

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.598 OF 2008

S.D. Joshi & Ors.

... Petitioners



Versus

High Court of Judicature at Bombay & Ors.

... Respondents

J U D G M E N T

Swatanter Kumar, J.

In the present writ petition, under Article 32 of the Constitution of India, the following simple but questions of some legal significance and consequences arise for consideration:

- (a) What is the scope of the expression 'judicial office' appearing in Article 217(2)(a) of the Constitution?
- (b) Whether a 'Family Court' has the trappings of a Court and the Family Court Judges, being the Presiding Officers of such Courts, on the claimed parity of jurisdiction and functions, would be deemed to be the members of the Higher Judicial Services of the State?
- (c) If answer to the above question is in affirmative, then whether Family Court Judges are eligible and entitled to be considered for elevation as Judge of the High Court in terms of Article 217 of the Constitution of India?

The facts giving rise to the above questions fall in a narrow compass and can be precisely stated as under:

Though the Parliament enacted the Family Courts Act 1984 (for short, 'the Act') on 14th September, 1984, the same was given effect

in the State of Maharashtra from 1st December, 1986 vide notification No. S.O. 944(E) dated 5th December, 1986. All the petitioners are presently working as Principal Judges and Judges of Family Courts at different places in the State of Maharashtra. The Government of Maharashtra, in consultation with the High Court of Judicature at Bombay, was pleased to frame Rules under Article 309 of the Constitution of India read with Sections 4 and 23 of the Act which are called 'Family Court (Recruitment and Service Conditions) Rules, 1990 (for brevity, referred to as 'the Rules'). Section 4 of the Act requires that appointment to the post of a Judge under the Act be made by nomination from amongst the candidates, who satisfy the qualifications stated under sub-clause (a) to (c) of sub-section (3) of this Section. The Bombay High Court issued an advertisement, which came to be published on 10th December, 1990, inviting applications for seven posts of Family Court Judge in the State of Maharashtra. Clause (2) of the advertisement relates to the eligibility of the candidates who could apply for the post. Clause (3) of the advertisement mentions about giving of preference to women as well as to the persons committed to the need to protect and preserve the institution of marriage and promote welfare of the children and have

experience and expertise in settlements of disputes by conciliation and counseling in appointment to these posts. The advertisement also contained the restrictions or disqualifications for selection. The candidate was to be appointed on probation for a period of two years and could be confirmed on the said post if a permanent vacancy existed and the work of the candidate was found to be satisfactory. The candidates were subjected to an interview held by a Committee constituted by the High Court and selected candidates were appointed as Judges of the Family Court where after petitioner Nos.1, 2 and 4 have been appointed as Principal Judges of the Family Court. The case of the petitioners is that the Judges of the Family Court hold a 'judicial office' in the territory of India, they discharge judicial functions and, as such, are entitled to be considered for elevation to the Bench of the Bombay High Court. To elucidate this argument, it has been stated that the appointment to the post of Judge of the Family Court is made under the statutory rules. Further, the duties and responsibilities of a Judge of the Family Court are similar to that of the duties and responsibilities of a Judge of the City Civil Court. Section 8 of the Act provides for exclusion of jurisdiction of the District Court and the City Civil Court in

matters in which the jurisdiction is vested in the Family Court alone. Section 19 of the Act provides that an appeal against the order passed by a Judge of the Family Court shall lie to the High Court. Thus, they hold a 'judicial office' as contemplated under Article 217 of the Constitution and are at parity with functional jurisdiction, while satisfying all the trappings of a Civil Court and, as such, they should be deemed to be qualified for elevation to the High Court. However, the petitioners claimed to have understood from the practice followed by the High Court in respect of elevation to the post of a High Court Judge from service that Family Court Judges appointed under Rule 3(B) of the Rules are not considered for the post of that office.

Aggrieved by this practice, they filed a representation before the Chief Justice of the Bombay High Court on 30th June, 2003. In this representation, all these points were considered. The High Court, vide its letter dated 7th May, 2007, rejected the representation resulting in filing of the present writ petition.

Reply only on behalf of the High Court of Judicature at Bombay has been filed which, during the course of arguments, was adopted by the counsel appearing for the State of Maharashtra. The facts are

hardly in dispute. After the representation was addressed to the Chief Justice of Bombay High Court on 30th June, 2003, the petitioners had also filed writ petition No.3726 of 2005 praying for a direction to decide the said representation which was disposed of by a Bench of the Bombay High Court by passing the order dated 20th October, 2005 which reads as under:

“P.C. :

Heard learned counsel for the Petitioners and the learned Assistant Government Pleader for the Respondents. Rule. Learned Assistant Government Pleader waives service of Rule on behalf of the Respondents. By consent, Rule made returnable and heard forthwith.

Rule made absolute in terms of prayer (b) of the petition. Writ Petition is disposed of accordingly.”

Thereafter, the matter was placed before the competent authorities for consideration. It has been stated in the reply that pursuant to the recommendations on unification of cadres of judicial officers in India made by the Shetty Commission, which was accepted by this Court in the case of *All India Judges Association v. Union of India* [(2002) 4 SCC 247] with some amendments, the issue of unification and integration of the cadres of judicial officers in

Maharashtra was considered by a Committee constituted by the High Court. The Committee submitted its report on 24th August, 2002, which was later accepted by the Full Court. It was expressly stated therein that the category of Family Court Judges has to be kept out of the process of integration and only benefits of pay-scales are to be extended to them. Though we may not attach any weightage to this decision of the Bombay High Court, one very material fact that cannot be ignored by the Court is that in the recommendations made by Shetty Commission, which were accepted with some modifications by this Court, as already stated, in the case of *All India Judges Association (supra)* (para 37), the merger of cadre of Family Court Judges in the general cadre of Judicial Services was never recommended. They were not treated as part of the regular cadre and, rightly so, were granted limited benefit (with regard to pay scale). Correctness of the decision of the Bombay High Court and/or for that matter of the recommendation of the Shetty Commission was never questioned by the petitioners. The Shetty Commission had itself relied upon two judgments of this Court, i.e., *State of Maharashtra v. Chandrakant Anant Kulkarni* [(1981) 4 SCC 130] and *S.P. Shivprasad Pipal v. Union of India* [(1998) 4 SCC 598] which

have some bearing on the controversy raised in the present writ petition.

In order to consider the representation of the petitioners and/or the persons placed like them, another Committee was constituted. The Committee did not find merit in any of the contentions raised in the representation and required that the matter should be placed before the Full Court. In furtherance thereto, the matter was placed before the Full Court on 29th April, 2007, when the following decision was taken unanimously :

“Having discussed the matter in detail, it was unanimously resolved that the request of the Family Court Judges cannot be accepted. Registry to inform them accordingly.”

