of reservation for differently abled persons. By the said resolution, reservation of 3% is provided for persons with disabilities. It is stated that as per the said resolution, from 1 to 7 posts there need not be any post reserved for persons with disabilities but from 8 to 33 posts, one post needs to be reserved for the differently abled persons i.e., persons with disabilities. Having said that, respondent Nos.5 and 6 have stated that at present all the eight posts are filled up and there is no vacancy; as and when the next vacancy becomes available, petitioner would be accommodated against such vacancy.

17. Learned counsel for the petitioner in his elaborate submissions has assailed the impugned order on the ground that there is error in fact as well as in law. He submits that it is quite clear now that instead of seven posts, there are eight posts of Clerk in the aided division of respondent No.6 college. Government resolution dated 04.03.2002 still holds the field as per which the first roster point in the special 100 point roster is earmarked for persons with disabilities along with roster points 34 and 67. According to him, even if contention of respondent Nos.5 and 6 is accepted that there is another government resolution dated 04.08.2011, that also provides for reservation of one post for persons with disabilities from post Nos.8 to 33. He, therefore, submits that either way at least one post should have been earmarked for persons with disabilities against which petitioner should have been accommodated. Failure to do so is illegal and arbitrary, he submits. In this connection, learned counsel for the petitioner has referred to the previous order of this Court dated 13.11.2017 as well as to the recommendations of the

Grievance Committee of respondent No.4 and that of the Commissioner for Persons with Disabilities. He has also placed reliance on the decision of the Supreme Court in *Union of India Vs. National Federation of Blind*, (2013) 10 SCC 772. Learned counsel for the petitioner has filed a written submission along with a compilation of decisions.

17.1. While Mr. Kadam, learned AGP has supported the impugned decision of respondent No.2 by contending that before arriving at the same respondent No.2 had given due opportunity of hearing to the petitioner which decision was based on the record produced by respondent Nos.5 and 6, Mr. Kulkarni, learned counsel appearing for respondent Nos.5 and 6 submits that in view of the latest stand taken by respondent Nos.5 and 6 in the affidavit in sur-rejoinder, Court may consider passing appropriate order.

18. Submissions made by learned counsel for the parties have received the due consideration of the Court.

19. Before proceeding further, we may advert to the order passed by this Court in the previous round of litigation i.e. on 13.11.2017, relevant portion of which reads as under:-

“15. We do not see how the petitioner can be denied the relief, but we express presently no opinion. Once the Management has accepted that the petitioner is its employee, working from 1999, then, we expect the Government and particularly respondent Nos.1 to 3 to apply their independent mind and take a rational and informed decision consistent with the mandate of the Persons with Disabilities Act, 1995. They cannot be so insensitive as to file an affidavit in this Court and accept the version of the Management. It is clear that once this Act has intervened, its provisions will have to be given such interpretation as would uphold its object and purpose and not defeat it. We do not see how any technical, much less hyper-technical, plea of the Management can be readily accepted by the State Government and contrary to the mandate of the Persons with Disabilities Act, 1995. We have found that the petitioner having been appointed and working without any Government aid in the form of salary grant being provided to him on par with other permanently aided employees, deserves an opportunity to satisfy the authorities about his entitlement

and the grievances in relation thereto.

16. We, therefore, direct the Director of Higher Education, Maharashtra State, Pune to give an opportunity to the petitioner to substantiate and prove his allegations and grievances, as raised in the petition against respondent Nos.5 and 6. He must be granted a personal hearing by the Director and allowed to produce all the records in relation to his appointment, as also the reservation made for persons with disabilities by the Management. He must also be given an opportunity to satisfy and prove his case that the reservation under the Persons with Disabilities Act, 1995 cannot be equated or brought or understood on par with the constitutional reservation like the reservation for the Scheduled Caste and the Scheduled Tribe candidates. Once the petitioner is not claiming to be appointed on the basis of his caste/class but under the category of persons with disability, then, commensurate with that claim of the petitioner, the Director must take a decision as expeditiously as possible and after taking into consideration even the reply or version of the Management. The Management's representative can also be given an opportunity to appear and make submissions. It will be open for the Director to obtain from respondent No.4-University its appropriate clarifications and version on this aspect.

