

VIKASH KUMAR

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v.

UNION PUBLIC SERVICE COMMISSION & ORS.

(Civil Appeal No. 273 of 2021)

FEBRUARY 11, 2021

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**[DR. DHANANJAYA Y CHANDRACHUD,
INDIRA BANERJEE AND SANJIV KHANNA, JJ.]**

Rights of Persons with Disabilities Act, 2016 – ss. 2(r), 2(s), 2(y), 3 and 56 – Civil Services Examination Rules, 2018 – Facility of a scribe in the Civil Services Examination – Entitlement to – The appellant has a disability in the form of dysgraphia, commonly known as a Writer's Cramp – On 07.02.2018, UPSC issued a notification for the CSE 2018 – The CSE Rules 2018 issued by DoPT providing for the manner and conduct of the examination – The general instructions provided that all candidates must write their papers in their own hand and will not be allowed the help of a scribe – Exceptions to this rule were provided for blind candidates; candidates with locomotor disability and cerebral palsy where the “dominant (writing) is affected to the extent of slowing the performance of function (minimum of 40% impairment)” – Candidates within the exception were allowed the help of a scribe – Appellant in his online application for the CSE 2018 declared himself to be a person with a benchmark disability of 40% or more and requested the UPSC to provide him with a scribe for the examination – Application was rejected by the UPSC – Aggrieved, appellant moved to the Tribunal – Tribunal dismissed the application and it was held that appellant did not fulfill the criteria – Appellant filed writ petition – The High Court declined to interfere with the order of the Tribunal on the ground that the appellant had not qualified at the Preliminary Examination for CSE 2018 and thus, the relief seeking an amendment of the CSE Rules 2018 to provide scribes to candidates with specific disabilities was rendered otiose – The Supreme Court directed AIIMS to constitute a medical board to evaluate the condition of the appellant – AIIMS, by its report opined that the appellant suffers from a “chronic neurological condition” termed as bilateral Writer's Cramp – However, the report opines that while he does not suffer from a “benchmark disability”, the

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- A *appellant is a 'person with disability' under the RPwD Act, 2016 – The extent of the disability is assessed at 6% – Held: The guidelines of the Ministry of Social Justice and Empowerment dated 29.08.2018 recognise the entitlement to a scribe only for candidates with benchmark disabilities – The guidelines which have been framed on 29.08.2018 can by no means be regarded as being exhaustive of the situations in which a scribe can be availed of by persons other than those who suffer from benchmark disabilities – The rights which emanate from provisions such as s.3 extend to persons with disability as broadly defined by s. 2(s) – To confine the facility of a scribe only to those who have benchmark disabilities would be to deprive a class of persons of their statutorily recognized entitlements – To do so would be contrary to the plain terms as well as the object of the statute – In the instant case, the condition of appellant was repeatedly affirmed by several medical authorities including NIMHANS and AIIMS – The appellant has a specified disability inasmuch as he has a chronic neurological condition – This condition Forms part of Entry IV of the Schedule to the RPwD Act 2016 – The writer's cramp has been found successively to be a condition which the appellant has, making it difficult for him to write a conventional examination – To deny the facility of a scribe in a situation such as the present would negate the valuable rights and entitlements which are recognised by the RPwD Act 2016 – Appellant entitled to the facility of a scribe – Thus, the impugned order and judgment of the High Court is set aside.*

- Rights of Persons with Disabilities Act, 2016 – ss. 2(r), 2(s), 2(y), 3 and 56 – Benchmark disability not a precondition to obtain a scribe – Held: The whole concept of a benchmark disability within the meaning of s. 2(r) is primarily in the context of special provisions including reservation that are embodied in Chapter VI of the RPwD Act 2016 – Conceivably, the Parliament while mandating the reservation of posts in government establishments and of seats in institutions of higher learning was of the view that this entitlement should be recognized for persons with benchmark disabilities – As a matter of legislative policy, these provisions in Chapter VI have been made applicable to those with benchmark disabilities where a higher threshold of disability is stipulated – Conflating the rights and entitlements which inhere in persons with disabilities with the notion of benchmark disabilities does dis-service to the salutary*

purpose underlying the enactment of the RPwD Act 2016 – To deny the rights and entitlements recognized for persons with disabilities on the ground that they do not fulfill a benchmark disability would be plainly ultra vires the RPwD Act 2016. A

Constitution of India – Arts.14, 19 and 21 – Rights of Persons with Disabilities Act, 2016 – Held: The golden triangle of Arts. 14, 19 and 21 applies with full force and vigour to the disabled – S.3 is a statutory recognition of the constitutional rights embodied in Arts. 14, 19 and 21 among other provisions of Part III of the Constitution – S. 3 casts an affirmative obligation on the government to ensure that persons with disabilities enjoy (i) the right to equality; (ii) a life with dignity; and (iii) respect for their integrity equally with others. B C

Principles/Doctrines – Principle of reasonable accommodation – Rights of Persons with Disabilities – Held: The principle of reasonable accommodation captures the positive obligation of the State and private parties to provide additional support to persons with disabilities to facilitate their full and effective participation in society – The concept of reasonable accommodation in s. 2(y) of the Rights of Persons with Disabilities Act, 2016 incorporates making “necessary and appropriate modification and adjustments” so long as they do not impose a disproportionate or undue burden in a particular case to ensure to persons with disability the enjoyment or exercise of rights equally with others” – Equality, non-discrimination and dignity are the essence of the protective ambit of the RPwD Act 2016. D E F

Rights of Persons with Disabilities Act, 2016 – Formulation of new policy concerning access to scribes for persons with disabilities – Held: Direction issued to the Union Government in the Ministry of Social Justice and Empowerment to ensure the framing of proper guidelines which would regulate and facilitate the grant of a facility of a scribe to persons with disability within the meaning of s. 2(s) where the nature of the disability operates to impose a barrier to the candidate writing an examination – It was also directed to consult persons with disabilities and involve them in the decision making process. G H

A **Allowing the appeal, the Court**

HELD: 1. The legal framework

1.1 The important point to note is that the guidelines of the Ministry of Social Justice and Empowerment (MSJE) dated 29

B August 2018 recognise the entitlement to a scribe only for candidates with benchmark disabilities. Among them, candidates belonging to three categories – the blind and those with locomotor disability or cerebral palsy - are to be given the facility if so desired. In the case of candidates with other benchmark disabilities, such a facility is to be extended upon a certificate.

C [Para 20][336-D-E]

2. Two Government Ministries: A policy disconnect

2.1 Referring to the OM dated 29 August 2018 issued by the MSJE, the affidavit of UPSC states that these guidelines confine the benefit of a scribe only to persons with benchmark

D disabilities. The request of the appellant is stated to have been rejected on the ground that there is an absence of any provision for a scribe to candidates falling in the category in which the appellant is placed. UPSC in fact states that it does not permit a deviation from the CSE Rules 2018. [Para 22][337-H; 338-A]

E 2.2 MSJE is the nodal ministry which is entrusted with implementing the provisions of the Rights of Persons with Disability Act, 2016. As the nodal ministry, it has formulated guidelines on 29 August 2018. These guidelines, as noticed, confine access to a scribe, reader or lab assistant to candidates

F having benchmark disabilities within the meaning of Section 2(r). Yet, as the nodal ministry, it recognizes that these guidelines are not exhaustive of the circumstances or conditions in which a scribe can be provided. On the contrary, the MSJE has recognized the prevalence of other medical conditions “not identified as disabilities per se” but which may hamper the writing capability

G of a person. It specifically leaves it open to every examining body to consider such cases for the grant of scribe, extra time or other facilities in consultation with the Ministry of Health and Family Welfare against the production of a medical certificate, in line with those prescribed for candidates with benchmark disabilities.

H [Para 23][338-E-G]

2.3 This view of the nodal ministry has evidently not percolated to UPSC which, on the other hand, considers itself to be strictly bound, without deviation, from the rules specified by DoPT for the conduct of the CSE. Notwithstanding the views of the MSJE, the UPSC does not recognize that the guidelines dated 29 August 2018 vest it with the discretion to provide accommodations on a case-by-case basis, beyond those spelt out in the guidelines. The rules which hold the field are in terms of the guidelines dated 29 August 2018. UPSC has therefore specifically stated before this Court that a candidate who does not fulfill the description of a person with benchmark disabilities would not be entitled to a scribe. These divergent views of two Central Ministries before the Court are symptomatic of a policy disconnect. [Para 24][339-A-C]

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3. Benchmark disability not a precondition to obtaining a scribe

3.1 The RPwD Act, 2016 embodies two distinct concepts when it speaks of (i) ‘persons with benchmark disabilities’ and (ii) persons with disability. In defining a person with benchmark disability, Section 2(r) encompasses two categories: (i) a person with not less than 40 per cent of a specified disability, where the specified disability has not been defined in measurable terms and (ii) a person with disability where the specified disability has been defined in measurable terms, as certified by the certifying authority. In other words, Section 2(r) encompasses both a situation where a specified disability has not been defined in measurable terms, in which event it means a person with not less than 40 per cent of the specified disability but also where a specified disability has been defined in measurable terms. A certification by the certifying authority is contemplated in regard to whether the person concerned does in fact meet the specified norm as quantified. [Para 25][339-D-F]

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3.2 The second concept which is embodied in Section 2(s) is that of a person with disability. Section 2(s) unlike Section 2(r) is not tagged either with the notion of a specified disability or a benchmark disability as defined in Section 2(r). Section 2(s) has been phrased by Parliament in broad terms so as to mean a person

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- A **with a long term physical, mental, intellectual or sensory impairment which in interaction with various barriers hinders full and effective participation in society equally with others.** [Para 26][339-G-H]

- B **3.3 The concept of a benchmark disability under Section 2(r) cannot be conflated with the notion of disability under Section 2(s). The definition in Section 2(r) applies in the case of a specified disability. The expression ‘specified disability’ is defined in Section 2(zc) to mean the disabilities as specified in the Schedule.** [Para 29][340-E]

- C **3.4 Conflating the rights and entitlements which inhere in persons with disabilities with the notion of benchmark disabilities does dis-service to the salutary purpose underlying the enactment of the RPwD Act 2016. Worse still, to deny the rights and entitlements recognized for persons with disabilities on the ground that they do not fulfill a benchmark disability would be plainly ultra vires the RPwD Act 2016.** [Para 31][341-G-H]

4. Rights of Persons with Disabilities Act 2016: A paradigm-shift

- E **4.1 The fundamental postulate upon which the RPwD Act 2016 is based is the principle of equality and non-discrimination. Section 3 casts an affirmative obligation on the government to ensure that persons with disabilities enjoy (i) the right to equality; (ii) a life with dignity; and (iii) respect for their integrity equally with others. Section 3 is an affirmative declaration of the intent of the legislature that the fundamental postulate of equality and non-discrimination is made available to persons with disabilities without constraining it with the notion of a benchmark disability.**

- F **Section 3 is a statutory recognition of the constitutional rights embodied in Articles 14, 19 and 21 among other provisions of Part III of the Constitution. By recognizing a statutory right and G entitlement on the part of persons who are disabled, Section 3 seeks to implement and facilitate the fulfillment of the constitutional rights of persons with disabilities.** [Para 33] [342-C-E]

- H **4.2 The principle of reasonable accommodation captures the positive obligation of the State and private parties to provide**

additional support to persons with disabilities to facilitate their A full and effective participation in society. [Para 35][343-D-E]

4.3 The general principle of reasonable accommodation did not find a place in the 1995 Act. The principle of reasonable accommodation has found a more expansive manifestation in the RPwD Act 2016. Section 3 of the RPwD Act 2016 goes beyond a formal guarantee of non-discrimination by casting affirmative duties and obligations on government to protect the rights recognized in Section 3 by taking steps to utilize the capacity of persons with disabilities “by providing appropriate environment”. Among the obligations which are cast on the government is the duty to take necessary steps to ensure reasonable accommodation for persons with disabilities. The concept of reasonable accommodation in Section 2(y) incorporates making “necessary and appropriate modification and adjustments” so long as they do not impose a disproportionate or undue burden in a particular case to ensure to persons with disability the enjoyment or exercise of rights equally with others.” Equality, non-discrimination and dignity are the essence of the protective ambit of the RPwD Act 2016. [Para 37][345-E-H; 346-A-B] B C D