On merits, it is submitted on behalf of the respondents that it is not enough to discharge judicial functions simpliciter for a period of ten years to be eligible for elevation as Judge of the High Court. Merely because an appeal lies to the High Court and they perform the functions of a Judge under the provisions of the Act, by itself, is not sufficient to attract the provisions of Article 217 of the Constitution. On the contrary, on a proper reading of Article 233(2)

of the Constitution, which deals with appointment of District Judges, it is clear that Judges of the Family Court stand excluded from the ambit of the said Article. The nature of their functioning, transferability and conditions of service do not justify parity with the members of the Higher Judicial Services of the State of Maharashtra. There is no parity in true scope of functioning and performance of duties. Thus, they pray for the dismissal of the writ petition.

Mr. Shekhar Naphade, learned senior counsel, referred to the various provisions of the Act to contend that the Judges of the Family Court are, primarily and in substance, discharging the functions of a regular Civil Court and, as such, they are holding a 'judicial office' within the meaning of Article 217(1) of the Constitution entitling them for consideration for elevation to the High Court. He emphasized that Section 2(a) of the Act defines a 'Judge' to mean the Judge, the Principal Judge, Additional Principal Judge or other Judge of a Family Court. 'Family Court' means a Family Court established under Section 3 of the Act. All other words and expressions, which have not been specifically defined in the Act, will be assigned the same meaning as defined under the Code of Civil Procedure, 1908 (for short, 'the Code'). While referring to Sections 3 and 4 of the Act

it was pointed out that a Family Court can be established by the State Government after consultation with the High Court and a Judge of the Family Court can be appointed by the State Government with the concurrence of the High Court alone. Section 8 deals with exclusion of jurisdiction of Civil Court in regard to the matters over which the Family Court has jurisdiction. Section 9 refers to the duty of the Family Court to make efforts for settlement. Section 10 makes the provisions of the Code applicable to the proceedings before the Family Court. Evidence is to be led before the Family Court, oral or by affidavit, as may be directed. Section 17 of the Act requires the Family Court to record reasons and make decisions on all points by a written judgment which is executable as a decree or order of the Court in terms of Section 18. Section 19 provides that appeals shall lie to the High Court against the judgment or order of the Family Court. On the cumulative reading of these provisions, the argument advanced was that it satisfies all the essentials of a Court, that is, it has been created by the law of the land and performing the functions of determination which is binding. It has the trappings of a Court and lastly has the power to execute its orders as decree or order under the civil law. Thus, the Presiding Officer of such Family Courts would

be deemed to be holding judicial office at parity with the members of the Judicial Services of the State. Reliance in this regard was placed by the counsel on *Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala* [AIR 1961 SC 1669].

It, certainly, would not matter that the representation of the petitioners was rejected by different Committees or even by the Full Court of the Bombay High Court. What this Court has to examine *de hors* such decisions or opinions expressed, is whether upon true interpretation and meaning of the expression 'judicial office', the petitioners can be treated at parity with or be included as Judicial Officers belonging to the Higher Judicial Services of the State of Maharashtra holding a 'judicial office'. In order to examine this issue, we may, while keeping in mind the abovestated provisions of the Act, also refer to the advertisement issued by the High Court. The applications were invited for seven posts of the Judges of the Family Court for Bombay, Pune, Nagpur and Aurangabad in the specified pay-scale. We will only refer to certain relevant clauses of the advertisement rather than reproducing the same in entirety:

- "2. To be eligible, a candidate must be a person who –

- (a) has for at least seven years held a judicial office in India or the office of a Member of a Tribunal or any post under the Union or a State requiring special knowledge of law; or
- (b) has for at least seven years been a practicing Advocate in the High Court of Bombay or its branches including one at Panaji or in the Courts subordinate thereto; or
- (c)
 - (1) is a Post Graduate in law with specialization in Personal Laws; or
 - (2) has post Graduate degree in Social Science such as Master of Social Welfare, Sociology, Psychology/Philosophy with a degree in Law and –
 - (i) has at least seven years experience in field work/research or of teaching in a Government Department or in a College/University or a comparable academic institute with special reference to problem of women and children; or
 - (ii) has seven years experience in the examination and/or application of Central/State Laws relating to marriage divorce maintenance, guardianship, adoption and other family disputes; and
- (d) is not less than 35 years of age as

on 1st December, 1990.

3. In selecting persons for appointment as Judges of the Family Courts –
 - (i) preference will be given to women.
 - (ii) preference will also be given to persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise in the settlement of disputes by conciliation and counseling.
4. A candidate must submit with his/her application copies of certificates showing –
 - i his/her age as on 1st December, 1990.
 - ii his/her standing as Practitioner in Court.
 - iii That he/she is of good moral character.
 - iv That he/she is certified to have sufficient knowledge of Marathi to enable him/her to speak, write and translate with facility into English and vice-versa.
 - v Other certificates in support of the claim to have one or the other qualifications referred to above.

- vi A candidate should express his/her concept of a Family Court in not more than 200 words on a separate sheet of paper to be annexed to the application.
- vii (a) In case the candidate is a practicing Advocate, two separate recommendations from Advocates designated as Senior Advocate or from practicing Advocates having more than 20 years standing at the Bar.
- (b) In case the candidate is in judicial service then two separate recommendations from judicial officers not below the rank of District Judge.
- (c) In respect of all other candidates two separate recommendations from authorities under whom the candidate is working, including the Head of the Institution in which the candidate is working.

The persons recommending must certify that the candidate is suitable for appointment as Judge of the Family Court.

The recommendations should be sent directly under sealed cover by the recommendations authority to the Registrar, High Court, Bombay and marked "confidential-Family Court", so as to reach on or before 21st January, 1991.

5. A candidate belonging to a Backward Class must also produce a certificate to the effect that he/she belongs to a community recognized as Backward for the purpose of recruitment to service under the Government of Maharashtra.
6. Certificates under 4(i) and 5 may be signed by the District Magistrate. Certificate under 4(ii) may be signed in the case of the High Court by the Prothonotary and Senior Master, High Court, Original Side, or the Registrar, High Court, Appellate Side, Bombay and the Additional Registrars of the High Court Benches at Nagpur, Aurangabad and the Special Officer, Panaji Bench (Goa) as the case may be or in case of Courts other than High Court, in Bombay by the Principal Judge, City Civil and Sessions Court, Greater Bombay, the Chief Judge, Court of Small Causes, Bombay and the Chief Metropolitan Magistrate, Bombay as the case may be, and in the case of other subordinate Courts in the State by the District Judges or by the Principal Judge of the Court in which the candidate has practiced, and should state the period during which the candidate has actually practiced. Certificate mentioned in 4(iii) may be signed by an Officer of the rank of Gazetted Class-I under the State of Maharashtra or Goa. Certificate mentioned in 4(iv) may be signed by the Presiding Officers of the Courts in which the candidate is practicing or by a Principal of a College recognized by a University. Certificate mentioned in 4(v) may be signed by the competent

authority concerned.

