CHAPTER 5

The PWD Act 1995 – A Critical Analysis

Introductory

India was among the first to sign and ratify the UN Convention on Rights of Persons with Disabilities (UNCRPD)\(^1\). The Convention came into force in May 2008. In fulfillment of its obligations under the UNCRPD, India is required to bring in laws and policies in harmony with the Convention. In order to harmonise the provisions of the law with the spirit and general principles of the UNCRPD, as well as other legislations on the subject, the Ministry of Social Justice & Empowerment, Govt. of India constituted a Committee on 30.04.2010, consisting of experts and representatives from various stakeholders to draft a new legislation. The draft Rights of Persons with Disabilities Bill 2011 (RPDB), which is proposed to replace Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter PWD Act), has already been submitted by the Committee and the same is in circulation for quite sometime; but without any concrete action\(^2\).

\(^{1}\)India ratified it on 1\(^{st}\) of October 2007

\(^{2}\)In India, currently the legal rights of persons with disabilities (PWDs) are protected by the Persons with Disabilities (Equal Opportunities) Act 1995 (PWD Act 1995). The Government of India appointed a Committee chaired by Dr Sudha Kaul to draft a new law, and this Committee has submitted a draft Rights of Persons with Disabilities Bill 2011 (RPDB). The draft bill is
While India was among the first to sign and ratify the UN Convention on Disability, it has not still incorporated the provisions of the Convention within its domestic laws. India is also not a signatory to the Optional Protocol to the UN Convention on Disabilities; and, in view of this, it has managed to safeguard itself in case of not fulfilling the commitments made under UNCRPD. The PWD Act, enacted in 1995, still remains the only major legal instrument for the persons with disabilities. This Chapter, accordingly, makes a critical analysis of the PWD Act, including the major weaknesses of the Act. More prominently, it covers the judicial interpretation of the PWD Act (including important judgements of the Courts in India in connection with the Act). A brief analysis of the proposed amendment to the PWD Act, namely the draft Rights of Persons with Disabilities Bill 2011 (RPDB) has also been covered.

5.2: The PWD Act – A Brief Introduction

The inclusion and treatment of the disabled persons on the basis of “equality” emerged as major issues in India in early 1980s, more particularly with the declaration of the year 1981 as International Year of Disabled Persons. A Working Group, set up in July 1980, came out with a draft “Disabled Persons (Security & Rehabilitation) Bill in 1981, the International Year of Disabled Persons. Since then, there was a sustained campaign for a comprehensive legislation for persons with disabilities.
In 1987, a Committee was constituted with Justice Bahrul Islam as Chairman. The Committee submitted its report in June 1988 with wide ranging recommendations concerning various aspects of rehabilitation, e.g., prevention, early intervention, education, training, employment, etc. The Committee's recommendations became a matter of intense debate and discussion at different levels for quite long time. However, since relief and rehabilitation of the disabled is mentioned in the State List in the Constitution, the Parliament of India lacked jurisdiction in passing a comprehensive legislation at the national level.

In the meantime, India became a party to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region, which was adopted at the Meeting to Launch the Asian and Pacific Decade of Disabled Persons 1993 - 2002 convened by the UN Economic and Social Commission for Asia and Pacific at Beijing on 1st December 1992. This Proclamation emphasized on enactment of legislation aimed at equal opportunities for persons with disabilities, including protection of their rights and removal of discrimination. India's participation in the Proclamation made it possible for the Parliament of India to enact a comprehensive law for persons with disabilities, because Article 253 of the Constitution of India allows Parliament to enact a law even in respect of State List in order to give effect to international commitment.
Because of long and continued campaign for a comprehensive disability legislation and also because of its international commitments to implement the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region, India enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (Act 1 of 1996), which was passed unanimously in both houses of the Parliament on 22nd December 1995 and got the assent of the President of India on 1st January 1996. The Government notified the Act on 5th January 1996 and it has been in effect from 7th February 1996. In fact, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PWD Act) was enacted because of strong NGO movement and intense lobbying by various disability groups to safeguard the rights of persons with disabilities.