17. Based on all these materials, the Director shall take a decision as expeditiously as possible in accordance with law and in any event, within a period of three months from today. The Director shall not take into consideration the contents of the affidavit filed by the Management or by the State Government (respondent Nos.1 to 3) in this petition. He must decide the issue independent of these affidavits and their contents so also the annexures thereto. He is expected to pass a reasoned order.

18. Once we direct the Director to look into the grievance of the petitioner and equally the version of the Management in regard thereto, the Director must also obtain the opinion and views of the Commissioner under the Persons with Disabilities Act, 1995 before passing his final order.”

20. Following the above order of this Court, respondent No.2 passed the impugned order dated 07.02.2018 declining to entertain the claim of the petitioner. Respondent No.2 while taking the decision as directed by this Court held that there were seven aided posts in Group ‘C’ cadre in respondent No.6 college and as per government resolution dated 04.08.2011 no reserved post was available for persons with disabilities.

That apart, there was no vacancy in any of those seven posts. Therefore, petitioner could not be accommodated in the aided posts.

21. At this stage, we may refer to what was recommended by the Grievance Committee of respondent No.4 University. Grievance Committee had recommended amongst others that petitioner should be extended the benefit of promotion to the post of Senior Clerk. Such recommendation was made on the premise that petitioner as a person with disabilities was entitled to the benefits under the 1995 Act, including accommodation in any of the aided posts of Junior Clerk. This recommendation of the Grievance Committee was accepted by the Management Council. Further, the same was not challenged by respondent Nos.5 and 6 before any forum. Thus, the said decision has attained finality.

22. That apart, this Court in its order dated 13.11.2017 had clarified that while taking the decision respondent No.2 should also obtain the views of the Commissioner for Persons with Disabilities. The Commissioner for Persons with Disabilities expressed the view that if no post is available for accommodating the petitioner then a supernumerary post should be created in which post petitioner should be accommodated. Notwithstanding such positive recommendations of the Grievance Committee as well as of the Commissioner for Persons with Disabilities impugned decision was taken by respondent No.2 who simply held that as per government resolution dated 04.08.2011 no reserved post was available for persons with disabilities and in any case, as vacancies in the seven posts were not available, petitioner could not be accommodated.

23. However, as we have noticed above, the position has considerably changed in view of the latest stand taken by respondent Nos.5 and 6 in the sur-rejoinder. It is clearly stated that there are now eight aided posts of Clerk in respondent No.6 college but since all the posts are presently

filled up and there being no vacancy, petitioner cannot be accommodated instantly. Whenever the next vacancy arises, respondent Nos.5 and 6 would accommodate the petitioner in such vacancy.

24. As per the government resolution dated 04.03.2002, a special 100 point roster has been prepared providing for three percent reservation to persons with disabilities in Group A to Group D posts in state government service. The roster points at Sr.Nos.1, 34 and 67 are earmarked for persons with disabilities. The said government resolution is applicable amongst others to aided institutions. It is the contention of the petitioner that the first post of Clerk should be earmarked for persons with disabilities. The said government resolution is applicable amongst others to aided institutions. On the other hand respondent Nos.5 and 6 in the sur-rejoinder have stated that there is subsequent government resolution dated 04.08.2011 which mandates three percent reservation for persons with disabilities in Group A to Group D posts, further clarifying that though there may not be reservation upto the 7<sup>th</sup> post but one post should be reserved for persons with disabilities from the 8<sup>th</sup> to 33<sup>rd</sup> posts. Thus the position has become clear now. Whether it is the 1<sup>st</sup> post or it is the 8<sup>th</sup> post, it is evident that either way one of the posts ought to have been earmarked for persons with disabilities. But the same has not been done. Failure to do so has therefore vitiated the impugned decision.

25. The 1995 Act was enacted to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific Region. Chapter VI of the 1995 Act deals with “employment”. While section 32 deals with identification of posts which can be reserved for persons with disabilities, section 33 provides for reservation of posts for persons with disabilities which should not be less than three percent. The provisions are extracted hereunder:-

“32. Identification of posts which can be reserved for persons with disabilities. - Appropriate Governments shall -

- (a) identify posts, in the establishments, which can be reserved for the persons with disability;
- (b) at periodical intervals not exceeding three years,

review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Reservation of Posts - Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

- (i) blindness or low vision;
- (ii) hearing impairment;
- (iii) locomotor disability or cerebral palsy,

in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.”