7. No male candidate who has more than one wife living shall be eligible for appointment to service under the State of Maharashtra unless Government, after being satisfied that there are special grounds for doing so, exempts any persons, subject to the provision of any law in force from the operation of this restriction.

No female candidate who has married a person having already a wife living shall be eligible for appointment to service under the Government of Maharashtra unless Government after being satisfied that there are special grounds for doing so, exempts her from the operation of this restriction.

8. The selected candidates will be placed by the Government, previous to their appointment before a medical board and will not be appointed unless the board certifies them to be both mentally and physically fit for the service under Government. They will be required to pass an examination in Hindi according to the prescribed rules.
9. At the time of appointment, the selected candidates will have to give an undertaking that for a period of two years from the date on which they cease to be in service, they will not practice in any Court over which they had presided.
10. A candidate if selected will first be appointed on probation for a period of

two years and if his/her work is not found satisfactory, the period of probation may be extended by the High Court for such further period as it may deem fit. On the expiry of such period he/she may be confirmed, if –

- (i) there is a permanent vacancy; and
- (ii) his/her work is found satisfactory.

During the period of probation and thereafter until expressly confirmed by a written order, the services of an appointee shall be terminable by one month's notice on either side without any reason being assigned therefor or by payment of salary for the period of notice or the unexpired portion thereof.”

The candidates had submitted their applications in furtherance to this advertisement which itself was issued in terms of the Rules. It is implicit that the advertisement has to be in consonance with Rules, Rules have to be in comity to the provisions of the Act and, in turn, the Act has to be within the constitutional framework. Thus, all other laws, essentially, should fall in conformity with the constitutional mandate contained in Articles 217 and 233 of the Constitution which are relevant for the purpose of the present case.

Bare reading of the advertisement clearly shows that different class of persons were eligible to apply for the post in question.

Firstly, the persons holding judicial office or office of the member of a Tribunal or a post under the Union or State requiring special knowledge of law for a period of seven years were eligible. Other eligible class was that of lawyers practicing as advocates in the High Court of Bombay or its branches, including Panaji, or Subordinate Courts thereto for a period of seven years. Even a person, who is post-graduate in law with specialization in personal law, was eligible. Still another class was of the persons who possessed post-graduate degree in Social Sciences, such as Master of Social Welfare, Sociology, Psychology with a degree in law and have seven years experience in the field of research or teaching in a Government Department or a College or University. All the persons belonging to these different classes were eligible to be appointed to the post of a Family Court Judge and preference was to be given to women in the matter of such appointments. The eligibility criteria, as stated in the advertisement, therefore, was somewhat distinct and different than the eligibility criteria provided for selection to the post of District Judge in the Higher Judicial Services of the State of Maharashtra. The petitioners, obviously, belong to one of the abovementioned classes and they, having been found suitable, were

selected/appointed to the posts in question by the appropriate authority constituted by the Government in consultation with the High Court.

Whether the 'Family Courts' established under the Act are Courts for all intents and purposes generally or otherwise.

First and foremost question that we need to examine is whether the Family Courts established under Section 3 of the Act is a Court in general and under the provisions of the Code of Civil Procedure in particular? It is already noticed that the 'Family Court' has been defined under Section 2(d) of the Act as a Family Court established under Section 3 of the Act. In terms of Section 3, the Family Court can be established for every area in the State, comprising city or town, whose population exceeds one million, by the State Government in consultation with the High Court. The 'Judge' of the Family Court is to be appointed by the State Government with the concurrence of the High Court. Under Section 4(4), the Act contemplates that every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience in such field and women shall be given

preference in appointment as Judges of the Family Courts. These Family Courts are to exercise special jurisdiction which is limited to the subject matters spelt out under Section 7(1)(a) and (b) of the Act. Family Courts have been vested with all jurisdiction exercisable by any District Court or any Subordinate Civil Court under the law, for the time being in force, in respect of suits and proceedings of the nature referred to in the Explanation of sub-section (1) of Section 7. Such Courts will be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be, such Subordinate Civil Court for the area to which the jurisdiction of the Family Court extends. The explanation to sub-section (1) of Section 7 states as to what kind of jurisdiction is exercisable by such Court. The explanation reads thus :

*“Explanation.—*The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:--

- (a) suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

- (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
- (d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;
- (e) a suit or proceeding for a declaration as to the legitimacy of any person;
- (f) a suit or proceeding for maintenance;
- (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.”

Section 8 further states that no District Court or any subordinate Civil Court will have jurisdiction over the matters which have been specifically spelt out under sub-section (1) of Section 7 of the Act in relation to the area over which, it exercises jurisdiction. It also excludes jurisdiction of the Magistrate, in relation to such area over which the Family Court exercises jurisdiction under Chapter IX of the Code of Criminal Procedure, 1973. Every pending suit or proceeding of the nature referred to in the Explanation to sub-section (1) of Section 7 of the Act, as well as every proceeding under

Chapter IX of the Code of Criminal Procedure, 1973 was liable to be transferred to such Family Court. Section 10 requires the Court to follow the procedure and powers available to the Civil Court under the provisions of Code of Civil Procedure, 1908 as well as that available to a Magistrate under Chapter IX of the Code of Criminal Procedure, 1973. Besides making such provisions applicable to the Family Court, sub-section (3) of Section 10 further vests large powers in the Family Court to lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings. Such Court has further been empowered to take evidence in accordance with the prescribed procedure and apply the provisions of the Evidence Act to record oral and/or evidence by way of affidavits. It has been vested specifically with the power to examine the truth or otherwise of the allegations made by one party and denied by another. After the evidence is complete, the judgment of a Family Court is required to contain a concise statement of the case, the points for determination, the decision thereto and reasons for such decision. For the purpose of execution of the decree and order of the Family Court, the provisions of the Code of Civil Procedure as well as Chapter IX of the Code of Criminal Procedure

have been made applicable to ensure that these orders are given effect to in the same manner as a decree and/or order of the Court of competent jurisdiction under the civil and criminal law. Further, the process of appeal is specifically provided under the Act. Every judgment and order, not being an interlocutory order, passed by the Family Court, is appealable to the High Court both on facts and in law, which has to be disposed of by the High Court in accordance with the procedure stated under Section 19 of the Act. This Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Various provisions of this Act, therefore, clearly demonstrate that the Family Court, a creature of statute, has been vested with power to adjudicate and determine the disputes between the parties which fall within the scope and ambit of Explanation to Section 7(1) of the Act. The persons, who are appointed as Judge of the Family Court, perform all duties and functions which are akin to the functions being performed by the Presiding Officer of a Civil or a Criminal Court, though to a very limited extent. The expression 'Judge' under Section 2(a) of the Act means the Principal Judge, Additional Principal Judge or other Judge of a Family Court. The Presiding

Judges of the Family Courts perform all the different statutory functions as are spelt out above and decide the cases in accordance with the provisions of the Act. It may be noticed that the primary object and duty of the Family Court Judges is to endeavour and persuade the parties in arriving at a settlement in respect of the suit or proceedings, in which it may follow such procedure, as it may deem fit.