4.4 When the government in recognition of its affirmative duties and obligations under the RPwD Act 2016 makes provisions for facilitating a scribe during the course of the Civil Services Examination, it cannot be construed to confer a largesse. Nor does it by allowing a scribe confer a privilege on a candidate. The provision for the facility of a scribe is in pursuance of the statutory mandate to ensure that persons with disabilities are able to live a life of equality and dignity based on respect in society for their bodily and mental integrity. There is a fundamental fallacy on the part of the UPSE/DoPT in proceeding on the basis that the facility of a scribe shall be made available only to persons with benchmark disabilities. This is occasioned by the failure of the MSJE to clarify their guidelines. The whole concept of a benchmark disability within the meaning of Section 2(r) is primarily in the context of special provisions including reservation that are embodied in Chapter VI of the RPwD Act 2016. Conceivably, the Parliament while mandating the reservation of E F G H

- A posts in government establishments and of seats in institutions of higher learning was of the view that this entitlement should be recognized for persons with benchmark disabilities. As a matter of legislative policy, these provisions in Chapter VI have been made applicable to those with benchmark disabilities where a higher threshold of disability is stipulated. Except in the specific statutory context where the norm of benchmark disability has been applied, it would be plainly contrary to both the text and intent of the enactment to deny the rights and entitlements which are recognized as inhering in persons with disabilities on the ground that they do not meet the threshold for a benchmark disability. A statutory concept which has been applied by Parliament in specific situations cannot be extended to others where the broader expression, persons with disability, is used statutorily. The guidelines which have been framed on 29 August 2018 can by no means be regarded as being exhaustive of the situations in which a scribe can be availed of by persons other than those who suffer from benchmark disabilities. The MSJE does not in its counter affidavit before this Court treat those guidelines as exhaustive of the circumstances in which a scribe can be provided for persons other than those having benchmark disabilities. This understanding of the MSJE is correct for the simple reason that the rights which emanate from provisions such as Section 3 extend to persons with disability as broadly defined by Section 2(s). [Para 41][348-E-H; 349-A-D]
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4.5 This Court is, therefore, of the view that DoPT and UPSC have fundamentally erred in the construction which has been placed on the provisions of the RPwD Act 2016. To confine the facility of a scribe only to those who have benchmark disabilities would be to deprive a class of persons of their statutorily recognized entitlements. To do so would be contrary to the plain terms as well as the object of the statute. [Para 42][349-D-E]

G **5. Reasonable accommodation**

5.1 In the specific context of disability, the principle of reasonable accommodation postulates that the conditions which exclude the disabled from full and effective participation as equal members of society have to give way to an accommodative society

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which accepts difference, respects their needs and facilitates the creation of an environment in which the societal barriers to disability are progressively answered. Accommodation implies a positive obligation to create conditions conducive to the growth and fulfilment of the disabled in every aspect of their existence – whether as students, members of the workplace, participants in governance or, on a personal plane, in realizing the fulfilling privacies of family life. The accommodation which the law mandates is ‘reasonable’ because it has to be tailored to the requirements of each condition of disability. The expectations which every disabled person has are unique to the nature of the disability and the character of the impediments which are encountered as its consequence. [Para 46][350-G; 351-A-B]

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6. Case of the appellant

6.1 Insofar as the case of the appellant is concerned, his condition has been repeatedly affirmed by several medical authorities including National Institute of Mental Health and Neuro Sciences (NIMHANS), Bangalore and AIIMS. The AIIMS report which was pursuant to the order of this Court is clear in opining that the appellant has a specified disability inasmuch as he has a chronic neurological condition. This condition Forms part of Entry IV of the Schedule to the RPwD Act 2016. The writer’s cramp has been found successively to be a condition which the appellant has, making it difficult for him to write a conventional examination. To deny the facility of a scribe in a situation such as the present would negate the valuable rights and entitlements which are recognised by the RPwD Act 2016. [Para 73][361-E-F]

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6.2 This Court, therefore, hold and declare that the appellant would be entitled to the facility of a scribe for appearing at the Civil Services Examination and any other competitive selection conducted under the authority of the government. [Para 74] [361-G]

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7. Formulation of new policy concerning access to scribes for persons with disabilities

7.1 A broader direction issued to the Union Government in the Ministry of Social Justice and Empowerment to ensure the

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- A framing of proper guidelines which would regulate and facilitate the grant of a facility of a scribe to persons with disability within the meaning of Section 2(s) where the nature of the disability operates to impose a barrier to the candidate writing an examination. In formulating the procedures, the Ministry of Social Justice and Empowerment may lay down appropriate norms to ensure that the condition of the candidate is duly certified by such competent medical authority as may be prescribed so as to ensure that only genuine candidates in need of the facility are able to avail of it. [Para 75][361-H; 362-A-C]
- B ensure that the condition of the candidate is duly certified by such competent medical authority as may be prescribed so as to ensure that only genuine candidates in need of the facility are able to avail of it. [Para 75][361-H; 362-A-C]
- C *Jeeja Ghosh v. Union of India (2016) 7 SCC 761 : [2016] 4 SCR 638; Justice Sunanda Bhandare Foundation v. Union of India (2018) 2 SCC 397; Union of India v. National Federation of the Blind (2013) 10 SCC 772 : [2013] 9 SCR 1023; Syed Bashir-ud-din Qadri v. Nazir Ahmed Shah (2010) 3 SCC 603 : [2010] 3 SCR 250 – relied on.*
- D *V Surendra Mohan v. State of Tamil Nadu (“Mohan”) (2019) 4 SCC 237: [2019] 1 SCR 954 – referred to.*

Case law Reference

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|--------------------|-------------|---------|
| E [2016] 4 SCR 638 | relied on | Para 34 |
| (2018) 2 SCC 397 | relied on | Para 35 |
| [2013] 9 SCR 1023 | relied on | Para 38 |
| [2010] 3 SCR 250 | relied on | Para 50 |
| F [2019] 1 SCR 954 | referred to | Para 51 |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 273 of 2021.

From the Judgment and Order dated 25.09.2019 of the High Court of Delhi at New Delhi in Writ Petition No. 9942 of 2018.

- G Ms. Madhavi Divan, ASG, Rajan Mani, Ms. Ritu Kumar, Pukhrambam Ramesh Kumar, Ms. Anupama Ng., Karun Sharma, Gopal Jha, A.K. Kaul, Ms. Aakanksha Kaul, Ms. Nidhi Khanna, Raj Bahadur Yadav, Amrish Kumar, Naresh Kaushik, Mrs. Lalitha Kaushik, Ms. Sanchita Ain, Advs. for the appearing parties.
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The Judgment of the Court was delivered by A

DR. DHANANJAYA Y CHANDRACHUD, J.

- A. Factual background
- B. The course run: The Tribunal and High Court of Delhi
- C. These proceedings
 - C.1 Arguments of the appellant
 - C.2 Arguments of the UPSC
 - C.3. Arguments of the Union of India
- D. The legal framework
- E. Two Government Ministries: A policy disconnect
- F. Benchmark disability not a precondition to obtaining a scribe
- G. Rights of Persons with Disabilities Act 2016: A paradigm-shift
 - G1 A statutory manifestation of a constitutional commitment
 - G2 Scheme of the 2016 Act
- H. Reasonable accommodation
- I. The argument of misuse
- J. The language of our discourse
- K. Realizing the transformative potential of the Rights of Persons with Disabilities Act, 2016: From principle to practice
- L. Case of the appellant
- M. Formulation of new policy concerning access to scribes for persons with disabilities
- N. In summation

A. Factual background

- 1. A citizen who suffers from a writer's cramp has travelled to this Court. The grievance is that he was denied a scribe in the civil

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- A services' examination¹. The case has run its course through the judicial system as an individual grievance. But its contours present portents of the aspirations of a whole class of persons whose daily engagement with physical disability defines their continuing quest for dignity. Through a maze of statutes, rules, and regulations, the case raises core issues about the actual realization of equal opportunity and access to the disabled.
 - B It tests what the law professes with how its ideals are realized. The language of our discourse, as much as its outcome, should generate introspection over the path which our society has traversed and the road that lies ahead in realizing the rights of the disabled. Voices such as those of the appellant are a constant reminder of the chasm between the
 - C law and reality. But they also provide a platform for change and evolution towards a better future.
2. Down to its bare bones, this appeal turns upon the interface of the Civil Services Examination Rules 2018² dated 7 February 2018 with the Rights of Persons with Disabilities Act, 2016³.
- D 3. The appellant has a disability in the form of dysgraphia, commonly known as a Writer's Cramp. In August 2016, he graduated with an MBBS degree from the Jawaharlal Nehru Institute of Post Graduate Medical Instruction and Research, popularly known by the acronym JIPMER. Intending to pursue a career in the civil services, he
 - E appeared in 2017 for the CSE. A scribe was provided to him by the Union Public Services Commission⁴ to enable him to appear in the written test. In the online application form for CSE 2017, the appellant declared himself to be a person with locomotor disability to avail the services of a scribe. On 7 February 2018, UPSC issued a notification for the CSE 2018⁵. The Department of Personnel and Training⁶ issued the CSE Rules 2018 providing for the manner and conduct of the examination. The general instructions provided that all candidates must write their papers in their own hand and will not be allowed the help of a scribe. Exceptions to this rule were provided for blind candidates; candidates with locomotor disability and cerebral palsy where the "dominant (writing) is affected to
 - G the extent of slowing the performance of function (minimum of 40%

¹ "CSE"

² "CSE Rules 2018"

³ "RPwD Act, 2016"

⁴ "UPSC"

⁵ "CSE Notification 2018"

⁶ "DoPT"

impairment)”. Candidates within the exception were allowed the help of A
a scribe. An additional ‘compensatory time’ of twenty minutes per hour
was also to be granted to such candidates.

4. In his online application for the CSE 2018, the appellant declared B
himself to be a person with a benchmark disability of 40% or more. By
his email dated 28 February 2018, the appellant requested the UPSC to
provide him with a scribe for the examination. UPSC, by its letter dated
15 March 2018, rejected the request on the ground that a scribe could be
provided only to blind candidates and candidates with locomotor disability
or cerebral palsy with an impairment of at least 40% and the appellant
did not meet this criterion.

5. The appellant also sought to appear for selection to the post of C
Medical Officer pursuant to the Combined Medical Services Examination
2017 conducted under the auspices of UPSC. In order to obtain a disability
certificate, he approached the Medical Board of Ram Manohar Lohia
Hospital, Delhi. By a communication dated 12 February 2018, the disability
certificate was denied to him. This led the appellant to preface a challenge
before the Central Administrative Tribunal⁷ where the case is still pending
adjudication.

B. The course run: The Tribunal and High Court of Delhi

6. Aggrieved by the denial of the services of a scribe for the CSE E
2018, the appellant moved the Tribunal. By an interim order dated 30
May 2018, the Tribunal directed the UPSC to provide him a scribe to
enable him to appear for the preliminary examination. The results were
published on 14 July 2018, but the appellant’s result was withheld. By a F
judgment dated 7 August 2018, the Tribunal dismissed the application
filed by the appellant on the ground that, since Ram Manohar Lohia
Hospital had refused to issue a disability certificate, the appellant could
not claim access to a scribe as a disabled candidate. The Tribunal also
noted that the appellant did not claim the facility of a scribe in the CSE G
2017 or during his MBBS graduation examinations. The Tribunal held
that though in para 5 of the CSE Notification 2018, the UPSC recognized
the right to a scribe, it has been limited to blind candidates and candidates
having locomotor disability and cerebral palsy, where a minimum 40%
impairment exists. The appellant was held not to fulfill the criteria. The
Tribunal also rejected a certificate dated 22 March 2015 issued by the

⁷ “Tribunal”

- A National Institute of Mental Health and Neuro Sciences, on the ground that it failed to mention the extent of the disability. Finally, the Tribunal questioned the maintainability of the prayer of the appellant for a direction to the UPSC to amend the CSE Notification 2018. Since the relief was in the realm of advising the executive on policy matters, the Tribunal refrained from interfering in the matter.
- B 7. The appellant instituted a writ petition before the High Court of Delhi and challenged the legality of the CSE Rules 2018. Meanwhile, he obtained a medical certificate dated 27 August 2018 from National Institute of Mental Health and Neuro Sciences (NIMHANS), Bangalore, declaring that he has a Writer's Cramp and would require a scribe during his examinations.
- C 8. A Division Bench of the High Court of Delhi by an order dated 25 September 2018 declined to interfere with the order of the Tribunal on the ground that the appellant had not qualified at the Preliminary Examination for CSE 2018 and thus, the relief seeking an amendment of
- D the CSE Rules 2018 to provide scribes to candidates with specific disabilities was rendered otiose. The appellant was granted liberty to file another application before the Tribunal in the future. This order of the High Court of Delhi has been challenged in appeal.