The PWD Act is a combination of service-oriented and right-based (mainly socio-economic) legislation, and is based on the following principles:

- prohibition of discrimination on the ground of disability in different spheres of life
- positive discrimination in favour of persons with disabilities
- grant of relaxation/concession to disabled persons to overcome their specific disabilities
- inclusion of persons with disabilities in main stream through specific policies and programs

The PWD Act consists of 14 Chapters and 74 Sections, which are further divided into several sub-sections. The Act defines seven broader categories of disabilities namely

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'blindness'; 'low vision'; 'leprosy-cured'; 'hearing impairment'; 'locomotor disability';
'mental retardation'; and 'mental illness' (Section 2 (i)). It further categorizes 'person
with disability' according to the degree of disability: mild, moderate, severe, or
profound. Only those who belong to moderate, severe, or profound categories of
disability listed above and have over 40% disability are entitled to benefit under the Act
(Section 2 (i)).

The extent and degree of disability is ascertained by a medical board consisting of at
least three members appointed by the central/state government, at least one of whom
should be a specialist in the relevant disability (Section 2 (p)). Among other things, the
Act provide for rehabilitation and integration of the disabled into society, including the
prevention of disabilities, protection of rights, provision of medical care, education,
training, employment, barrier-free environment for persons with disabilities. Most
importantly, there is an exclusive chapter on "non-discrimination" that deals with
removal of any discrimination against persons with disabilities in the sharing of
development benefits. The Act also establishes National and State Commissioners for
Persons with Disabilities. It is, in fact, the first disability legislations in India endorsing
the disabled have a right of access to education, vocational training, employment

4 The Chief Commissioner of the Center and Commissioners for persons with disabilities in the
states are responsible for monitoring the implementation of the provisions under the Act and
overseeing utilization of the budget allocated to each Commissioner. The Commissioners are
authorized to take up complaints relating to deprivation of rights of the persons with disabilities
or regarding the non-implementation of laws, rules, administrative orders etc. relating to
persons with disabilities.
opportunities, and some other sector specific rights and entitlements\textsuperscript{5}. The Act also establishes the responsibility on the appropriate Governments and authorities to ensure the realization of the rights of the disabled persons coming under the various provisions of the Act.

The PWD Act requires state governments to carry out surveys concerning causes of occurrences of disabilities and screen children at least once a year for identifying "at-risk" cases to promote methods of preventing disabilities. They must provide training facilities to staff at the primary health centers and sponsor awareness programs for disseminating information on general hygiene, health, and sanitation. They must also take measures for pre-natal, perinatal and postnatal care of mothers and children. The Act provides that a minimum of 3 percent of seats be reserved for the persons with disabilities in government educational institutions (Section 39). There is a similar provision in case of government employment (Section 33)\textsuperscript{6} and poverty alleviation schemes initiated by the government (Section 40). Section 41 provides for incentives to employers to ensure that at least five percent of their work force was composed of

\textsuperscript{5} such as special insurance schemes for employees with disabilities, housing for persons with severe disabilities, etc.

\textsuperscript{6} Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 provides for a reservation of 3 percent in the vacancies in identified posts (1 percent each for persons with blindness or low vision, hearing impairment, and locomotor disability or cerebral palsy) in Government establishments including the Public Sector Undertakings.
persons with disabilities. Sections 44, 45 and 46 of the Disabilities Act 1995 guarantee access without discrimination. Section 47 prohibits discrimination when an employee acquires disability during service and also provides that an employee, who acquires a disability during the service, may not be dispensed with or reduced in rank by the employer. The Act mandates that such an employee be assigned some other work, with the same pay-scale and service benefits.

The major chunk of the benefits provided for in the legislation is, however, in the nature of welfare services and special schemes for the persons with disabilities. Under the Act, State governments and the local authorities are required to promote a disabled child’s integration with other students and ensure that he has access to free education; and, if necessary, special schools in public and private sectors must be created for the special education of disabled children. The Act mandates that research may be initiated by official and non-official agencies to design and develop new teaching materials or other items which may help a disabled child to obtain equal opportunity in education. Government shall make arrangements for conducting part-time classes for children with disabilities, who could not complete their education; impart non-formal education in rural areas. Government entities also can establish teachers’ training courses and institutions and help other private organizations develop such training. Governments

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and appropriate authorities are under an obligation under the Act to provide transportation facilities and supply school books to disabled children, as well as to remove barriers to their movement in educational institutions, and, if necessary, to restructure school curriculum for the benefit of such children. The Act also provides for grant of scholarships to students with disabilities.

Similarly, in the field of employment opportunities, the Act directs the government to frame schemes to provide for training of persons with disabilities; relaxation of upper age limit; health and safety measures and creation of non-handicapping workplaces; incentives to employers in the public and private sectors for employing persons with disabilities and so on.