This question need not detain us any further, as the law in this regard is no more *res integra* and stands finally stated by a Constitution Bench of this Court in the case of *Harinagar Sugar Mills Ltd. (supra)*. Justice Hidayatullah, as His Lordship then was, while giving his own reasons concurred with other Judges in allowing the appeal setting aside the order of the Central Government. While commenting upon the maintainability of the appeals, he drew a distinction between a 'Court' and a 'Tribunal' and dealt with the question as to whether the Central Government, while hearing this appeal, was a Tribunal and held as under:-

“31. With the growth of civilization and the problems of modern life, a large number of Administrative Tribunals have come into existence. These tribunals have the authority of

law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary courts of civil judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to courts, but are not courts. When the Constitution speaks of “courts” in Article 136, 227 or 228 or in Articles 233 to 237 or in the Lists, it contemplates courts of civil judicature but not tribunals other than such courts. This is the reason for using both the expressions in Articles 136 and 227. By “courts” is meant courts of civil judicature and by “tribunals”, those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that courts have “an air of detachment”. But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient. Lord Sankey, L.C. in *Shell Company of Australia v. Federal Commissioner of Taxation* observed:

“The authorities are clear to show that there are tribunals with many of the trappings of a court, which, nevertheless, are not courts in the strict sense of exercising judicial power.... In that connection it may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a court. 6. Nor because it is a body to which a matter is referred by another body. See *Rex v. Electricity Commissioners*”

32. In my opinion, a court in the strict sense is a tribunal which is a part of the ordinary hierarchy of courts of civil judicature maintained by the State under its constitution to exercise the judicial power of the State. These courts perform all the judicial functions of the State except those that are excluded by law from their jurisdiction. The word “judicial”, be it noted, is itself capable of two meanings. They were admirably stated by Lopes, L.J. in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* in these words:

“The word ‘judicial’ has two meanings. It may refer to the discharge of duties exercisable by a Judge or by Justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind — that is, a mind

to determine what is fair and just in respect of the matters under consideration.”

That an officer is required to decide matters before him “judicially” in the second sense does not make him a court or even a tribunal, because that only establishes that he is following a standard of conduct, and is free from bias or interest.

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Now, in its functions the Government often reaches decisions, but all decisions of the Government cannot be regarded as those of a tribunal. Resolutions of the Government may affect rights of parties, and yet, they may not be in the exercise of the judicial power. Resolutions of the Government may be amenable to writs under Articles 32 and 226 in appropriate cases, but may not be subject to a direct appeal under Article 136 as the decisions of a tribunal. The position, however, changes when Government embarks upon curial functions, and proceeds to exercise judicial power and decide disputes. In those circumstances, it is legitimate to regard the officer who deals with the matter and even Government itself as a tribunal. The officer who decides, may even be anonymous; but the decision is one of a tribunal, whether expressed in his name or in the name of the Central Government. The word “tribunal” is a word of wide import, and the words “court” and “tribunal” embrace within them the exercise of judicial power in all its forms. The decision of the Government thus falls within the powers of this Court under Article 136.”

It was held that all tribunals are not Courts though all Courts are tribunals. This view has been reiterated by this Court, more particularly, in relation to drawing a distinction between a tribunal and a Court. A tribunal may be termed as a Court if it has all the trappings of a Court and satisfies the above stated parameters. Every Court may be a tribunal but every tribunal necessarily may not be a Court. The essential features of 'Court' have been noticed by us above and once these essential features are satisfied, then it will have to be termed as a 'Court'. The statutory provisions of the Family Court squarely satisfy these ingredients and further Presiding Officers of Family Courts are performing judicial and determinative functions and, as such, are Judges.

'Judge' is a generic term and other terms like, Umpire, Arbiter and Arbitrator are only species of this term. A Judge, primarily, determines all matters of disputes and pronounces what is law now, as well as what will be the law for the future and acts under the appointment of the Government. Pollock C.B. in *Ex parte Davis* [(1857) 5 W.R.523] said, "judges are philologists of the highest orders. They are not mere administrative officers of the Government but represent the State to administer justice." Thus, we have no

hesitation in coming to the conclusion that the Family Court constituted under Section 3 of the Act has all the trappings of a Court and, thus, is a court and the Presiding Officer, that is, Judge of the Family Court is a 'Judge' though of limited jurisdiction.

Whether Petitioners can be treated as part of the 'Judicial Services' of the State of Maharashtra?

In exercise of the powers conferred by Articles 233, 234 and proviso to Article 309 of the Constitution of India read with Article 235, the Governor of Maharashtra, after consultation with Maharashtra Public Service Commission and the High Court of Bombay framed the Rules known as 'The Bombay Judicial Services Recruitment Rules, 2008' (for short, 'the Rules of 2008'). These Rules repealed the Rules known as the Bombay Judicial Services Recruitment Rules, 1956. The District Judges in Bombay were earlier being appointed under the Bombay Civil Courts Act, 1869. At the time of unification of cadres, as we have noticed above, the matter whether the Family Courts could be treated as part of the judicial cadre of the State was considered. However, the Committee recommended that it is only for the purposes of pay scales that they could be placed at parity and the cadre of the Judges of the Family

Court could not be considered for integration into the cadre of the Judicial Services and they could not be equated with Judges of the City Civil Court and/or the District Court Judges. This decision had never been questioned by any person.

After coming into force of the Rules of 2008, appointments were made to the State Judicial Services including the Higher Judicial Services strictly in accordance with these Rules. Rule 2 defines 'Service' to mean the Maharashtra Judicial Service. Rule 3 of the Rules of 2008 states that there shall be constituted a State Service, known as Maharashtra State Judicial Services and such services shall be deemed to have been constituted with effect from the 1st day of July 1996. Rule 3(2) states that the services shall consist of the cadres specified in column 2 of the Schedule appended to the Rules of 2008 and the character and number of posts in each of those cadres shall be as specified in the corresponding entries in column (3) thereof. Rule 3(3) provided for that table. The said Table 'A' reads as under:

1	2
(a) District Judges	(i) District Judges; (ii) Additional District Judges Principal Judge, Additional Principal Judge and Judges of City Civil and Sessions Court,

	Mumbai. Chief Judge and Additional Chief Judges of Court of Small Causes.
(b) Senior Civil Judges	(i) Chief Metropolitan Magistrate; (ii) Additional Chief Metropolitan Magistrates; (iii) Judges of Court of Small Causes and Metropolitan Magistrates; (iv) Civil Judges, Senior Division.
(c) Civil Judge, Junior Division	(i) Civil Judge, Junior Division.