C. These proceedings

- E 9. During the course of the proceedings, by an order dated 16 January 2020, we directed the All India Institute of Medical Sciences⁸ to constitute a medical board to evaluate the condition of the appellant and render its opinion on (i) whether he suffers from a benchmark disability within the meaning of Section 2(r) and Section 2(zc) of the RPwD Act, 2016; and (ii) whether he is a 'person with disability' under Section 2(s) of the RPwD Act, 2016 and the extent of the disability. AIIMS, by its report dated 10 February 2020, opined that the appellant suffers from a "chronic neurological condition" termed as bilateral Writer's Cramp. However, the report opines that while he does not suffer from a "benchmark disability", the appellant is a 'person with disability' under the RPwD Act, 2016. The extent of the disability is assessed at 6%.

C.1 Arguments of the appellant

10. Mr Rajan Mani, learned counsel appearing on behalf of the appellant, has made the following submissions:

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- i The appellant has been issued medical certificates dated 21 March 2015 and 27 August 2018, which certify that he has a Writer's Cramp and would require a scribe. According to Section 2(s) of the RPwD Act, 2016, a person with disability means a person with long-term, physical, mental, intellectual and sensory impairment, which hinders their full and effective participation in society. These certificates prove that the appellant falls under Section 2(s) of the Act and is entitled to the protection of the Act; A
- ii Writer's Cramp, or dysgraphia, is a specific disability and is listed in entry 2(a) of the Schedule to the RPwD Act, 2016. The Ministry of Social Justice and Empowerment⁹, by a notification dated 14 January 2018, has also recognized the specific learning disability of dysgraphia; C
- iii The CSE Rules 2018 and the CSE Notification 2018 are in violation of Section 20 of the RPwD Act, 2016. Under Section 20, every government establishment is required to provide "reasonable accommodation" and a conducive environment to employees with disability. "Reasonable accommodation" as defined in Section 2(y) means necessary and appropriate modifications and adjustments to ensure that persons with disabilities enjoy their rights equally with others. The provision of scribes and compensatory time during the examination to candidates such as the appellant are reasonable accommodations necessary to be provided under the RPwD Act, 2016; D
- iv The CSE Rules 2018 and the CSE Notification 2018 violate Article 14 and Article 16(1) of the Constitution and the RPwD Act, 2016 as they provide for scribes only for candidates who are blind, those suffering from locomotor disability or cerebral palsy. In the CSE Rules 2018, applications are invited from all persons with disabilities and age relaxation is also provided to them, including for those suffering from learning disabilities. However, the provision of scribes is limited to a few candidates; F
- v The CSE Rules 2018 fail to recognize that persons such as the appellant with a Writer's Cramp have difficulty in writing G

⁹ "MSJE"

- A in their own hand and thus, should be granted a similar facility of a scribe;
- vi Other institutions in India, such as the Institute of Chartered Accountants of India and the University of Delhi, recognize Writer's Cramp as a disability for which candidates have been provided with scribes;
- B vii The medical certificates dated 21 March 2015 and 27 August 2018 indicate that the appellant falls within the definition of a "person with disability" under the Act. Thus, even without a disability certificate, the appellant should be granted the facility of a scribe;
- C viii The RPwD Act, 2016 makes a distinction between "persons with disability" and "persons with benchmark disability", the latter being those who are certified by a disability certificate to have not less than 40% of the specified disabilities enumerated under the Schedule to the Act. Persons with benchmark disability are eligible for special provisions of reservation in employment and higher education. However, Section 20 of the Act applies to all persons with disabilities and is not limited to persons with benchmark disability. Thus, even without the disability certificate, the appellant would be entitled to measures of reasonable accommodation such as the provision of a scribe for professional examinations; and
- D ix The extent of the disability of 6% as evaluated by the medical board of AIIMS pertains to the extent of his locomotor disability due to a chronic neurological condition and the inability in moving himself or objects. The evaluation does not pertain to the writing ability of the petitioner. Further, the medical report corroborates the prior medical certificates issued to the appellant and certifies that the appellant suffers from Writer's Cramp which causes difficulty in writing.
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- H i The issue relating to the entitlement of the appellant for the facility of a scribe for writing the CSE 2018 is governed by

C.2 Arguments of the UPSC

11. Mr Naresh Kaushik, learned Counsel appearing on behalf of the UPSC, has submitted that :

- i The issue relating to the entitlement of the appellant for the facility of a scribe for writing the CSE 2018 is governed by

the rules framed by the DoPT. According to the CSE Rules 2018, persons with benchmark disabilities are provided with the facility of a scribe, if desired. In case of persons with a benchmark disability, the facility of a scribe is provided on the production of a certificate issued by a Chief Medical Officer of a Government Healthcare Institution to the effect that person concerned has a physical limitation to write and a scribe is essential to write the examination on the candidate's behalf;

- ii The appellant had made an incorrect declaration in his application for the CSE 2018 by declaring that he belongs to the category of persons with benchmark disability without possessing the prescribed medical certificate; and
- iii The appellant has failed to challenge the legality of the CSE Rules 2018 and has only made claims under Section 20 of the RPwD Act, 2016.

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C.3. Arguments of the Union of India

12. Ms Madhavi Divan, learned Additional Solicitor General, appearing for the Union of India, made the following submissions:

- i According to the MSJE, Writer's Cramp is not a disability, but a person suffering from Writer's Cramp has difficulty in writing. The MSJE had also issued comprehensive guidelines dated 26 February 2013 on the conduct of written examinations for persons with disabilities, which provide that the facility of a scribe should only be allowed to a person with a disability of 40% or more. These guidelines were revised on 29 August 2018 which provide for the facility of scribes in the category of candidates affected with blindness, locomotor disability and cerebral palsy; and for other persons with benchmark disability, a medical certificate has to be produced certifying that there is a physical limitation to write and a scribe is essential to write the examination on the candidate's instructions;
- ii Writer's Cramp is not specifically included in the list of specified disabilities in the Schedule of the RPwD Act, 2016. Thus, the guidelines dated 29 August 2018 are not applicable to persons suffering from Writer's Cramp. However, many

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- A such medical conditions which may hamper writing ability have not been identified as disabilities. In these instances, the examining body has to consider the cases of such candidates and whether facilities of scribes and compensatory time is to be granted;
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 - iii There is a whole swathe of facilities which are available to persons with disabilities to ensure a more inclusive society – seats on public transport, ramp facilities and toilets. Specific measures are undertaken in educational institutions to facilitate the participation of persons with disabilities. The percentage of disability is not relevant in these contexts. However, different considerations govern the provision of facilities for persons with disabilities in competitive examinations;
 - iv As an extension of [iii] above, the CSE conducted by the UPSC is an extremely competitive examination. While there may be candidates below the benchmark disability threshold deserving of the facility of scribes to level the playing field, the abuse of this facility cannot be ruled out. In a competitive examination of this nature, the purity of the examination has to be preserved; and
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 - v As regards the case of the appellant, a fresh medical examination should be conducted, to specifically determine if his disability is such as to necessitate a scribe.

D. The legal framework

- F 13. Broadly speaking, there are two sets of regulatory provisions which hold the field. The first consists of the notifications issued by the DoPT in the Ministry of Personnel, Public Grievances and Pensions.
- G 14. On 7 February 2018, a notification was issued by the Ministry prescribing the Rules for the Conduct of the CSE to be held by the UPSC in 2018. The notification covers diverse aspects governing the conduct of the examination. Among them is Section 1 of Appendix-I which incorporates the ‘plan of examination’ and Section 2 which provides for the ‘scheme, subjects for the preliminary and main examination’. This is followed by ‘general instructions’ for the conduct of the preliminary and main examination for the civil services. Insofar as is material, the H general instructions contain the following stipulations:

“General Instructions {Preliminary as well as Main A Examination} :

(i) Candidates must write the papers in their own hand. In no circumstances will they be allowed the help of a scribe to write the answers for them. However, blind candidates and candidates with Locomotor Disability and Cerebral Palsy where dominant (writing) extremity is affected to the extent of slowing the performance of function (minimum of 40% impairment) will be allowed to write the examination with the help of a scribe in both the Civil Services (Preliminary) as well as in the Civil Services (Main) Examination.

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(ii) Compensatory time of twenty minutes per hour shall be permitted for the Blind candidates and the candidates with locomotor disability and cerebral palsy where dominant (writing) extremity is affected to the extent of slowing the performance of function (minimum of 40% impairment) in both the Civil Services (Preliminary) as well as in the Civil Services (Main) Examination.”

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These rules have since been amended in 2019. Apart from the notification which has been issued by the UPSC, there are guidelines which have been prescribed by the MSJE in the Department of Empowerment of Persons with Disabilities. A notification has been issued on 4 January 2018 in exercise of the powers conferred by Section 56 of the RPwD Act, 2016. Section 56 is comprised in Chapter X of the RPwD Act, 2016 titled as “Certification of Specified Disabilities”. Section 56 provides that:

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“56.Guidelines for assessment of specified disabilities. – F
The Central Government shall notify guidelines for the purpose of assessing the extent of specified disability in a person.”

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15. Thus, the guidelines which have been notified on 4 January 2018 trace their origin to the statutory power conferred by Section 56 of the RPwD Act, 2016. In their prefatory recital, the guidelines record that the Department of Empowerment of Persons with Disabilities constituted an expert committee to suggest these guidelines “for evaluation and procedure of certification by various specified disabilities”. The expert committee in turn constituted eight sub-committees for dealing with the following categories:

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- A “(i) locomotor disability;
 (ii) visual impairment;
 (iii) hearing impairment;
 (iv) chronic neurological conditions;
- B (v) persons affected with blood related disorders;
 (vi) developmental disorders;
 (vii) mental illness; and
 (viii) multiple disabilities;”
- C Following the deliberations of the expert committee, the guidelines were notified in the form of S.O. 76(E). Insofar as is material, the guidelines stipulate that:
 - D “Now, therefore, in exercise of powers conferred by Section 56 of the Rights of Persons with Disabilities Act, 2016 (49 of 2016), the Central Government hereby notifies the guidelines for the purpose of assessing the extent of following specified disabilities in a person after having considered the recommendations of the Ministry of Health and Family Welfare as provided at **Annexure II**, namely:-
 - E I. locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;
II. blindness and low-vision;
III. deaf and hard of hearing and speech and language disability;
 - F IV. intellectual disability and specific learning disabilities;
V. mental illness;
VI. chronic neurological conditions;
VII. haemophilia, thalassemia and sickle cell disease; and
VIII. multiple disabilities.
 - H 2. The said guidelines for the purpose of assessing disabilities at Annexure II shall supersede the guidelines for evaluation of various disabilities and procedure for certification *vide* Government of India, Ministry of Social Justice and Empowerment notification

number 16-18/97-NI I. dated the 1st June 2001 and the guidelines for evaluation and assessment of mental illness and procedure of certification *vide* Government of India, Ministry of Social Justice and Empowerment notification number 16-18/97-NI dated the 18th February 2002, except as respects things done or omitted to be done before such supersession.

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Note:- In terms of Section 57 of the Rights of the Persons with Disabilities Act, 2016 (49 of 2016), the State Governments or as the case may be, Union Territory Administrators shall designate persons, having requisite qualifications and experience, as certifying authorities, who shall be competent to issue the certificate of disability and also notify the jurisdiction within which and the terms and conditions subject to which, the certifying authority shall perform its certification functions.

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Note: The Director General of Health Services, Ministry of Health and Family Welfare, Government of India shall be the final authority to decide upon cases where any controversy or doubt arises in matters relating to interpretation of the definitions or classifications or evaluation procedure regarding the said guidelines.”