26. In **National Federation of Blind** (*supra*), Supreme Court referred to and relied upon its earlier decision in the case of *Government of India through Secretary Vs. Ravi Prakash Gupta*, (2010) 7 SCC 626 and explained the subtle but significant difference in the operation of sections 32 and 33. Scope of identification comes into play only at the time of appointment and not necessarily relevant at the time of computing the three percent reservation under section 33 of the 1995 Act. It was held as under:-

“29) In the light of the above pronouncement, it is clear that the scope of identification comes into picture only at the time of appointment of a person in the post identified for disabled persons and is not necessarily relevant at the time of computing 3% reservation under Section 33 of the Act. In succinct, it was held in **Ravi Prakash Gupta** (*supra*) that Section 32 of the Act is not a precondition for computation of reservation of 3% under Section 33 of the Act rather Section 32 is the following effect of Section 33.”

26.1. Referring to section 33, Supreme Court held that this provision establishes vividly the intention of the legislature i.e., reservation of three percent for differently abled persons would have to be computed on the basis of total vacancies in the strength of a cadre and not just on

the basis of the vacancies available in the identified posts. Holding that there is no ambiguity in the language of section 33, Supreme Court dissected the said section and explained the significance thereof in the following manner:-

“31) A perusal of Section 33 of the Act reveals that this section has been divided into three parts. The first part is “every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability.” It is evident from this part that it mandates every appropriate Government shall appoint a minimum of 3% vacancies in its establishments for persons with disabilities. In this light, the contention of the Union of India that reservation in terms of Section 33 has to be computed against identified posts only is not tenable by any method of interpretation of this part of the Section.

32) The second part of this section starts as follows: “...of which one percent each shall be reserved for persons suffering from blindness or low vision, hearing impairment & locomotor disability or cerebral palsy in the posts identified for each disability.” From the above, it is clear that it deals with distribution of 3% posts in every establishment among 3 categories of disabilities. It starts from the word “of which”. The word “of which” has to relate to appointing not less than 3% vacancies in an establishment and, in any way, it does not refer to the identified posts. In fact, the contention of the Union of India is sought to be justified by bringing the last portion of the second part of the section viz. “....identified posts” in this very first part which deals with the statutory obligation imposed upon the appropriate Government to “appoint not less than 3% vacancies for the persons or class of persons with disabilities.” In our considered view, it is not plausible in the light of established rules of interpretation. The minimum level of representation of persons with disabilities has been provided in this very first part and the second part deals with the distribution of this 3% among the three categories of disabilities. Further, in the last portion of the second part the words used are “in the identified posts for each disability” and not “of identified posts”. This can only mean that out of minimum 3% of vacancies of posts in the establishments 1% each has to be given to each of the 3 categories of disability viz., blind and low vision, hearing impaired and locomotor disabled or cerebral palsy separately and the number of appointments equivalent to the 1% for each disability out of total 3% has to be made against the vacancies in the identified posts. The attempt to read identified posts in the first part itself and also to read the same to have any relation with the computation of reservation is completely misconceived.

33) The third part of the Section is the proviso which reads thus: “Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.” The proviso also justifies the above said interpretation that the computation of reservation has to be against the total number vacancies in the cadre strength and not against the identified posts. Had the legislature intended to mandate for computation of reservation against the identified posts only, there was no need for inserting the proviso to Section which empowers the appropriate Government to exempt any establishment either partly or fully from the purview of the Section subject to such conditions contained in the notification to be issued in the Official Gazette in this behalf. Certainly, the legislature did not intend to give such arbitrary power for exemption from reservation for persons with disabilities to be exercised by the appropriate Government when the computation is intended to be made against the identified posts.

26.2. At this stage we may also mention about the provisions of section 41 of the 1995 Act which speaks of providing incentives to employers to ensure that five percent of the workforce is composed of persons with disabilities. On a conjoint reading of sections 33 and 41, Supreme Court took the view that while section 33 provides for a minimum level of representation of three percent in the establishments of appropriate government, the legislature intended to ensure five percent of representation in the entire workforce both in public as well as in private sector. Supreme Court also made it clear that its decision in *R K Sabharwal Vs. State of Punjab*, (1995) 2 SCC 745 which held that percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength and that the concept of ‘vacancy’ has no relevance in operating the percentage of reservation would not be applicable to reservation for persons with disabilities because in **R K Sabharwal** (*supra*), the point for consideration was with regard to implementation of the scheme of reservation for SC, ST and OBC which is vertical reservation whereas reservation in favour of persons with disabilities is horizontal. It was also declared in unequivocal terms that

the reservation policy stipulated in the 1995 Act is vacancy based reservation.