Rule 5 provides for the method of recruitment, qualification and age limit in relation to different posts including the post of District Judge. 50% of the posts shall be filled by promotion from the cadre of Senior Civil Judges on the basis of the principle of merit-cum-seniority and passing of a suitability test. To be eligible for this 50%, the candidate must have been in the cadre of Senior Civil Judge after successful completion of the officiating period. Further, he must have been officiating as a Senior Civil Judge for five years at least. 25% of the posts shall be filled by promotion strictly on the basis of merit through limited competitive examination from amongst the Senior Civil Judges and remaining 25% of the posts shall be filled up by nomination from amongst the eligible persons practicing as Advocates on the basis of a written examination and *viva-voce* test conducted by the High Court. To be eligible for nomination, a person

should have been an advocate or a Government Pleader or Public Prosecutor for not less than seven years on the date of publication of the advertisement. The written examination was to carry 200 marks while the *viva-voce* test was to carry 50 marks. A candidate should secure not less than 50% of the marks in each paper in written examination to qualify for *viva-voce* and only the candidates, who obtain a minimum of 40% marks in the *viva-voce*, shall be entitled for selection.

A bare reading of the above provisions clearly show that a person to be entitled to promotion as District Judge has to be a member of the cadre of Senior Civil Judge. The advocates or other eligible persons entitled to be considered for appointment under the nomination category have to satisfy the prescribed qualifications and to clear the written examination as well as the *viva-voce* test, as per the Rules. In other words, a person has to be member of the judicial service before he could be considered for appointment to the Higher Judicial Services of the State. The appointment to that cadre has to be strictly construed and must be made in accordance with the provisions stated in the Rules. Once the Governor of Maharashtra has framed the Rules of 2008, in exercise of its constitutional powers

and in accordance with the procedure prescribed therein and has explained who would be a 'District Judge', what would be service and its constitution and, thereby, excluded the Judges of the Family Court from the service consciously, then it is neither permissible nor possible for the Court to direct such inclusion by implication. In fact, the petitioners have not challenged the Rules of 2008 earlier or even in the present petition. In order to accept the contention of the petitioners that they are part of the Judicial Services of the State of Maharashtra, the Court will have to read into Rule 3 (Table A), the expression 'Family Court Judges'. Once the legislature has framed the Rules and kept out the Principal or other Family Court Judges from the cadre of the 'Judicial Services' of the State of Maharashtra, then they cannot be treated as part of the cadre by inference or on the doctrine of parity, which we shall shortly deal with in some detail.

Now, we may refer to relevant Articles of the Constitution. Primarily, under Article 233(1), appointment to the post of District Judge is to be made by the Governor in consultation with the High Court exercising jurisdiction in relation to such State. Article 233(2) states the kind of persons, who are eligible to be considered. The same reads as under :

“A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.”

On fulfilling the above criteria alone, the candidate can be appointed to the ‘judicial office’ in accordance with the stated procedure. Article 236 explains the expression ‘District Judge’ as well as ‘Judicial Service’ for the purposes of Chapter VI which reads as under:

“236. Interpretation— In this Chapter :

- (a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;
- (b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.”

A bare reading of the above Article clearly shows that the expression 'District Judge' includes different kinds of Judges but not Family Court Judges. Similarly, 'judicial services' means a service consisting exclusively of the persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. The expression 'judicial service', therefore, would not include a Family Court Judge as they are neither persons eligible to fill up the post of District Judge nor are they holding civil judicial posts inferior to the post of District Judge.

The learned counsel, appearing for the petitioners, heavily relied upon the judgment of this Court in the case of *State of Maharashtra v. Labour Law Practitioners' Association* [(1998) 2 SCC 688] to contend that the expression 'judicial services' should be given a wider meaning and since the petitioners are performing judicial functions by presiding over the Family Court as Judges, they should be treated as part of the Judicial Services of the State of Maharashtra. He placed reliance upon the following paragraphs of the judgment :

"11. Under Article 236(b), the expression "judicial service" is defined to mean "a service

consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge". Judicial service thus postulates a hierarchy of courts with the District Judge as the head and other judicial officers under him discharging only judicial functions.

12. In the case of *Chandra Mohan v. State of U.P.* this Court was required to consider the question of eligibility of "judicial officers" for appointment as District Judges under Article 233 of the Constitution. Under the U.P. Higher Judicial Service Rules "judicial officers" were eligible for appointment as District Judges and the expression was meant to cover members of the executive department who discharged some revenue and magisterial duties also. When selection of such persons was challenged, this Court was required to consider and interpret the provisions of Articles 233 to 236 of the Constitution. The procedure for selection under the said Rules was also challenged as violative of Article 233. The Court said that the Governor could not appoint as District Judges persons from services other than the judicial service. A person who is in the Police, Excise, Revenue or such other service cannot be appointed as a District Judge. Dealing with the definition of "judicial service" in Article 236, this Court said that the judicial service consists only of persons intended to fill up the posts of District Judges and other civil judicial posts and that is an exclusive service only consisting of judicial officers. In so interpreting judicial service in contra-distinction to executive service where some executive officers may also be performing judicial or quasi-judicial functions, this Court was at pains to

emphasise the constitutional scheme for independence of the judiciary. It said that the acceptance of this (i.e. Government's) position would take us back to pre-independence days and would also cut across the well-knit scheme of the Constitution providing for independence of the judiciary. This Court, therefore, defined judicial service in exclusive terms as consisting only of judicial officers discharging entirely judicial duties. It said that having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a District Judge.

13. Reliance has been placed upon this judgment as showing that judicial service is interpreted narrowly to cover only the hierarchy of civil courts headed by the District Judge. This Court, however, was not considering the position of other civil courts, in the context of the extensive definition given to the term "District Judge". This Court was concerned with preserving independence of the judiciary from the executive and making sure that persons from non-judicial services, such as, the Police, Excise or Revenue were not considered as eligible for appointment as District Judges. That is why the emphasis is on the fact that the judicial service should consist exclusively of judicial officers. This judgment should not be interpreted narrowly to exclude from judicial service new hierarchies of civil courts being set up which are headed by a judge who can be considered as a District Judge bearing in

mind the extensive definition of that term in Article 236.

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Going by these tests laid down as to what constitutes judicial service under Article 236 of the Constitution, the Labour Court judges and the judges of the Industrial Court can be held to belong to judicial service. The hierarchy contemplated in the case of Labour Court judges is the hierarchy of Labour Court judges and Industrial Court judges with the Industrial Court judges holding the superior position of District Judges. The Labour Courts have also been held as subject to the High Court's power of superintendence under Article 227."