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16. The guidelines in Annexure-II to the notification cover various heads of disability including locomotor disability. Some of the relevant provisions under the above head are extracted below:

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“1.1. Guidelines for Evaluation of Permanent Physical Impairment (PPI) of Upper Extremities

- (a) The estimation and measurement shall be made when the clinical condition has reached the stage of maximum improvement from the medical treatment. Normally the time period is to be decided by the medical doctor who is evaluating the case for issuing the PPI Certificate as per standard format of the certificate.
- (b) The upper extremity is divided into two component parts; the arm component and the hand component.
- (c) Measurement of the loss of function of arm component consists of measuring the loss of range of motion, muscle strength and co-ordinated activities

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A (d) Measurement of loss of function of hand component consists of determining the prehension, sensation and strength. For estimation of prehension opposition, lateral pinch, cylindrical grasp, spherical grasp and hook grasp have to be assessed.

B (e) The impairment of the entire extremity depends on the combination of the impairments of both components.

(f) Total disability% will not exceed 100%.

(g) Disability is to be certified as whole number and not as a fraction.

C (h) Disability is to be certified in relation to that upper extremity.

1.2.1. ARM (UPPER EXTREMITY) COMPONENT

Total value of the arm component is 90%

1.2.2. Principles of evaluation of range of motion (ROM) of joints

D (a) The value of maximum ROM in the arm component is 90%

(b) Each of three joints i.e. shoulder, elbow and wrist component was earlier weighed equally - 30%. However, functional evaluation in clinical practice indicates greater limitations imposed if hand is involved. So, appropriate weightage is given to involvement of different joints as mentioned below;

E Shoulder= up to 20%, Elbow= up to 20%, Wrist= up to 10%, & Hands= up to 40%, dependent upon extent of involvement (mild - less than 1/3, moderate - up to 2/3, or severe - almost total). If more than one joint of the upper extremity is involved, the loss of percentage in each joint is calculated separately as above and then added together.

1.2.3. Principles of evaluation of strength of muscles:

G (a) Strength of muscles can be tested by manual method and graded from 0-5 as advocated by Medical Research Council (MRC), London, UK depending upon the strength of the muscles (Appendix -I).

(b) Loss of muscle power can be given percentages as follows:

H (i) The mean percentage of loss of muscle strength around a joint is multiplied by 0.30.

- (ii) If loss of muscle strength involves more than one joint the mean loss of percentage in each joint is calculated separately and then added together as has been described for loss of motion. A

1.2.4. Principles of evaluation of coordinated activities:

- (a) The total value for coordinated activities is 90% B
- (b) Ten different coordinated activities should be tested as given in the Form A. (Appendix II. assessment proforma for upper extremity)
- (c) Each activity has a value of 9% C
- (d) Average normal range of different joints for reference is at Appendix III,”

17. Section E contains guidelines for evaluating locomotor disability due to chronic neurological conditions. The medical authority for certification of locomotor disability is to comprise of : D

1. The Medical Superintendent or Chief Medical Officer or Civil Surgeon;
2. A Specialist in Physical Medicine and Rehabilitation or Specialist in Orthopedics; and
3. One specialist nominated by the Chief Medical Officer in accordance with the condition of the person with disability.

18. Besides locomotor disability, the guidelines cover visual impairment, hearing impairment, speech and hearing disability, intellectual disability, disability caused due to chronic neurological conditions, disability due to blood disorder and multiple disabilities : F

“25.2. The disability caused due to chronic neurological conditions such as multiple sclerosis, parkinsons disease is multi dimensional involving manifestation in muscular skeleton system and also psycho social behaviour. The disability in musculo-skeletal system on account of these conditions shall be assessed in terms of Section E (para 10-10.8 of Annexure II) of these guidelines relating to assessment of locomotor disability due to chronic neurological conditions and the psychosocial disability (mental illness) shall be assessed by using the IDEAS as at Appendix IV. Comprehensive G

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- A disability on account of these conditions shall then be calculated by using the formula $a + b$ (90-a)
Where "a" will be the higher score and
And "b" will be the lower score. However, the maximum total percentage of multiple disabilities shall not exceed 100%."
- B Appendix-II of the guidelines provides a detailed assessment proforma in relation to upper extremities.
- C 19. On 29 August 2018, the MSJE in the Department of Empowerment of Persons with Disabilities issued an Office Memorandum. The OM is titled: "Guidelines for conducting written examination for persons with benchmark disabilities". The OM notes that the Department issued guidelines for conducting written examinations for persons with disabilities defined under the erstwhile legislation, namely the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995¹⁰. These guidelines were issued on 26 February 2013.
- D 20. The guidelines were reviewed under the auspices of a committee which was constituted on the basis of the issues which were raised by the UPSC, among other bodies. In the meantime, the 1995 Act was superseded by the enactment of the RPwD Act, 2016 which
- E came into force on 19 April 2017. The OM states that the RPwD Act, 2016 provides for reservations in government jobs for persons with benchmark disabilities as defined in Section 2(r). Based on the findings of the Committee, the Union government has through the OM laid down revised guidelines "**for conducting a written examination for persons with benchmark disabilities**" in supersession of the earlier guidelines dated 26 February 2013. The above guidelines which have been notified through the OM dated 29 August 2018 *inter alia* contain the following stipulations in regard to the provision of scribes to persons with benchmark disabilities:
- F "I. These guidelines may be called as 'Guidelines for conducting written examination for persons with benchmark disabilities 2018.
II. There should be a uniform and comprehensive policy across the country for persons with benchmark disabilities for written examination taking into account improvement in technology and
- G
- H ¹⁰ "1995 Act"

new avenues opened to persons with benchmark disabilities A providing a level playing field. Policy should also have flexibility to accommodate the specific needs on case-to-case basis.

III. There is no need for fixing separate criteria for regular and competitive examinations.

IV. The facility of Scribe/Reader/Lab Assistant should be allowed B to any person with benchmark disability as defined under section 2(r) of the RPwD Act, 2016 and has limitation in writing including that of speed if so desired by him/her.

In case of persons with bench mark disabilities in the category of C blindness, locomotor disability (both arm affected-BA) and cerebral palsy, the facility of scribe/reader/lab assistant shall be given. If so desired by the person.

In case of other category of persons with benchmark disabilities, D the provision of scribe/reader/lab assistant can be allowed on production of a certificate to the effect that the person concerned has physical limitation to write, and scribe is essential to write examination on his behalf, from the Chief Medical Officer/Civil Surgeon/ Medical Superintendent of a Government health care institution as per proforma at Appendix-I.”

The form of certificate which has been provided in Appendix-I E is extracted below:

APPENDIX - I
Certificate regarding physical limitation in an examinee to write

This is to certify that, I have examined Mr/Ms/Mrs _____ (name of the candidate with disability), a person with _____ (nature and percentage of disability as mentioned in the certificate of disability), S/o/D/o _____, a resident of _____ (Village/District/State) and to state that he/she has physical limitation which hampers his/her writing capabilities owing to his/her disability.

Signature

Chief Medical Officer/Civil Surgeon/ Medical Superintendent of a
Government health care institution

Name & Designation.

Name of Government Hospital/Health Care Centre with Seal

● Place:
Date:

Note:

Certificate should be given by a specialist of the relevant stream/disability (eg. Visual impairment – Ophthalmologist, Locomotor disability – Orthopaedic specialist/PMR).

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- A The above guidelines envisage the provision of a scribe to candidates with benchmark disabilities in written examinations. The policy also recognises that there should be a measure of flexibility to accommodate specific needs on a case-to-case basis. Under the guidelines, the facility of a scribe is envisaged to any person with a benchmark disability as defined under Section 2(r) and having a limitation in writing, including of speed. Under the guidelines, candidates with benchmark disabilities comprised within the categories of (i) blind candidates; (ii) candidates suffering from locomotor disability (both arms affected); and (iii) cerebral palsy are entitled at their choice to the facility of a scribe or, as the case may be, a reader or lab assistant. In the case of persons falling within other categories of benchmark disabilities a scribe, reader or lab assistant can be allowed upon the production of a certificate that "the person concerned has physical limitation to write and scribe is essential to write examination on his behalf." The certificate has to be issued by the CMO, Civil Surgeon or Medical Superintendent of a government healthcare institution in the proforma appended as Annexure-1.
- B The important point to note is that the guidelines of the MSJE dated 29 August 2018 recognise the entitlement to a scribe only for candidates with benchmark disabilities. Among them, candidates belonging to three categories – the blind and those with locomotor disability or cerebral palsy - are to be given the facility if so desired. In the case of candidates with other benchmark disabilities, such a facility is to be extended upon a certificate which is issued in terms as noted above.
- C Following the notification which was issued on 29 August 2018, the rules for the conduct of CSE were amended. The amended rules contemplate that:
- D "Candidates must write the papers in their own hand. In no circumstances will they be allowed the help of a scribe to write the answers for them. The Persons with Benchmark Disabilities in the categories of blindness, locomotor disability (both arm affected - BA) and cerebral palsy will be provided the facility of scribe, if desired by the person. In case of other category of Persons with Benchmark Disabilities as defined under section 2(r) of the RPWD Act, 2016, the facility of scribe will be allowed to such candidates on production of a certificate to the effect that the person concerned has physical limitation to write, and scribe is essential to write examination on behalf from the Chief Medical Officer."

Officer/ Civil Surgeon/ Medical Superintendent of a Government Health Care institution as per proforma at Appendix - V. The Persons with Benchmark Disabilities in the category of blindness, locomotor disability (both arm affected - BA) and cerebral palsy will be allowed Compensatory Time of twenty minutes per hour of the examination In case of other categories of Persons with Benchmark1 disabilities, this facility will be provided on production of a certificate to the effect that the person concerned has physical limitation to write from the Chief Medical Officer/Civil Surgeon/ Medical Superintendent of a Government Health Care institution ·as per proforma at Appendix-V.” A

The above amendment is similar to the guidelines prescribed by the OM dated 29 August 2018. C

Now it is in this background that it is necessary to advert briefly to the position which has been adopted on affidavit by the two arms of the Central Government – the MSJE on the one hand and the UPSC on the other hand. D

E. Two Government Ministries: A policy disconnect

21. UPSC in its counter affidavit filed through its Joint Secretary states that it conducts the CSE “strictly in accordance with the rules framed and enacted by the Government of India in the Department of Personnel and Training”. It also notices that the provisions of the RPwD Act 2016 are administered by a nodal ministry known as the Ministry of Social Justice and Empowerment which finalises policies, instructions and guidelines with aid and assistance of experts in the field, for the purpose of extending benefits under the enactment. According to UPSC: E

“...the Civil Services Examination Rules enacted by the DoPT do not contain a provision for providing any benefit to a candidate suffering from the disability known as writer’s cramp or dysgraphia. In fact the rules enacted by the DoP&T provide the benefit of facility of a scribe to the candidates suffering from benchmark disabilities alone, and no benefit is contemplated under the rules to the persons who do not suffer from the bench mark disabilities but with some other kind of disabilities.” F

22. Referring to the OM dated 29 August 2018 issued by the MSJE, the affidavit of UPSC states that these guidelines confine the benefit of a scribe only to persons with benchmark disabilities. The G H

- A request of the appellant is stated to have been rejected on the ground that there is an absence of any provision for a scribe to candidates falling in the category in which the appellant is placed. UPSC in fact states that it does not permit a deviation from the CSE Rules 2018.