To facilitate access to public spaces, the Act talks about making the compartments and toilets in trains, buses, vessels and aircrafts accessible to the persons with disabilities. Additionally, for barrier-free access and movement of the disabled persons, the Act talks about installation of auditory signals at road crossings and elevators; curb cuts and engraving on the surfaces of roads, pavements and railway platforms; and ramps in public buildings, hospitals etc. However, these cannot be claimed as a matter of right, as their availability is subject to either formulation of schemes by the government or the 'economic capacity and development' of the State. The Act also provides for concessional allotment of land and housing for the disabled and for the implementation of various schemes for the disabled.
The PWD Act establishes Central Co-ordination Committee at the federal level, and State Co-ordination Committees and Executive Committees at the state level to review and monitor compliance with the Act, to assess the impact of government policies on the persons with disabilities and advise the government on important policy decision pertaining to the persons with disabilities.

In brief, the Persons with Disabilities Act, 1995 Act has made an effort to place positive obligations on the state to provide for access to education, employment, healthcare, barrier-free environment and social security for disabled persons. While positive obligations have been placed on the government to act on the life and dignity of disabled persons, there is also a need for sensitization on how to respond to the needs of such persons at the level of the family and society. Majority of the stakeholders under the PWD Act seemed to be unaware of the various provisions of the Act itself. Limited awareness of the PWD Act has, in fact, resulted in slow implementation of its

- **8** consisting of the Secretary, Ministry of Social Justice and Empowerment, Government of India, who is the Chairperson of the Committee; the Chief Commissioner, the Director-General for Health Services, the Director-General of Employment and Training, six Joint Secretaries to Government, the Financial Advisor of the Ministry of Finance, the Advisor of the Railway Board, four state representatives (by rotation), one member representing the interests of the group, and five disabled persons (including women with disabilities).

- **9** The Executive Committee is responsible for carrying out the decisions of the Central Coordination Committee. It may also perform such functions as may be assigned to it by the Central Coordination Committee. It holds a meeting at least once every three months and observes procedural rules as may be prescribed by the central government. The Executive Committee may associate with such persons whose assistance and advice it may need to obtain in the performance of its functions.
provisions\textsuperscript{10}. Further, the quasi-judicial bodies of Commissioners of Disability have limited powers, and therefore have failed to produce a noticeable change in society.

\textbf{5.3: Weaknesses of the PWD Act}

At the time of the drafting/enactment of the PWD Act, there was already a shift in the definition of disability throughout the world from a medical problem to a social model of disability, which emphasizes and enhances disability rights within the human rights perspective. The definitions of disability under the Disabilities Discrimination Act 1995 of UK and the American with Disabilities Act 1990 (which were enacted almost at the same time or even before the enactment of the PWD Act) recognize a social model of disability. However, the Indian legislations on disability have not been able to accept this shift in the perception of disability. The PWD Act has tried to define disability by way of listing separate categories of disability under Section 2(i) on the basis of certain medical/physical characteristics. In real, the term ‘disability’ is included in a very narrow sense in the Act. The Act has simply incorporated a medical definition of disability\textsuperscript{11}. Even the medically defined disability under the Act it not complete, as it has left out many of the important medical categories that are recognized or defined as disability world over. The PWD Act fails to take into account that the term “people with

\textsuperscript{10} Despite being on the statute book for more than 16 years, the Act is still not understood well by lawyers, judges, academics, students, and the civil society groups [Jayna Kothari, \textit{The Future of Disability Law in India}, xvii (Oxford University Press: New Delhi, 2012)]

disabilities” encompasses a very wide range of differing life experiences and physical
and mental states.  

Many of the provisions made by the Act in support of persons with disabilities come
with the rider “within the limits of economic capacity”. Thus, it is very easy for the
appropriate authorities to get away without effectively implementing the provisions of
the Act. Employment is really a problem for person with disabilities. To quote Kishor
Bhanushali, “Unemployment rate among person with disabilities is more than double
the unemployment rate among their non-disabled counterparts....The three percent
reservation as provided by PWD Act has remained on paper”.