For a better understanding of the principle of law enunciated above, reference to the facts of the case would be necessary. The Labour Law Practitioners Association had filed a writ petition in the High Court challenging the appointment of the private respondents in the writ petition as Labour Court Judges. These private respondents were earlier working as Assistant Commissioners of Labour in the Department of Labour, State of Maharashtra. It was prayed that the amended Section 9 of the Bombay Industrial Relations Act and amended Section 7 of the Industrial Disputes Act insofar as they authorize the appointment of Assistant Commissioner of Labour as

Judges of the Labour Court are void, illegal and contrary to Article 234 of the Constitution. A learned Single Judge of the Bombay High Court set aside the notification dated 8th March, 1979 and gave a direction to the State of Maharashtra to comply with the provisions of Article 234 of the Constitution while making appointments of the Judges of the Labour Court. This decision of the learned Single Judge was challenged in the Letters Patent Appeal which also came to be dismissed and, therefore, the Special Leave Petition before the Supreme Court was filed.

This Court, while dismissing the appeal commented upon the expression 'judicial service' and held that 'judicial service' means a service consisting exclusively of the persons intended to fill the post of District Judge and other Civil Judges inferior to the Court of District Judge in terms of Article 236 of the Constitution. Keeping in view the principle of separation of powers and independence of judiciary, Judicial Services contemplates the service exclusively of judicial posts in which there will be a hierarchy headed by a District Judge. Upholding the view taken by the High Court that persons presiding over Industrial and Labour Court would constitute 'Judicial Service'

as defined and, therefore, compliance of Article 234 of the Constitution was mandatory.

We fail to understand as to what benefit the present petitioners can derive from this judgment. Primarily, the Court gave a wider connotation to the expression 'judicial service' keeping in view the specialization in different fields required for administration of justice. In that case, the Government had intended to make the appointment by itself without following the procedure provided under Article 234 of the Constitution, which says that appointments were to be made by the Governor in accordance with the Rules made by him in that behalf after consultation with the Public Service Commission and the High Court exercising jurisdiction in relation to such State in case of appointments made to the posts other than District Judges to the Judicial Service of the State. This, on a plain reading and understanding, means that the Judge of the Labour Court was not a post of the District Judge or equivalent thereto. On the contrary, in terms of Article 234, the Government was directed to follow the prescribed procedure before making these appointments. The methodology adopted by the Government for making appointments directly, thus, was found to be faulty under the scheme

of the Constitutional provisions appearing in Chapter VI of the Constitution.

A Constitution Bench of this Court in the case of *Chandra Mohan v. State of UP* [AIR 1966 SC 1987] was concerned with appointments to the posts of District Judges which were challenged by the existing members of the Judicial services on the ground that judicial officer from executive departments, discharging some revenue and magisterial duties, are not members of the judicial services and thus cannot be appointed to such posts. The Court, while referring to the independence of the judiciary, said that subordinate judiciary in India is in the closest contact with the people and thus their independence should be beyond question. Explaining the words 'judicial services' the Court gave the expression a narrower meaning and, while setting aside the appointments so made of the persons other than from judicial services of the State, held as under:

“16. So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as District Judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district Judge? The acceptance of this position would take us

back to the pre-independence days and that too to the conditions prevailing in the princely States. In the princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless if Article 233(1) stood alone, it may be argued that the Governor may appoint any person as a district judge, whether legally qualified or not, if he belongs to any service under the State. But Article 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of District Judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in clause (2) thereof. Under clause (2) of Article 233 two sources are given, namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader. Can it be said that in the context of Chapter VI of Part VI of the Constitution "the service of the union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting viz. the chapter dealing with subordinate courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to courts. That apart, Article 236(2) defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge. If this definition, instead of appearing in Article 236,

is placed as a clause before Article 233(2), there cannot be any dispute that “the service” in Article 233(2) can only mean the judicial service. The circumstance that the definition of “judicial service” finds a place in a subsequent article does not necessarily lead to a contrary conclusion. The fact that in Article 233(2) the expression “the service” is used whereas in Articles 234 and 235 the expression “judicial service” is found is not decisive of the question whether the expression “the service” in Article 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district Judges. The expressions “exclusively” and “intended” emphasise the fact that the judicial service consists only of persons intended to fill up the posts of district Judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined “judicial service” in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a district judge.”

Another Constitution Bench of this Court in the case of *Statesman (Private) Ltd. v. H.R. Deb & Ors.* [AIR 1968 SC 1495] spelt out the distinction between Judicial Office and Judicial function.

A challenge was made to the appointment of Presiding Officer, Second Labour Court on the ground that he did not possess essential qualifications as prescribed in Section 7(3) of the Industrial Disputes Act, 1947, as he was holding the office of Executive Magistrate though performing judicial functions as well. The Court held as under:

“11. Lest our meaning be extended by Government to cases under serving of saving under Section 9, we wish to make it clear that the intention of the legislature really is that men who can be described as independent and with sufficient judicial experience must be selected. The mention of High Court Judges and District Judges earlier in the same section indicates that ordinarily judicial officers from the civil judiciary must be selected at least so long as the separation of judiciary from the Executive in the public services is not finally achieved. The appointment of a person from the ranks of civil judiciary carries with it an assurance which is unique. The functions of a Labour Court are of great public importance and quasi civil in nature. Men of experience on the civil side of the law are more suitable than Magistrates. Persons employed on multifarious duties and in addition performing some judicial functions, may not truly answer the requirement of Section 7 and it may be open in a quo warranto proceeding to question their appointment on the ground that they do not hold essentially a judicial office because they primarily perform other

functions. For it cannot be denied that the expression “holding a judicial office” signifies more than discharge of judicial functions while holding some other office. The phrase postulates that there is an office and that that office is primarily judicial. Office means a fixed position for performance of duties. In this case the distinction was unsubstantial because the Magistrate was holding a fixed position for nineteen years and performing functions primarily of a judicial character. The case was not fit for interference by a writ in view of the provisions of Section 9 of the Act.”

The Bench, while dealing with the case of *Labour Law Practitioners’ Association (supra)*, found that this judgment should not be interpreted narrowly to exclude from judicial services, new hierarchy of Civil Courts being set up which are headed by a Judge who could be considered as a District Judge bearing in mind the extensive definition of the term in Article 236. We have no hesitation in noticing that the judgments of the Constitution Bench of this Court in the cases of *Chandra Mohan* and *H.R. Deb (supra)* are binding and they have taken a view that the expression ‘judicial service’ has to be confined to the persons appointed as Judges under the relevant Rules and the provisions contained in Articles 233 and 234 of the Constitution. We have already noticed that in the case of *Labour Law Practitioners’ Association (supra)*, the Court was

primarily concerned with ensuring that Labour Court Judges who were performing judicial functions should maintain independence of judiciary and they should be placed under the control of the High Court and the appointments to those offices should be made in conformity with Article 234 of the Constitution. Thus, this judgment can hardly be cited to support the proposition advanced by the petitioners. 'Judicial service' as understood in its 'generic sense', may impliedly include certain other services for limited purposes but such other services may not be judicial service *stricto sensu* as contemplated under Articles 233 and 234 of the Constitution.