- Contrasted with the position which has been adopted on affidavit B before this Court by the UPSC, a more nuanced view has been suggested by the reply filed on behalf of the MSJE. The Ministry, while reiterating the guidelines which have been framed on 29 August 2018 states that writer's cramp is not specifically included in the list of specified disabilities contained in the schedule to the RPwD Act, 2016 and "accordingly the guidelines stated above are not applicable to a person suffering from writer's cramp". Having said this, the Ministry states:

- "G. That it is noteworthy to mention that there are certain other medical conditions which are not identified as disabilities per se but which may have implications hampering the writing capability of a person without manifesting into any specified disability. Therefore, it is the responsibility of the examining body to consider such cases for the purpose of granting scribe, extra time and likewise in consultation with the Ministry of Health and Family Welfare on production of medical certificate similar in line with that of other categories of persons with benchmark disabilities."
- E 23. MSJE is the nodal ministry which is entrusted with implementing the provisions of the RPwD Act, 2016. As the nodal ministry, it has formulated guidelines on 29 August 2018. These guidelines, as we have noticed earlier, confine access to a scribe, reader or lab assistant to candidates having benchmark disabilities within the meaning of Section 2(r). Yet, as the nodal ministry, it recognizes that these guidelines are not exhaustive of the circumstances or conditions in which a scribe can be provided. On the contrary, the MSJE has recognized the prevalence of other medical conditions "not identified as disabilities per se" but which may hamper the writing capability of a person. It specifically leaves it open to every examining body to consider such cases for the grant of scribe, extra time or other facilities in consultation with the Ministry of Health and Family Welfare against the production of a medical certificate, in line with those prescribed for candidates with benchmark disabilities.
- H 24. This view of the nodal ministry has evidently not percolated to UPSC which, on the other hand, considers itself to be strictly bound,

without deviation, from the rules specified by DoPT for the conduct of the CSE. Notwithstanding the views of the MSJE, the UPSC does not recognize that the guidelines dated 29 August 2018 vest it with the discretion to provide accommodations on a case-by-case basis, beyond those spelt out in the guidelines. The rules which hold the field are in terms of the guidelines dated 29 August 2018. UPSC has therefore specifically stated before this Court that a candidate who does not fulfill the description of a person with benchmark disabilities would not be entitled to a scribe. These divergent views of two Central Ministries before the Court are symptomatic of a policy disconnect. We express our disquiet about the fact that, in a policy matter with profound consequences for India's disabled population, the left hand does not know what the right one is doing.

F. Benchmark disability not a precondition to obtaining a scribe

25. It is in this backdrop that the Court must resolve the issue, bearing as it does on the rights of similarly situated candidates. The RPwD Act, 2016 embodies two distinct concepts when it speaks of (i) 'persons with benchmark disabilities' and (ii) persons with disability. In defining a person with benchmark disability, Section 2(r) encompasses two categories: (i) a person with not less than 40 per cent of a specified disability, where the specified disability has not been defined in measurable terms and (ii) a person with disability where the specified disability has been defined in measurable terms, as certified by the certifying authority. In other words, Section 2(r) encompasses both a situation where a specified disability has not been defined in measurable terms, in which event it means a person with not less than 40 per cent of the specified disability but also where a specified disability has been defined in measurable terms. A certification by the certifying authority is contemplated in regard to whether the person concerned does in fact meet the specified norm as quantified.

26. The second concept which is embodied in Section 2(s) is that of a person with disability. Section 2(s) unlike Section 2(r) is not tagged either with the notion of a specified disability or a benchmark disability as defined in Section 2(r). Section 2(s) has been phrased by Parliament in broad terms so as to mean a person with a long term physical, mental, intellectual or sensory impairment which in interaction with various barriers hinders full and effective participation in society equally with others.

- A 27. Section 2(s) is significant because it recognizes firstly, the nature of the impairment, secondly, the interconnection of the impairment with various barriers and thirdly, the impact of the impairment in hindering full and effective participation on a footing of equality. On the first aspect namely the nature of the impairment, Section 2(s) requires that the impairment should be long term - physical, mental, intellectual or sensory.
- B The statutory definition has evidently recognized that it is the nature of the impairment in its interaction with barriers that results in the full and effective participation of the person in society equally with others being hampered. Section 2(s) is, in other words, a far-reaching recognition by the legislature of disability as not only a function of a physical or mental
- C impairment but of its interaction with barriers resulting in a social milieu which prevents the realization of full, effective and equal participation in society.

28. Both as a matter of textual construction and bearing in mind the purpose and object underlying the term, it is necessary to emphasise D that the definition in Section 2(s) cannot be constricted by the measurable quantifications tagged with the definition under Section 2(r).

29. The concept of a benchmark disability under Section 2(r) cannot be conflated with the notion of disability under Section 2(s). The definition in Section 2(r) applies in the case of a specified disability. The E expression 'specified disability' is defined in Section 2(zc) to mean the disabilities as specified in the Schedule. The Schedule to the Act incorporates five specified disabilities:

1. Physical disabilities comprised of
- F (a) Locomotor disability including
- F (i) leprosy cured persons
- F (ii) cerebral palsy
- F (iii) dwarfism
- G (iv) muscular dystrophy
- G (v) acid attack victims;
- H (b) Visual impairment encompassing
- H (i) blindness
- H (ii) low-vision

- (c) Hearing impairment A
 - (d) Speech and language disability
 - 2. Intellectual disability including
 - (a) specific learning disabilities
 - (b) autism spectrum disorder B
 - 3. Mental behavior
 - 4. Disability caused due to
 - (a) Chronic neurological conditions, such as
 - (i) multiple sclerosis C
 - (ii) parkinson's disease
 - (b) Blood disorder
 - 5. Multiple disabilities (more than one of the above specified disabilities). D
- The Central government has been empowered to notify any other category as a specified disability.
30. The concept of benchmark disabilities under the RPwD Act, 2016 has specifically been adopted in relation with the provisions of Chapter VI and Chapter VII. Chapter VI contains special provisions for persons with benchmark disabilities. Among those provisions is Section 31 (free education for children with benchmark disability), Section 32 (reservation in higher educational institutions), Section 33 (identification of posts for reservation), Section 34 (reservation), Section 36 (Special Employment Exchange) and Section 37 (Special Schemes and Development Programmes). Chapter VII contains special provisions for persons with benchmark disabilities in need of high support. Thus, the concept of benchmark disabilities has been adopted by the legislation bearing in mind specific provisions which are contained in the law for persons meeting this description. E
31. Conflating the rights and entitlements which inhere in persons with disabilities with the notion of benchmark disabilities does dis-service to the salutary purpose underlying the enactment of the RPwD Act 2016. Worse still, to deny the rights and entitlements recognized for persons with disabilities on the ground that they do not fulfill a benchmark disability would be plainly ultra vires the RPwD Act 2016. F G H

A **G Rights of Persons with Disabilities Act 2016: A paradigm-shift**

G1 A statutory manifestation of a constitutional commitment

32. Part III of our Constitution does not explicitly include persons with disabilities within its protective fold. However, much like their able-bodied counterparts, the golden triangle of Articles 14, 19 and 21 applies with full force and vigour to the disabled. The RPwD Act 2016 seeks to operationalize and give concrete shape to the promise of full and equal citizenship held out by the Constitution to the disabled and to execute its ethos of inclusion and acceptance.
- C 33. The fundamental postulate upon which the RPwD Act 2016 is based is the principle of equality and non-discrimination. Section 3 casts an affirmative obligation on the government to ensure that persons with disabilities enjoy (i) the right to equality; (ii) a life with dignity; and (iii) respect for their integrity equally with others. Section 3 is an affirmative declaration of the intent of the legislature that the fundamental postulate of equality and non-discrimination is made available to persons with disabilities without constraining it with the notion of a benchmark disability. Section 3 is a statutory recognition of the constitutional rights embodied in Articles 14, 19 and 21 among other provisions of Part III of the Constitution. By recognizing a statutory right and entitlement on the part of persons who are disabled, Section 3 seeks to implement and facilitate the fulfillment of the constitutional rights of persons with disabilities.
- F 34. There is a critical qualitative difference between the barriers faced by persons with disabilities and other marginalized groups. In order to enable persons with disabilities to lead a life of equal dignity and worth, it is not enough to mandate that discrimination against them is impermissible. That is necessary, but not sufficient. We must equally ensure, as a society, that we provide them the additional support and facilities that are necessary for them to offset the impact of their disability.
- G This Court in its judgment in **Jeeja Ghosh v. Union of India¹¹**, noted that a key component of equality is the principle of reasonable differentiation and specific measures must be undertaken, recognizing the different needs of persons with disabilities, to pave the way for substantive equality. Justice A K Sikri stated in the above judgement:

H ¹¹ (2016) 7 SCC 761

“40. In international human rights law, equality is founded upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. **Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.**”

(emphasis supplied)

35. The principle of reasonable accommodation captures the positive obligation of the State and private parties to provide additional support to persons with disabilities to facilitate their full and effective participation in society. The concept of reasonable accommodation is developed in section (H) below. For the present, suffice it to say that, for a person with disability, the constitutionally guaranteed fundamental rights to equality, the six freedoms and the right to life under Article 21 will ring hollow if they are not given this additional support that helps make these rights real and meaningful for them. Reasonable accommodation is the instrumentality – are an obligation as a society – to enable the disabled to enjoy the constitutional guarantee of equality and non-discrimination. In this context, it would be apposite to remember Justice R M Lodha’s (as he then was) observation in **Justice Sunanda Bhandare Foundation v. Union of India**¹², where he stated:

“9...In the matters of providing relief to those who are differently abled, the approach and attitude of the executive must be liberal and relief oriented and not obstructive or lethargic...”

G2 Scheme of the 2016 Act

36. The RPwD Act 2016 was a landmark legislation which repealed the 1995 Act and brought Indian legislation on disability in line

¹² (2018) 2 SCC 397

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- A with the United Nations Convention on the Rights of Persons with Disabilities¹³. Under the old regime, disability was simply characterized as a medical condition devoid of any understanding of how disability is produced by social structures that cater to able-bodied persons and hamper and deny equal participation of persons with disabilities in the society. Section 2 (t) of the 1995 Act defined a “person with disability” in the following terms:
 - “(t) “person with disability” means a person suffering from not less than forty per cent of any disability as certified by a medical authority”
- B
- C The RPwD Act 2016 has a more inclusive definition of “persons with disability” evidencing a shift from a stigmatizing medical model of disability under the 1995 Act to a social model of disability which recognizes that it is the societal and physical constraint that are at the heart of exclusion of persons with disabilities from full and effective participation in society. Section 2(s) of the RPwD Act 2016 [which we have analyzed in paras 26-28 above] provides:
 - “(s) “person with disability” means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others”
- D
- E A barrier is defined under Section 2(c) of the RPwD Act 2016 in the following terms:
 - “(c) “barrier” means any factor including communicational, cultural, economic, environmental, institutional, political, social, attitudinal or structural factors which hampers the full and effective participation of persons with disabilities in society;”
- F
- G Under the 1995 Act, only seven kinds of disabilities were recognized. Section 2(i) listed the following disabilities:
 - “(i) “disability” means—
 - (i) blindness;
 - (ii) low vision;
 - (iii) leprosy-cured;
- H

¹³ “UNCRPD”

(iv) hearing impairment; A

(v) locomotor disability;

(vi) mental retardation;

(vii) mental illness”

The RPwD Act, 2016 now recognizes 21 “specified disabilities” B and enables the Central Government to add further categories of disability. The 2016 Act also makes special provisions for persons with benchmark disability under Chapter VI and VII of the Act. A person with benchmark disability is defined under Section 2(r) of the 2016 Act [analyzed in para 25 above] as:

“(r) “person with benchmark disability” means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.” D

It is clear from the scheme of the RPwD Act, 2016 that “person with disability” and “person with benchmark disability” are treated as separate categories of individuals having different rights and protections. A third category of individuals “persons with disability having high support needs” has also been defined under the RPwD Act 2016. E

37. The general principle of reasonable accommodation did not find a place in the 1995 Act. The provision for taking aid of a scribe was limited to blind students or students with low vision in educational institutions. Section 31 of the 1995 Act provided:

“All educational institutions shall provide or cause to be provided amanuensis to blind students and students with or low vision.” F

The principle of reasonable accommodation has found a more expansive manifestation in the RPwD Act 2016. Section 3 of the RPwD Act 2016 goes beyond a formal guarantee of non-discrimination by casting affirmative duties and obligations on government to protect the rights recognized in Section 3 by taking steps to utilize the capacity of persons with disabilities “by providing appropriate environment”. Among the obligations which are cast on the government is the duty to take necessary steps to ensure reasonable accommodation for persons with disabilities. The concept of reasonable accommodation in Section 2(y) incorporates G