Most of the policies and schemes of government are guided by medical model rather
than social or human rights model. As per the original provisions of the Act, the three
percent reservation is limited to only three categories of disability (namely blindness or
low vision; hearing impairment; and locomotor disability or cerebral palsy, with a 1
percent reservation for each category) whereas the Act defines seven categories of
disability. The Act provides for employment to only those people who come under these

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12 Jayna Kothari, “The UN Convention on Rights of Persons with Disabilities: An Engine for
Law Reform in India” XLV (18) Economic & Political Weekly 70 (May 1, 2010)

13 this issue of economic consideration was in fact raised in the case of Javed Abidi vs. Union of
India and Ors (the details of this case law is included under the section on ‘Judicial
Interpretation of PWD Act' of this Chapter)

14 Amendment to the Act further expanded this to 5 percent with the additional 2 percent
reservation for mentally retarded, cerebral palsy and autism; but mentally illness category still
left out of reservation provisions
three stated categories of disability. The persons with mental illness and mental disability are expressly left out of it irrespective of the extent and severity of their illness. The mentally disabled category of people has been officially recognised by the PWD Act; but they are denied any employment quota. The Act provides reservation for the employment of the disabled persons in government sector only\(^\text{15}\); and at the same time provides for an "exemption clause".

The Act provides for 'identification of jobs' that can be reserved for persons with disabilities; and, this remains the major stumbling block for implementing reservation. While the lists of identified jobs given by state governments is often very restrictive and arbitrary and vary from the jobs identified by the central government, many establishments cited, till recently, the non-identification of jobs as the reason for non-implementation of reservation\(^\text{16}\). Further, non-compliance by appropriate authorities does not impose any specific sanction or responsibility to such authorities. In case of the

\(^{15}\) The interpretation of the PWD Act by the Bombay High Court, in the case of Shree Satish Prabhakar Padhye and Others vs. Dalco Engineering Private Ltd., found that non-discrimination in employment would also extend to the private sector since the term 'establishment' in Section 2(k) has been defined in such a manner that it would cover private establishments as well. However, the Supreme Court later reversed this decision, in the case of Dalco Engineering Private Ltd. vs. Shree Satish Prabhakar Padhye [Civil Appeal No. 1886 of 2007], and held that the PWD Act would not be applicable to private establishments [Jayna Kothari, supra note 10, p. 95]

\(^{16}\) In view of the difficulties arising out of the non-identification of jobs and non-compliance of the provision of the Section 32 of the Act, the Supreme Court in a landmark judgement in the case of Government of India vs. Ravi Prakash Gupta [7 SCC 626 (2010)] held that identification of jobs was not a mandatory for reservation to be done.
private sector the provision for reservation of jobs has remained at recommendation level whereby the Act talks about the “incentive policy”, which has not been worked out in great details. And again the incentive provision has been made conditional to the Government’s “economic capacity and development”.

As per a World Bank study, while the PWD Act was an important intervening policy development in education and its position on a rights-based entitlement to basic education was clear and consistent with India’s international commitments on education of children with disabilities (CWD) its guidance on modalities for ensuring realization of the right was less so, with all options for delivery of education for CWD allowed for and not as much specific guidance on which was the priority mode anticipated and in what circumstances other modes would be appropriate. It gave no guidance on who should take the decisions on the most appropriate form of education delivery for a specific child with a disability.

17 A scheme of incentives to employers in the private sector for providing employment to persons with disabilities has been launched with effect from 1st April 2008. Under the Scheme, called “Scheme of Incentives to Employers in the Private Sector for Providing Employment to Persons with Disabilities”, the Government of India provides the employer’s contribution for Employees Provident Fund (EPF) and Employees State Insurance (ESI) for 3 years, for employees with disabilities employed in the private sector on or after 01.04.2008, with a monthly salary upto Rs.25000.


19 Id.
Further, Section 39 which states reservation of 3 per cent seats in government institutions and government-aided institutions is mentioned under the employment chapter and not under that of education. In order to deny seats to the disabled, the convenient excuse taken by educational institutions is that the Act talks about reservation of jobs and not admissions in educational institutions. In fact, this confusion in Section 39 led to several interpretation and re-interpretation in various Court cases, which are being discussed under the section on ‘Judicial Interpretation of PWD Act’ of this Chapter. The Act doesn’t define parameters of segregationist, integrationist, and inclusive education. The lack of ideological commitment of the government towards this issue is reflected in the various forms.

Another major weakness of the PWD Act is that it does not provide for a powerful implementing body. The Chief Commissioner and Commissioners for Persons with Disabilities are envisaged to be the watchdog bodies with the powers of a civil court; but very few power and facilities have actually been provided to these offices. The fundamental limitation of the office is that its only legal sanction in case of a breach is to “take up the matter with the appropriate authorities”\(^\text{20}\). The Office does not itself have enforcement powers of a court or administrative tribunal; it can and does make orders, but can not enforce compliance; and as such, its effective powers are either “naming and

\(^{20}\text{Id.}\)
shaming” or encouraging referral to the court system\textsuperscript{21}. These offices are in fact not equipped well with adequate human and office resources.