In this view of the matter, it is difficult for the Court to hold that the Family Court Judges will form part of the cadre of the Judicial Services under the State of Maharashtra as contemplated under Rule 3 of the Rules of 2008.

Is the claim of parity put forward by the petitioners sustainable in law?

We may examine the preamble and statement of objects and reasons of the Act at this juncture.

In order to clearly understand the object of the Legislature in establishing Family Courts, reference to the recommendations of the Law Commission would be useful. In its 59th Report, the Law Commission emphatically recommended that the court, in dealing with the disputes concerning family, ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts for an amicable settlement before the commencement of the trial. The same view was reiterated in the 230th Report of the Law Commission. Despite the amendment to the Code of Civil Procedure, it was felt that the matters concerning family disputes were not being dealt with a conciliatory approach. Thus, the Bill, *inter alia*, provided for establishment of Family Courts by the State Governments. The State Governments were expected to set up these Courts and family disputes were to be dealt with by these specially constituted Courts. The most important feature of the preamble of the Act was, “establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith”. This sufficiently indicates the limited jurisdiction that was vested in the Family Court under the provisions of the Act. The

primary purpose of the Court was to promote conciliation and amicably settle the matters relating to matrimonial and family disputes rather than adjudicate on the same.

This analysis gives us a bird's eye view with regard to constitution and functioning of the Family Courts. Where the jurisdiction of the Civil Courts and the Criminal Court in relation to the matters specified under Section 7(1) of the Act were specifically excluded, there it also necessarily implies that the Family Courts have the jurisdiction only to deal with the matters specified in the Explanation to Section 7(1) and none other. Thus, it is a Court of limited jurisdiction.

According to the petitioners, they have been performing the functions of a Judge by presiding over the Family Courts and, thus, are entitled to be considered as part of the judicial services of the State and, consequently, would be deemed to have held 'judicial office' in terms of Article 217 of the Constitution. It is, therefore, of some relevance to examine the points of similarity and distinction between the Family Courts on the one hand and Courts presided

over by the members of the higher judicial services of the State of Maharashtra on the other, which are as follows:

Sl.No.	District Court	Family Court
1.	Court of District Judge is created under constitutional provisions read with the Rules of 2008 for the Higher Judiciary.	It is created by the statute, that is, Section 3 of the Act
2.	District and Sessions Judges are appointed in accordance with the provisions of Article 233 read with Rules 5 and 6 of the Rules of 2008.	The Family Court Judges are appointed in accordance with the provisions of Section 4 of the Act.
3.	District Judges discharge Judicial functions.	Judges of the Family Court also discharge judicial functions under the Act.
4.	The District and Sessions Judge exercises and decides all kind of Civil/Criminal cases. They also exercise original, appellate and revisional jurisdiction. In other words they exercise a much wider jurisdiction	The Presiding Officer of the Family Court exercises a limited jurisdiction and decides matters which strictly fall within the ambit and scope of Explanation to Section 7(1) of the Act only. Thus, they exercise a limited jurisdiction.
5.	The Civil Courts are expected to refer the matter to the appropriate forum in accordance with the provisions of Section 89 of the Code of Civil Procedure. But they have to decide the matter, primarily, on merit and by answering each issue of law and fact.	The Family Court in terms of the object of the Act is, primarily, required to make efforts of conciliation and every attempt should be made to settle the matter and then alone it can travel to the jurisdiction of determination within the limited scope as spelt out under the provisions of the Act.
6.	Under Article 233(2) of the Constitution, a person in the service of Union or the State is	Under the advertisement issued for appointment to the Judge of the Family Court as well as

	not eligible even to apply for the post of the District and Sessions Judge. It is primarily advocates with seven years of practice who are entitled to apply for the post. They, in accordance with the terms and conditions of Rule 6 of the Rules of 2008, have to pass written competitive examination by obtaining at least 50% marks in each paper and in aggregate and 40% in the vivavoce before they can be considered fit to be appointed to that post.	under the provisions of the Act, the ambit of the persons eligible to apply is much wider and even a person in service of the Union or a State could apply and be appointed to that post. In fact, if they have experience, through service or otherwise, of settlement of family disputes, they are required to be given preference in matters of appointment. They do not have to compete in any written examination but, like the petitioners, are primarily selected by an interview alone.
7.	The persons belonging to the cadre of District and Sessions Judges had earlier dealt with all the cases including family and matrimonial cases before Section 8 of the Act came into force. Even after exclusion of jurisdiction in terms of Section 8 of the Act, they exercise jurisdiction on much wider field and subjects.	The Family Court exercises jurisdiction only with respect to the matters specified in Section 7(1) of the Act over which the jurisdiction of the Civil Court is excluded in terms of Section 8 of the Act.
8.	The District Judge and particularly the Principal District and Sessions Judge exercises vast administrative as well as judicial control over the courts subordinate to the District Court.	The Judge of the Family Court hardly exercises any administrative jurisdiction and has no administrative control over any other court.
9.	There is complete freedom to the lawyers to appear and assist the Court in the determination of different proceedings before it. This	The right of representation and assistance by lawyers before the Family Court is totally restricted in terms of Section 13 of the Act.

	helps the District and Sessions Judge to get a better experience in different fields of law.	
10.	The Civil Courts have to work strictly in accordance with law and adhere to the provisions of the Evidence Act, Code of Criminal Procedure and Code of Civil Procedure.	The Family Court are not strictly required to record evidence and perform their functions in accordance with the provisions of the Code of Civil Procedure and the Indian Evidence Act. In terms of Section 14, they can evolve their own procedure for deciding the proceedings pending before it.

In view of the clear points of distinction, which are substantial and affect the learning, performance and discharge of judicial duties, the disparity between the Judges of the Family Court and the members of the Higher Judicial Services of the State of Maharashtra is discernibly demonstrated. Keeping in view the kind of jurisdiction they exercise while deciding cases, it is difficult for the Court to hold that they are at parity and their services are interchangeable to the extent that the Presiding Officers of the Family Court would be granted the stature of the members of the Higher Judicial Services of the State.

Proper administration of justice, being one of the main constitutional goals, has to be in consonance with the expectations of the society and with definite expertise in all fields of law. Administration of justice, *per se*, takes within its ambit, primarily, judicial experience and expertise by determining disputes between the parties in accordance with law as well as ensuring proper administration within the hierarchy of Courts. The members of the Higher Judicial Services perform duties like maintenance of records as per Rules, inspection of other Courts, inspection of jails and ensuring proper adherence to the prescribed procedures. Even the Judges of the Family Court may be performing such functions but definitely to a very limited extent. Their experience in the judicial field as well as in channelizing the administration of justice is comparatively of a narrower nature.

Therefore, we are unable to hold that by necessary implication or on the claim of parity, the Presiding Officers of the Family Courts can be deemed to be the members of the Higher Judicial Services (District and Sessions Judges) of the State of Maharashtra in terms of the constitutional provisions and the relevant Rules.