26.3. Regarding the importance of employment for persons with disabilities, Supreme Court held as under:-

“49) Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. As a result, many disabled people live in poverty and in deplorable conditions. They are denied the right to make a useful contribution to their own lives and to the lives of their families and community.

50) The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various International treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons. Even though the Act was enacted way back in 1995, the disabled people have failed to get required benefit until today.

51) Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., **‘computing 3% reservation on total number of vacancies in the cadre strength’** which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new Office Memorandum(s) in consistent with the decision rendered by this Court.”

27. The 1995 Act has since been replaced by the Rights of Persons with Disabilities Act, 2016 (for short “the 2016 Act” hereinafter) which has been enacted to give effect to the United Nations Convention on the Rights of Persons with Disabilities and for matters connected therewith or incidental thereto. Here also like the 1995 Act, section 33 provides for

identification of posts for reservation for persons with disabilities whereas section 34 provides for reservation which should not be less than four percent.

28. The interplay between vertical reservation and horizontal reservation was first dealt with by the Supreme Court in *Indra Sawhney Vs. Union of India*, **1992 Supp (3) SCC 217**. After concluding that reservations contemplated in clause (4) of Article 16 of the Constitution of India should not exceed 50%, it was clarified in paragraph 812 that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). It was clarified that all reservations are not of the same nature. There are two types of reservations, which may be referred to as 'vertical reservations' and 'horizontal reservations'. Reservations in favour of SC, ST and OBC i.e., under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped may be referred to as horizontal reservations relatable to Article 16(1). Proceeding further, Supreme Court held that horizontal reservations cut across the vertical reservations - what is called inter-locking reservations. Explaining this aspect it was held that if three percent of the vacancies are reserved in favour of physically handicapped persons, this would be a reservation relatable to clause (1) of Article 16. Persons selected against this quota will be placed against the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments. If he belongs to open category, he will be placed in that category by making necessary adjustments. Thus even after providing for such horizontal reservations, the percentage of reservations in favour of backward class citizens would remain the same.

29. This aspect of the matter was again examined by the Supreme Court in *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission*, **(2007) 8 SCC 785**. It was held as under:-

“9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - *Indira Sawhney, R. K. Sabharwal vs. State of Punjab, Union of India vs. Virpal Singh Chauhan and Ritesh R. Sah vs. Dr. Y. L. Yamul*. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example :

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb

the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]”

30. Again in *Union of India Vs. M. Selvakumar*, (2017) 3 SCC 504, Supreme Court had the occasion to once again examine the inter-locking of vacancies necessitated by vertical and horizontal reservations. It was held as follows:-

“22. Article 16 of the Constitution provides for equality of opportunity in matters of public employment. The State in terms of Article 16 of the Constitution provides two types of reservations i.e. a vertical or social reservation as provided for in Article 16 clause (4) and horizontal reservation which is referable to Article 16 clause (1). Special reservation in favour of physically handicapped, women etc. under Article 16(1) or 15(3) of the Constitution are the instances of horizontal reservation.”

31. In the light of the above discussions, we are of the view that the impugned decision of respondent No.2 dated 07.02.2018 cannot be sustained. The same is accordingly set aside and quashed. Consequently, we direct respondent Nos.2, 5 and 6 to include the petitioner as a category ‘C’ employee (Clerk) in the establishment of respondent No.6 as a person with disability under the aided division. Since such inclusion of the petitioner would require the dislodging of an incumbent employed either at Sr.No.1 or at Sr.No.8, the said respondents should provide an opportunity of hearing to the affected employee as well as to the petitioner and thereafter pass the consequential order in accordance with law having regard to the discussions made above.

32. Let the above exercise be carried out within a period of three months from the date of receipt of a copy of this order. All other consequential benefits to which petitioner is entitled as a person with disabilities including arrear dues etc. shall be made available to the petitioner.

33. With the above directions, writ petition is disposed of.

**(MADHAV J. JAMDAR, J.)**

**(UJJAL BHUYAN, J.)**

*Minal Parab*