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- A making “necessary and appropriate modification and adjustments” so long as they do not impose a disproportionate or undue burden in a particular case to ensure to persons with disability the enjoyment or exercise of rights equally with others.” Equality, non-discrimination and dignity are the essence of the protective ambit of the RPwD Act 2016.
- B 38. While most of the obligations under the RPwD Act 2016 are cast upon the government or local authorities, the Act and rules made under it have also imposed certain obligations on the private sector. The role of the private sector in the market has increased manifold since the advent of liberalisation in India. The RPwD Act 2016 recognizes that
- C with the burgeoning role of the private sector in generating employment in India, an active responsibility has to be cast upon private employers to create an inclusive workforce by providing persons with disabilities equal opportunities in the job market. However, the guarantee of equal opportunity must be accompanied by the provision of reasonable accommodation. The Rules framed under the RPwD Act 2016 stipulate
- D that private establishments shall not discriminate against persons with disability on the ground of disability.¹⁴ It is to be noted that the definition of discrimination under Section 2(h) of the RPwD Act, 2016 includes denial of reasonable accommodation. Private employers are mandated to frame an equal opportunity policy¹⁵. Equal opportunity policies for establishments having more than 20 employees are required to include
- E provisions relating to (i) appointment of liaison officers in establishments to look after the recruitment of persons with disabilities and provisions of facilities and amenities for such employees¹⁶; (ii) identification of posts/ vacancies for disabled persons¹⁷; (iii) provision of additional facilities and benefits such as training facilities, assistive devices, barrier free
- F accessibility, preference in transfer and promotion, allotment of residential accommodation and special leave¹⁸. The RPwD Act 2016 further provides that private establishments have to conform with accessibility norms stipulated by the government with respect to building plans¹⁹. The RPwD Act 2016 also provides that 5 % of the workforce of establishments

G ¹⁴ Rule 3 (1) of the Rights of Persons with Disabilities Rules, 2017

¹⁵ Section 21 of the RPwD Act, 2016 read with Rule 8 of the Rights of Persons with Disabilities Rules, 2017

¹⁶ Rule 8(3) (e) of the Rights of Persons with Disabilities Rules, 2017

¹⁷ Rule 8(3) (b) of the Rights of Persons with Disabilities Rules, 2017

¹⁸ Rule 8 (3) sub-clauses (c) and (d) of the Rights of Persons with Disabilities Rules, 2017

H ¹⁹ Section 44 of the RPwD Act, 2016

receiving incentives from the appropriate government would be comprised of persons having benchmark disability²⁰. This Court in **Union of India v. National Federation of the Blind**²¹ has recognized that employment opportunities play an instrumental role in empowering persons with disabilities. Justice P. Sathasivam (as he then was) observed:

“50. 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.”

It is imperative that not only the government but also the private sector takes proactive steps for the implementation of the RPwD Act 2016.

39. The RPwD Act 2016 is fundamentally premised on the recognition that there are many ways to be, none more ‘normal’ or ‘better’ than the other. It seeks to provide the disabled a sense of comfort and empowerment in their difference. Recognizing the state of affairs created by centuries of sequestering and discrimination that this discrete and insular minority has faced for no fault on its part, the RPwD Act 2016 aims to provide them an even platform to thrive, to flourish and offer their unique contribution to the world. It is based on the simple idea with profound implications that each of us has: “unique powers to share with the world and make it interesting and richer.”²² By opening doors for them and attenuating the barriers thwarting the realization of their full potential, it seeks to ensure that they are no longer treated as second class citizens.

40. It gives a powerful voice to the disabled people who, by dint of the way their impairment interacts with society, hitherto felt muted and silenced. The Act tells them that they belong, that they matter, that they are assets, not liabilities and that they make us stronger, not weaker. The other provisions of Chapter II follow upon the basic postulates

²⁰ Section 35 of RPwD Act, 2016

²¹ (2013) 10 SCC 772

²² Sonia Sotomayor,, Just Ask!: Be Different, be Brave, be You [2019, Penguin] letter to the reader.

- A embodied in Section 3 by applying them in specific contexts to ensure rights in various milieus such as community life, reproduction, access to justice and guardianship. Chapter III of the RPwD Act, 2016 recognises specific duties on the part of educational institutions. Section 17 speaks of specific measures to promote and facilitate inclusive education. Among them, Clause (g) contemplates the provision of books, learning materials and assistive devices for students with benchmark disabilities free of cost up to the age of eighteen. Section 17(i) requires suitable modifications in the curriculum and examination system to meet the needs of students with disabilities such as (i) extra time for completion of examination (ii) the facility of scribe or amanuensis (iii) exemption from second and third language courses. The guarantee under Section 17 (i) is not confined to persons with benchmark disabilities but extends to students with disabilities. It is thus evident that the legislature has made a clear distinction between disability and benchmark disability. Section 20 provides a mandate of non-discrimination in employment. Under Section 21, every establishment is under a mandate to notify equal opportunity policies setting out the measures which will be adopted in pursuance of the provisions of Chapter IV. Chapter V provides guarantees for social security, health, rehabilitation and recreation to persons with disabilities.
- 41. When the government in recognition of its affirmative duties and obligations under the RPwD Act 2016 makes provisions for facilitating a scribe during the course of the Civil Services Examination, it cannot be construed to confer a largesse. Nor does it by allowing a scribe confer a privilege on a candidate. The provision for the facility of a scribe is in pursuance of the statutory mandate to ensure that persons with disabilities are able to live a life of equality and dignity based on respect in society
- F for their bodily and mental integrity. There is a fundamental fallacy on the part of the UPSE/DoPT in proceeding on the basis that the facility of a scribe shall be made available only to persons with benchmark disabilities. This is occasioned by the failure of the MSJE to clarify their guidelines. The whole concept of a benchmark disability within the meaning of Section 2(r) is primarily in the context of special provisions including reservation that are embodied in Chapter VI of the RPwD Act 2016. Conceivably, the Parliament while mandating the reservation of posts in government establishments and of seats in institutions of higher learning was of the view that this entitlement should be recognized for persons with benchmark disabilities. As a matter of legislative policy, these provisions in Chapter VI have been made applicable to those with

benchmark disabilities where a higher threshold of disability is stipulated. A
Except in the specific statutory context where the norm of benchmark
disability has been applied, it would be plainly contrary to both the text
and intent of the enactment to deny the rights and entitlements which
are recognized as inhering in persons with disabilities on the ground that
they do not meet the threshold for a benchmark disability. A statutory
concept which has been applied by Parliament in specific situations
cannot be extended to others where the broader expression, persons
with disability, is used statutorily. The guidelines which have been framed
on 29 August 2018 can by no means be regarded as being exhaustive of
the situations in which a scribe can be availed of by persons other than
those who suffer from benchmark disabilities. The MSJE does not in its
counter affidavit before this Court treat those guidelines as exhaustive
of the circumstances in which a scribe can be provided for persons
other than those having benchmark disabilities. This understanding of
the MSJE is correct for the simple reason that the rights which emanate
from provisions such as Section 3 extend to persons with disability as
broadly defined by Section 2(s). D

42. We are, therefore, of the view that DoPT and UPSC have
fundamentally erred in the construction which has been placed on the
provisions of the RPwD Act 2016. To confine the facility of a scribe
only to those who have benchmark disabilities would be to deprive a
class of persons of their statutorily recognized entitlements. To do so
would be contrary to the plain terms as well as the object of the statute. E

H. Reasonable accommodation

43. At the heart of this case lies the principle of reasonable
accommodation. Individual dignity undergirds the RPwD Act, 2016 . F
Intrinsic to its realization is recognizing the worth of every person as an
equal member of society. Respect for the dignity of others and fostering
conditions in which every individual can evolve according to their
capacities are key elements of a legal order which protects, respects
and facilitates individual autonomy. In seeking to project these values as
inalienable rights of the disabled, the RPwD Act, 2016 travels beyond
being merely a charter of non-discrimination. It travels beyond imposing
restraints on discrimination against the disabled. The law does this by
imposing a positive obligation on the State to secure the realization of
rights. It does so by mandating that the State must create conditions in
which the barriers posed by disability can be overcome. The creation of G
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- A an appropriate environment in which the disabled can pursue the full range of entitlements which are encompassed within human liberty is enforceable at law. In its emphasis on substantive equality, the enactment of the legislation is a watershed event in providing a legal foundation for equality of opportunity to the disabled.
 - B 44. As a social construct, disability encompasses features broader and more comprehensive than a medical condition. The RPwD Act, 2016 recognizes that disability results in inequality of access to a range of public and private entitlements. The handicaps which the disabled encounter emerge out of disability's engagement with the barriers created by prejudice, discrimination and societal indifference. Operating as restraining factors, these barriers have origins which can be traced to physical, social, economic and psychological conditions in society. Operating on the pre-existing restraints posed by disability, these barriers to development produce outcomes in which the disabled bear an unequal share of societal burdens. The legislation has recognized that remedies for the barriers encountered by the disabled are to be found in the social environment in which they live, work and co-habit with others. The barriers encountered by every disabled person can be remedied by recognizing comprehensive rights as inhering in them; rights which impose duties and obligations on others.
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 - E 45. The principle of reasonable accommodation acknowledges that if disability as a social construct has to be remedied, conditions have to be affirmatively created for facilitating the development of the disabled. Reasonable accommodation is founded in the norm of inclusion. Exclusion results in the negation of individual dignity and worth or they can choose the route of reasonable accommodation, where each individuals' dignity and worth is respected. Under this route, the "powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship, to permit realization of these ends."²³
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 - G 46. In the specific context of disability, the principle of reasonable accommodation postulates that the conditions which exclude the disabled from full and effective participation as equal members of society have to give way to an accommodative society which accepts difference, respects their needs and facilitates the creation of an environment in
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- ²³ Reasonable Accommodation In A Multicultural Society, Address to the Canadian Bar Association Continuing Legal Education Committee and the National Constitutional and Human Rights Law Section, April 7, 1995, Calgary, Alberta at 1.

which the societal barriers to disability are progressively answered. Accommodation implies a positive obligation to create conditions conducive to the growth and fulfilment of the disabled in every aspect of their existence – whether as students, members of the workplace, participants in governance or, on a personal plane, in realizing the fulfilling privacies of family life. The accommodation which the law mandates is ‘reasonable’ because it has to be tailored to the requirements of each condition of disability. The expectations which every disabled person has are unique to the nature of the disability and the character of the impediments which are encountered as its consequence.

47. For instance, for a visually impaired person, the reasonable accommodation she requires might consist of screen magnification software or a screen reader [which can speak out the content on a computer screen in a mechanical voice]. It might also consist of content being made available in Braille and a sighted assistant. In the same way, for someone with a hearing impairment, reasonable accommodation could consist of speech-to-text converters, access to sign language interpreters, sound amplification systems, rooms in which echo is eliminated and lip-reading is possible. Similarly, for a person with dyslexia, reasonable accommodation could consist of access to computer programmes suited to meet their needs and compensatory time.

48. Failure to meet the individual needs of every disabled person will breach the norm of reasonable accommodation. Flexibility in answering individual needs and requirements is essential to reasonable accommodation. The principle contains an aspiration to meet the needs of the class of persons facing a particular disability. Going beyond the needs of the class, the specific requirement of individuals who belong to the class must also be accommodated. The principle of reasonable accommodation must also account for the fact that disability based discrimination is intersectional in nature. The intersectional features arise in particular contexts due to the presence of multiple disabilities and multiple consequences arising from disability. Disability therefore cannot be truly understood by regarding it as unidimensional. Reasonable accommodation requires the policy makers to comprehend disability in all its dimensions and to design measures which are proportionate to needs, inclusive in their reach and respecting of differences and aspirations. Reasonable accommodation cannot be construed in a way that denies to each disabled person the customization she seeks. Even if

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- A she is in a class of her own, her needs must be met.²⁴ While assessing the reasonableness of an accommodation, regard must also be had to the benefit that the accommodation can have, not just for the disabled person concerned, but also for other disabled people similarly placed in future.
- B 49. As the Committee on the Rights of Persons with Disabilities²⁵ noted in General Comment 6, reasonable accommodation is a component of the principle of inclusive equality.²⁶ It is a substantive equality facilitator. The establishment of this linkage between reasonable accommodation and non-discrimination thus creates an obligation of immediate effect.²⁷
- C Under this rights-based and disabled-centric conceptualization of reasonable accommodation, a failure to provide reasonable accommodation constitutes discrimination. Reasonable accommodation determinations must be made on a case-by-case basis, in consultation with the disabled person concerned.²⁸ Instead of making assumptions about how the relevant barriers can be tackled, the principle of reasonable accommodation requires dialogue with the individual concerned to determine how to tackle the barrier.²⁹
- D 50. The concept of reasonable accommodation as a component of the equality guarantee has been recognized in a consistent line of precedents of this Court.³⁰ Illustratively, in **Syed Bashir-ud-din Qadri v. Nazir Ahmed Shah**³¹, this Court, speaking through Justice Altamas Kabir,

²⁴ Amita Dhanda, Prof. of Law, NALSAR, “In a class of my own: Reasonable accommodation from a disability perspective” [ppt presentation].