‘Judicial Office’ within the meaning of Article 217

Even if, for the sake of argument, we accept the contentions raised on behalf of the petitioners, the most significant question that would require consideration is whether they hold a ‘judicial office’ within the meaning of Article 217 which is a condition precedent for consideration for elevation to the High Court.

For the purpose of examining the issue before us, it will be appropriate to examine the scheme of Article 233 along with Article 217 of the Constitution. Article 233(2) provides that a person in service of the Union or the State Government is not eligible to be considered for appointment as District Judge and who has not been an advocate or a pleader for not less than seven years. This clearly shows the constitutional mandate to ensure independence of judiciary in comparison to other organs of the State. In contradistinction to this, a person in service of the Union or the State would be eligible to be appointed as Judge of the Family Court. Article 217(2) of the Constitution has been worded in a negative language. It states that a person shall not be qualified for appointment as Judge of the High Court unless he satisfies all the

conditions stated in that Article. In terms of Article 217(2)(a), a person should have at least for ten years held a 'judicial office' in the territory of India. Thus, the entire emphasis is on the expression 'judicial office'. The expression 'judicial office' has nowhere been defined in the Constitution of India unlike 'District Judge' or 'Judicial Service' which expressions have been explained under Article 236 of the Constitution of India. Still this expression has come up for consideration of this Court on different occasions and in different contexts. In the case of *H.R. Deb* (supra), this Court considered the distinction between 'judicial office' and 'judicial service' and held that expression 'judicial office' signifies more than discharge of judicial functions. The phrase postulates that there is an office and that office is primarily judicial. In the case of *Shri Kumar Padma Prasad v. Union of India* [(1992) 2 SCC 428], this Court was considering whether the Legal Remembrancer-cum-Secretary (Law and Judicial) and Assistant to Deputy Commissioner, having powers analogous to First Class Judicial Magistrates, was holding a judicial office for the purposes of appointment as Judge of the High Court. The Court, while answering the question against the recommendation, held as under:

“21. This Court has thus authoritatively laid down that the appointment of district judges under Article 233(2) can only be from the judicial service of the State as defined under Article 236(b) of the Constitution.

22. It is in the above context that we have to interpret the meaning of expression “judicial office” under Article 217(2)(a) of the Constitution of India. The High Court Judges are appointed from two sources, members of the Bar and from amongst the persons who have held “judicial office” for not less than ten years. Even a subordinate judicial officer manning a court inferior to the District Judge can be appointed as a Judge of a High Court. The expression “judicial office” in generic sense may include wide variety of offices which are connected with the administration of justice in one way or the other. Under the Criminal Procedure Code, 1973 powers of judicial Magistrate can be conferred on any person who holds or has held any office under the Government. Officers holding various posts under the executive are often vested with the magisterial powers to meet a particular situation. Did the framers of the Constitution have this type of ‘offices’ in mind when they provided a source of appointment to the high office of a Judge of High Court from amongst the holders of a “judicial office”. The answer has to be in the negative. We are of the view that holder of “judicial office” under Article 217(2)(a) means the person who exercises only judicial functions, determines causes inter-parties and renders decisions in a judicial capacity. He must belong to the judicial service which as a class is free from executive control and is disciplined to uphold

the dignity, integrity and independence of judiciary.”

In view of the above enunciated law, the expression ‘judicial office’ should be construed in a manner which shall be in conformity with the constitutional scheme. Judicial office may be read in conjunction with the expression ‘judicial service’. The expression ‘judicial service’ cannot be given a wider meaning than the meaning given to it under the Constitution itself. To expand that meaning to the extent that all services dealing with the process of determination of disputes should be included, would tantamount to introducing words which have not been used by the Constitution.

Such approach may not be possible and in any case would not serve the constitutional ends stated in Articles 217(2)(a), 233 and 234 of the Constitution. It is an established practice that for elevation to the High Court, normally, the members of the Higher Judicial Services are considered on the basis of merit-cum-seniority. Keeping in view the limited exposure that is available to the Presiding Officers of the Family Court, it may not be feasible to hold that such officers are holding a ‘judicial office’ in terms of Article 217(2)(a) and are eligible for consideration for elevation to the High Court. The

scheme of Chapter V of Part VI of the Constitution has its own effect on the meaning of the expressions 'judicial office' as well as 'judicial service'. The Judges are not employees of the State. As members of the judiciary, they exercise sovereign judicial powers of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the bureaucracy or the members of other services. With the development of law, numerous tribunals and quasi-judicial bodies have been created to determine the disputes between the parties. Functions of such tribunals are, primarily, quasi-judicial and in the realm of civil jurisprudence alone. In other words, such tribunals or bodies exercise a very limited jurisdiction. It will not be appropriate to treat them as an inextrical part of State judicial services or call them Courts as understood in our Constitution, merely because they give final decision, because they hear witnesses, because two or more contesting parties appear before them, because they give decisions which affect the right of the parties and an appeal might be provided against their decision. Even the Government, in its hierarchy, is now vested with the powers of limited adjudication but that does not mean that all such persons shall be deemed to be the members of the judicial services and

would hold judicial office under the Constitution. In the case of *Labour Law Practitioners' Association (supra)*, this Court referred to its earlier judgments and reiterated with approval that 'judicial office' under Article 217(2)(a) must be interpreted in consonance with the scheme of Chapter V and Chapter VI of Part VI of the Constitution. So construed, it means a 'judicial office' which belongs to the judicial services as defined under Article 236(b) of the Constitution. This Court, in the case of *Shri Kumar Padma Prasad (supra)*, also held that when a person is not eligible to be appointed as District Judge, it would be mockery of the Constitution to hold that he is eligible to be appointed as Judge of the High Court. The constitutional scheme is clear that independence of the judiciary is the basic feature of the Constitution. Our Constitution, unlike the Australian Constitution in which there is rigid separation of powers, does not provide that judicial powers can be conferred only on the Courts properly so called. This being the underlining feature of the constitutional provisions, it would not be in conformity with the constitutional mandate to designate every institution, determining disputes of civil nature, a 'Court' or the person presiding over such institution as holding a 'judicial office'.

For the reasons afore-recorded, we have no hesitation in holding that the Principal and other Judges of the Family Court may be 'Judges' presiding over such courts in its 'generic sense' but *stricto sensu* are neither Members/integral part of the 'Judicial Services' of the State of Maharashtra as defined under Article 236 nor do they hold a 'judicial office' as contemplated under Article 217 of the Constitution of India. Thus, they do not have any *jus legitimimum* to be considered for elevation to the High Court. Therefore, we find no merit in this Writ Petition. The same is dismissed.

However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[Swatanter Kumar]

.....J.
[Chandramauli Kumar Prasad]

New Delhi
November 11, 2010