²⁵ “CRPD Committee”

²⁶ CRPD Committee, General Comment 6 on Equality and Non-discrimination (2018) [GC 6], CRPD/C/GC/6, 26th April, 2018, para 11.

F ²⁷ Lord, J. E., & Brown, R. (2010). The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities. In Critical perspectives on human rights and disability law (pp. 273-307). Brill Nijhoff, at p. 279.

²⁸ CRPD Committee, GC 6 at para 25[c].

G ²⁹ Anna Lawson, ‘Reasonable Accommodation in the Convention on the Rights of Persons with Disabilities and Non-Discrimination in Employment: Rising to the Challenges?’, in Charles O’Mahony and Gerard Quinn (eds.), Disability Law and Policy: An Analysis of the UN Convention (Dublin: Clarus Press, 2017), pp. 359–74, at 362.

³⁰ Rajive Raturi v. Union of India and Ors., 2017 (14) SCALE 412, Jeeja Ghosh and Anr. v. Union of India and Ors. (2016) 7 SCC 761 and Disabled Rights Group and Ors. v. Union of India and Ors., (2018) 2 SCC 397.

H ³¹ (2010) 3 SCC 603.

held that a person having cerebral palsy should be given access to an external electronic aid as a reasonable accommodation to offset the impact of his inability to write on the blackboard. The Court held as follows:

“31. ...while a person suffering from cerebral palsy may not be able to write on a blackboard, an electronic external aid could be provided which could eliminate the need for drawing a diagram and the same could be substituted by a picture on a screen, which could be projected with minimum effort.”

51. A discordant note struck by this Court having a direct bearing on the principle of reasonable accommodation finds expression in a two judge Bench decision of this Court in the case of **V Surendra Mohan v. State of Tamil Nadu**³² (“**Mohan**”). The proceedings before this Court arose from a judgment of the Madras High Court. At issue was the decision of the Tamil Nadu Public Service Commission³³ to impose a ceiling of 40-50% visual/hearing impairment to be eligible to be appointed as a Civil Judge (Junior Division). Differently stated, a person whose visual/hearing impairment exceeded 50% was disqualified from being eligible for the said post. In the said case, the appellant’s disability was 70%. The appellant’s name was not included in the list of registered numbers who were provisionally admitted to the oral test. He challenged this in the Madras High Court. By its judgment dated 5 June 2015, the Madras High Court held that, as per the decision of the Government dated 8 August 2014 and notification issued by the TNPC dated 26 August 2014, those partially blind with 40%-50% disability were only eligible and the appellant having 70% disability was not eligible to participate in the selection.

52. A two judge Bench of this Court held that a judicial officer in a State has to possess reasonable limit of the faculties of hearing, sight and speech in order to hear cases and write judgments and, therefore, stipulating a limit of 50% disability in hearing impairment or visual impairment as a condition to be eligible for the post is a legitimate restriction. This court affirmed the submission of the Madras High Court that seeking to address the socially constructed barriers faced by a visually or hearing impaired judge, whose disability exceeds 50%, would create ‘avoidable complications’. As a result, the impugned ceiling was found to be valid. The relevant portion of the judgment is excerpted below:

³² (2019) 4 SCC 237.

³³ “TNPC”

- A “40... The High Court in its additional statement has encapsulated the functions and duties of Civil Judge in following words:-
“7....
Impaired vision can only make it extremely difficult, even impossible, to perform any of these functions at all. Therefore, creating any reservation in appointment for those with disabilities beyond the 50% level is far from advisable as it may create practical and seemingly other avoidable complications.
- B Moreover, given the need to prepare judgments based on the case papers and other material records in a confidential manner, the assistance of a scribe or the like completely takes away the secrecy and discreetness that come with the demands of the post.”
- C 53. This judgment was delivered by this Court after India became a party to the UNCRPD and the RPwD Act 2016, came into force. The aforesaid view espoused by this Court is innocent of the principle of reasonable accommodation. This Court did not consider whether the failure of the TNPC to provide reasonable accommodation to a judge with a disability above the impugned ceiling was statutorily or constitutionally tenable. There is no reference in this Court’s judgment to whether the appellant would have been able to discharge the duties of
- D a Civil Judge (Junior Division), after being provided the reasonable accommodations necessitated by his disability.
- E 54. The analysis by this Court in the portion excerpted above begs the question. Specifically, the relevant question, under the reasonable accommodation analysis, is not whether complications will be caused by the grant of a reasonable accommodation. By definition, reasonable accommodation demands departure from the status quo and hence ‘avoidable complications’ are inevitable. The relevant question is whether such accommodations would give rise to a disproportionate or undue burden. The two tests are entirely different.
- F 55. As we have noted previously, the cornerstone of the reasonable accommodation principle is making adjustments that enable a disabled person to effectively counter the barriers posed by their disability. Conspicuous by its absence is any reasonable accommodation analysis whatsoever by this Court in **Mohan**. Such an analysis would have required a consideration of the specific accommodations needed, the cost of
- G providing them, reference to the efficacy with which other judges with

more than 40-50% visual/hearing impairment in India and abroad can discharge judicial duties after being provided the necessary accommodations, amongst other factors. In holding that the ceiling was reasonable on the application of the principle of reasonable accommodation, the ratio as expounded fails as “distinct exhortatory dimension that must always be kept in mind while determining whether an adjustment to assist a disabled person to overcome the disadvantage that she or he has in comparison to an able-bodied person is reasonable.”³⁴ It is persons with disabilities who have been the victim of this lapse.

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56. In light of the fact that the view of this court in **Mohan** was rendered in a case under the 1995 Act which has now been replaced by the RPwD Act 2016 and in light of the absence of a reasonable accommodation analysis by this Court, the **Mohan** judgment stands on a legally vulnerable footing. It would not be a binding precedent, after enforcement of the RPwD Act 2016.

57. The ASG’s argument that a whole swath of facilities are provided to the disabled without enquiring into the percentage of their disability and that a percentage is only essential in cases such as the present is flawed for two reasons. First, the inarticulate premise underpinning this argument appears to be that the legally guaranteed entitlements of the disabled are privileges doled out by the state and bespeaks an incorrect understanding of the concept of reasonable accommodation. Since reasonable accommodation is a component of the duty not to discriminate against the disabled, as we have explained above, the state is bound to provide these facilities to its disabled citizens. A robust conception of reasonable accommodation needs to be adopted.

58. Second, and relatedly, this being so, it can be no answer to tell a disabled candidate whose disability genuinely necessitates access to a scribe that they are already being given all the above facilities. Providing those facilities does not absolve the state of the obligation to provide a disabled candidate access to a scribe, when this need is clearly established as being relatable to their disability.

59. The ASG referred to the difficulty caused to her by dint of having carpel tunnel syndrome as an example of the dangerous consequences that would flow from opening the door too widely when it comes to granting scribes. In the hearing, examples were also cited of

³⁴ *First Group Plc v. Paulley* [2017] UKSC 4, para 117 [Lord Kerr - partly dissenting].

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- A individuals having a small, everyday problem and expecting a scribe on that basis. While valid, such comparisons may end up creating a false equivalence between those with a legitimate disability-based reasonable accommodation need and others with everyday ‘life problems’.³⁵ Therefore, it has to be ensured that we do not make light of, or trivialize,
- B the needs of those whose disability may not meet the quantitative threshold of 40% but are nonetheless disabling enough to merit the grant of the reasonable accommodation of a scribe and extra time. As the CRPD Committee notes, it is wrong to expect a person with disability to be ‘disabled enough’ to claim the accommodations necessitated by their disability.³⁶ Such an approach would not be in consonance with the
- C progressive outlook of the RPwD Act 2016.

60. The ASG’s argument that the appellant must be subjected to further medical examinations, even though his disability has been accepted, is emblematic of a key barrier that often comes in the way of the disabled being able to access reasonable accommodation in India.
- D As the CRPD Committee observes in its concluding observations on India, the competent authorities must ensure that “multiple assessments [as to existence of disability] do not create an undue burden for applicants.”³⁷

61. The party contending that a particular accommodation will impose a disproportionate or undue burden has to prove the same.³⁸ And such a justification has to be based on objective criteria.³⁹ Further, the CRPD Committee has held that an assessment of reasonable accommodation must be made “in a thorough and objective manner, covering all the pertinent elements, before reaching a conclusion that the respective support and adaptation measures would constitute a disproportionate or undue burden for a State party.”⁴⁰ It is against this backdrop that we will now consider the ASG’s principal justification for

³⁵ IDAP Interview Series: Interview XV with Judge Ronald M. Gould, response to q. 13, available at <https://www.idialaw.org/blog/idap-interview-series-interview-xv-with-judge-ronald-m-gould/>

³⁶ CRPD Committee, GC 6, para 73[b].

G ³⁷ CRPD Committee, Concluding Observations on the Report of India, [“Concluding Observations”], GE. 19- 18639[E], 24th September, 2019, para 7[b].

³⁸ CRPD Committee, GC 6, para 26[g].

³⁹ Id at para 27.

⁴⁰ CRPD Committee, Ms JH v Australia, GE.18-22328(E), 31.08.2018, para 7.4. A similar view was also adopted by the Committee in the case of Michael Lockrey versus Australia, CRPD/C/15/D/13/2013, 30th May, 2016, para 8.5 [holding that a failure to

denying the reasonable accommodation of a scribe to the appellant and others similarly situated, namely that the facility of a scribe maybe misused for nefarious purposes.

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I. The argument of misuse

62. Ms Madhavi Divan, learned Additional Solicitor General laid emphasis on the competitive nature of the CSE and of the need to preserve the purity of the examination. The difficulty in accepting the argument lies in the sequitur. There can be no doubt about the fact that the CSE is competitive in itself. There can similarly be no doubt about the need to preserve the purity of the examination. But the apprehension that the facility of a scribe should not be misused can furnish no valid ground to deprive the whole class of citizens – persons with disability who need a scribe – from the statutory entitlements which emanate from the provisions of the enactment, on the supposition that someone may misuse the provisions of the law. There are two further responses to this argument. First, Ms. Divan has not furnished any empirical data to substantiate the assertion that persons with disabilities are misusing the facility of scribes to obtain any undue advantage. As noted earlier, a justification to provide a reasonable accommodation must be based on objective criteria. The conjecture as to misuse does not meet this test.

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63. Further, we are of the considered view that undue suspicion about the disabled engaging in wrongdoing is unwarranted. Such a view presumes persons with disabilities, as a class, as incompetent and incapable of success absent access to untoward assistance. The disabled confront stereotypes in several aspects of their day to day lives. One of them is that they do not perform as well as others. Like other stereotypes, this one is also totally flawed and contrary to reality. Such an ableist premise is inconsistent with the approach to disability enshrined in the UNCRPD and the RPwD Act 2016. To think that persons with disabilities who do not have a benchmark disability but nonetheless request access to a scribe, as a class, have the objective of gaming the system is to misunderstand their aspiration, to stamp them with a badge of cheaters and to deprive them of their lawful entitlements. The system may be vulnerable to being gamed by able-bodied persons, however, it is the provide a deaf juror access to a stenographer to conduct real-time steno-captioning violated the principle of reasonable accommodation]; and Gemma Beasley versus Australia, GE.16-08383 (E) 290716 290716, 29th April, 2013 para 8.5 [holding that a failure to provide a hearing impaired juror access to an Auslan interpreter violated the principle of reasonable accommodation.

- A persons with disabilities who are being asked to bear the cost of maintaining the purity of the competitive examinations by giving up their legal entitlements on the presumption that there is a possibility of misuse.

64. When competent persons with disabilities are unable to realize their full potential due to the barriers posed in their path, our society

- B suffers, as much, if not more, as do the disabled people involved. In their blooming and blossoming, we all bloom and blossom. The most significant loser as a consequence of the UPSC's rigid approach in this case (of refusing to provide scribes to those not having benchmark disabilities) is the UPSC itself. For it is denying to the nation the opportunity to be served by highly competent people who claim nothing but access to equal opportunity and a barrier-free environment.

65. When an able-bodied student engages in cheating, the normal consequence is their disqualification or other suitable punitive action. The same consequence can flow from a candidate using their disability

- D to game the system. If some incidents come to light of able-bodied candidates hiding chits in their dress code and misusing them to cheat in an exam, the normal consequence is suitable punitive action against such students. It is not to switch to a different dress code that is so uncomfortable that many competent students find it hard to sit in it for the entire duration of the exam and perform to the best of their ability. In E the same way, just because of the fault of some bad apples in the system, persons with disabilities whose disability necessitates access to a scribe cannot be disentitled from claiming the same.⁴¹

66. Second, the examining body is entitled to prescribe procedures that ensure against a misuse and to deal with any instances which may

- F come to light.

This is not a problem peculiar to India or that of an intractable nature. To illustrate, in March 2019, the US Federal Bureau of Investigation launched an investigation code-named Operation Varsity Blues which is popularly known as the 'College Admissions Scandal'.

- G As part of the investigation, several individuals were arrested and charged on the allegation of seeking extended time on college entrance exams, by falsely making it appear that the concerned students had learning

⁴¹ Dr. Sanjay Jain, "Right to education : An enabler", in "Marginalised communities and higher education" in Eds Surendrakumar and H. L. Vinod "Marginalised communities and higher education", Sage Publication 2021, section Critical Analysis of Scribe

- H guidelines [forthcoming].

disabilities, so as to acquire the requisite medical documentation. Once the accommodation was approved, large-scale cheating and impersonation took place at test centres in Houston, Texas and Hollywood, California.⁴² Suffice it to say that the possibility of misuse cannot be used to deprive equal access to persons with disability from seeking the facility of a scribe. Absent such a facility, persons such as the appellant who suffers from a chronic neurological condition would be deprived of a statutory right of equal opportunity in gaining an appointment to public services. To do so would negate both the constitutional right and its statutory recognition in the provisions of the RPwD Act, 2016.

J. The language of our discourse

67. The shift in the way we view disability – as a social construct rather than an individual pathology – must also translate into a linguistic shift in the way we refer to persons with disabilities. The language of our discourse must evince a clear desire to make the disabled feel empowered and included, not alienated and situated on a different footing from their able-bodied counterparts - whether on a pedestal or in a cage.⁴³

68. The Tribunal, in its judgment, couched the disability of the appellant in terms of ‘suffering’ and ‘disease’. Specifically, in its order dated 30 May 2018, the Tribunal, at para 5, noted: “*The applicant is suffering with a disease called Writer’s Cramp.*” In its order dated 7 August 2018, at para 7, the Tribunal refers to those “suffering” with disabilities. Even if the usage is unintentional, we cannot ignore its enduring impact in shaping the way the society views the disabled and the way they view themselves. Viewing disability as an affliction that causes suffering, or that views it as a God-given fate (whether a blessing or a curse) is rooted in the medical model of disability. Our discourse must be couched in terms that reflect the recognition of a human rights model to viewing disability. Insensitive language offends the human dignity of persons with disabilities.

69. In its concluding observations on India, the CRPD Committee notes with concern references to “normal life” as opposed to the lives of

⁴² US Department of Justice, Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruitment Scheme, 12th March, 2019, available at <https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic>

⁴³ Paraphrased from - CNN, ‘Ginsburg: ‘The pedestal you put women on is a cage’, 12th February, 2018, available at <https://www.youtube.com/watch/sJ9Got6C500>

A persons with disabilities and derogatory terminology such as “mentally ill” and “divyangjan”, which as it notes, remains controversial⁴⁴. It is our earnest hope that the paradigm-shifting conversation about the rights and status of the disabled, that the CRPD Committee has generated, will find a resonance in the language we use to refer to them.

B K. Realizing the transformative potential of the Rights of Persons with Disabilities Act 2016: From principle to practice

70. In the hearing, one of us presciently noted that the imposition of the criterion of a benchmark disability to access a scribe – an arena in which it has no relevance as per the statutory framework – betrays a

C profound lack of awareness on the part of the authorities about the RPwD Act 2016. The OM of 29 August 2018, in its preambular portion recites as follows:

“The Act [Rights of Persons with Disabilities Act, 2016] provides for reservation in Government jobs for persons with benchmark disabilities as defined under section 2 (r) of the said Act.”

D 71. As one commentator notes, “if the connection between reservation in government jobs for the disabled and guidelines for grant of scribes in all exams they may appear in appears strange, that is because it is.”⁴⁵ Another notes that there exists no justification for this move.⁴⁶ The facts of this case are a stark reminder of the need to generate

E greater legal consciousness about the entitlements of the disabled set forth in the RPwD Act 2016. We would also like to take judicial notice of the fact that several instances have come to light of competent authorities fixing criteria for the grant of scribes that are in brazen disregard of the RPwD Act 2016 and the OM dated 29 August 2018.⁴⁷

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⁴⁴ CRPD Committee, Concluding Observations on India, para 6[b].

⁴⁵ Ibid.

⁴⁶ Dr. Sanjay Jain, “Right to education : An enabler” in “Marginalised communities and higher education” in Eds Surendrakumar and H. L. Vinod “Marginalised communities and higher education”, Sage Publication 2021 Critical Analysis of Scribe guidelines [forthcoming].

G ⁴⁷ Live Law News Network, ‘BCI Creating Entry Barriers For Disabled Lawyers’: Says Blind AIBE Candidate; Seeks Proper Implementation Of 2018 PwD Guidelines, 7th January, 2021, available at <https://www.livelaw.in/top-stories/bar-council-of-india-aibe-persons-with-disability-blind-law-student-168124>; Rintu Mariam Biju, AIBE 2021: Is BCI creating entry barriers for disabled law grads? 23rd January, 2021, Bar and Bench, available at <https://www.barandbench.com/news/aibe-2021-is-bci-creating-entry-barriers-for-disabled-law-grads>

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72. If the legal entitlements set forth in the RPwD Act 2016 are to not remain mere parchment, reflected in our inability to overcome barriers against substantively unequal treatment, the nodal Ministry, in coordination with other relevant actors, must make a concerted effort to ensure that the fruits of the Act actually reach the intended beneficiaries. In this regard, Article 8(2) of the UNCRPD outlines the awareness-raising measures that must be undertaken. Based on Article 8, the RPwD Act 2016 captures the need for the State to conduct and promote awareness campaigns and sensitization programmes in Section 39. These must be conducted to recognize and advance knowledge of the skills and abilities of persons with disabilities and of their contributions to the workforce and foster respect for the decisions of persons with disabilities in their family life. Sensitization programmes must be held at educational institutions and in professional spheres on the condition of disability and the rights of disabled persons and the like. The government must give effect to these provisions regularly to sensitize our society to the everyday challenges that may be imposed by the actions or inactions of the able-bodied on their disabled counterparts.

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L. Case of the appellant

73. Insofar as the case of the appellant is concerned, his condition has been repeatedly affirmed by several medical authorities including National Institute of Mental Health and Neuro Sciences (NIMHANS), Bangalore and AIIMS. The AIIMS report which was pursuant to the order of this Court is clear in opining that the appellant has a specified disability inasmuch as he has a chronic neurological condition. This condition Forms part of Entry IV of the Schedule to the RPwD Act 2016. The writer's cramp has been found successively to be a condition which the appellant has, making it difficult for him to write a conventional examination. To deny the facility of a scribe in a situation such as the present would negate the valuable rights and entitlements which are recognised by the RPwD Act 2016.

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74. We, therefore, hold and declare that the appellant would be entitled to the facility of a scribe for appearing at the Civil Services Examination and any other competitive selection conducted under the authority of the government.

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M. Formulation of new policy concerning access to scribes for persons with disabilities

75. Before concluding, we also intend to issue a broader direction to the Union Government in the Ministry of Social Justice and

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- A Empowerment to ensure the framing of proper guidelines which would regulate and facilitate the grant of a facility of a scribe to persons with disability within the meaning of Section 2(s) where the nature of the disability operates to impose a barrier to the candidate writing an examination. In formulating the procedures, the Ministry of Social Justice and Empowerment may lay down appropriate norms to ensure that the condition of the candidate is duly certified by such competent medical authority as may be prescribed so as to ensure that only genuine candidates in need of the facility are able to avail of it. This exercise shall be completed within a period of three months of the receipt of a certified copy of this judgment and a copy of the guidelines shall be transmitted to the Registrar (Judicial) of this Court. Upon receipt of the guidelines the Registrar (Judicial) shall place it on the record upon which the proceeding shall be listed under the caption of directions.

76. While framing the guidelines, we reiterate at the risk of repetition, that the Union Government should be mindful that the duty to provide reasonable accommodation is an individualized duty as has also been noted by the CRPD Committee in General Comment 6. In other words, a case-by-case approach must be adopted by the relevant body charged with the obligation of providing reasonable accommodation. This requires the relevant body to engage in a dialogue with the individual with disability. While considering the financial cost and resources available for the provision of accommodation, the overall assets rather than just the resources of the concerned unit or department within an organization must be taken into account. It should also be ensured that persons with disability are not required to bear the costs of the accommodation.
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77. We find it apposite to mention here that consultation with persons with disabilities and their involvement in decision making about matters affecting their lives is necessary to bring about any meaningful change in the realization of their rights. Taking note of the emergence of movements of persons with disabilities and the philosophy of “nothing about us without us”, the CRPD Committee in its General Comment No. 7 has also underscored the importance of such participative decision making by involving persons with disabilities and organizations of the persons with disabilities.⁴⁸
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⁴⁸ CRPD Committee, General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7, 9 November 2018, para 5.

78. In India, as reflected by the policy disconnect in this case, there is often a lack of involvement of the disabled in such decision making processes, leading to their voice not being heard and their grievances remaining unaddressed. This has also been listed as an area of concern by the CRPD Committee in its concluding observations on India.⁴⁹ Taking into account our constitutional and international obligations, we direct the MSJE to frame the abovementioned guidelines in consultation with the public, specifically with persons with disabilities and organisations representing them .

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N. In summation

79. When President George HW Bush signed into law the Americans with Disabilities Act, he noted that, by dint of the passage of the law, “every man, woman, and child [and we would like to add practitioners of alternative sexuality here] with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”⁵⁰

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80. In the three decades that have elapsed since then, a generation of Americans with disabilities has emerged, calling themselves the ADA Generation. These disabled people rightfully regard the ADA’s guarantees as a birthright and, due to accessible infrastructure, a strict prohibition on disability discrimination and changed public attitudes, are able to participate in American life on equal terms with their able-bodied counterparts.⁵¹

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81. Cases such as the present offer us an opportunity to make a meaningful contribution in the project of creating the RPwD generation in India. A generation of disabled people in India which regards as its birthright access to the full panoply of constitutional entitlements, robust statutory rights geared to meet their unique needs and conducive societal conditions needed for them to flourish and to truly become co-equal participants in all facets of life.

⁴⁹ CRPD Committee, Concluding observations on India, para 10, 11.

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⁵⁰ ADA.Gov, Remarks of President George H. W. Bush at the Signing of the Americans with Disabilities Act, 26th July, 1990, available at https://www.ada.gov/ghw_bush_ada_remarks.html

⁵¹ Joseph Shapiro, Disability Pride: The High Expectations of a New Generation, 17th July, 2020, The New York Times, available at <https://www.nytimes.com/2020/07/17/style/americans-with-disabilities-act.html>

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A 82. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court of Delhi dated 25 September 2018. There shall be no order as to costs.

83. Pending application(s), if any, stand disposed of.

B Ms Sanchita Ain, learned Counsel has also assisted the Court. Ms Ain has provided valuable inputs to the Court during the course of the hearing. Before concluding we record our appreciation of the assistance which has been rendered by Mr Rajan Mani, learned Counsel, Ms Madhavi Divan, learned Additional Solicitor General and Mr Naresh Kaushik, learned Counsel.

Ankit Gyan

Appeal allowed.