While the title of the PWD Act mentions ‘equal opportunities’ and ‘protection of rights’, it fails to state clearly that persons with disability shall be treated as equal citizens before the law and shall not be discriminated on the basis of their disability\textsuperscript{22}. A general explicit provision on ‘equal citizens before the law’ and ‘non-discrimination on the basis of disability’ was highly desirable. The overall policy and delivery model remains a rather traditional administratively-driven mechanism, with limited sense of genuine partnership in policy development and service delivery between the public and non-public sectors\textsuperscript{23}. The Act does not explicitly talk anything about consultation/participation of the disabled persons and their organizations in the design and development of policies and programmes, including interventions or monitoring of the specific programmes.

Many of the obligations of the appropriate authorities under the Act are not specific and are, therefore, difficult to interpret in terms of enforcement. It thus seems that many of the provisions are merely statements of intent only. The Act has failed to ensure social

\textsuperscript{21} Id.

\textsuperscript{22} Section 47 of the Act talks about non-discrimination only in the case of government employment and that too mainly to address the discrimination faced by persons acquiring disability during service.

\textsuperscript{23} People with Disabilities in India: From Commitments to Outcomes, supra note 18, p. 125
protection and adequate standard of living to persons with disabilities. It does not specifically provide rights to basic services such as food, clothing, and access to clean water, sanitation, and other livelihood opportunities, etc.

In toto, the PWD Act has not been enacted with a strong anti-discrimination and human rights concerns. It is mostly a form of social welfare legislation and is not enough to guarantee people with disabilities equal rights for participation in society as fully equal citizens. To quote Jayna Kothari,

...there is no declaration of the basic rights to equality and non-discrimination and to the protection of the right to life and dignity for all persons with disabilities. Most crucially, the PWD Act does not have any clear equality guarantee for persons with disabilities. While most disability statutes such as the Americans with Disabilities Act 1990 and the Disability Discrimination Act 1995 of the UK have been primarily anti-discrimination laws protecting equality through civil and political rights, the PWD Act is an example of a statute based on redistributive social policy, giving rise to positive measures on the part of the State, but without the backing of human rights....the PWD Act in India does not have a clear articulation of equality. By not having a clear articulation of equality, even the courts, while adjudicating claims under the PWD Act, are not really informed by a rights perspective.

Several important provisions of the UNCRPD are found missing in the PWD Act. To begin with, the definition of disability under the PWD Act is very limited and narrow compared to the broader approach to disability adopted by UNCRPD. The social barriers that

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24 Kalpana Kannabiran, supra note 7, p. 22
25 Jayna Kothari, “The UN Convention...”, supra note 12, p. 65
26 Id.
27 Id., p. 69
hinder the equal participation of the disabled has not been addressed in the PWD Act. The Act has also not made any reference to civil and political rights and most importantly it has failed to include any general provision on equality, non-discrimination and reasonable accommodation for the persons with disability. The mental disability category was simply incorporated in the Act without actually providing them any rights, entitlement or services. Additionally, the PWD Act has failed to incorporate any specific provisions to address the concerns of the most vulnerable and disadvantaged disabled persons – such as women and children with disabilities, people with disability due to old-age.

5.4: Judicial Interpretation of PWD Act

The PWD Act has several ambiguities. However, the judiciary has played an active role in removing such ambiguities and making the PWD Act effective. There are several instances where the judiciary has provided specific relieves to persons with disabilities through positive interpretation of the various provisions under the Persons with Disabilities Act 1995. With few exceptions, most of the judgements of the judiciary in the disability cases have gone in favour of the persons with disabilities.

For convenience, the judgements of the judiciary in interpreting the PWD Act have been clubbed under some major themes – namely scope & definition of disability; access to education for the disabled; employment opportunities for persons with

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28 The Act has a Chapter on “Non-discrimination”; but it only talks about removing non-discrimination in certain specific sectors such as transport and employment. There is no provision in the Act that denounces discrimination.
disabilities; accessibility, barrier-free environment & land, housing, etc. for the disabled; mental disability; social security & miscellaneous provisions, and office of the commissioner of disability & implementation of the Act. For a clear understanding, each major theme has been discussed below separately incorporating the relevant/important Sections/provisions of the PWD Act at the beginning followed by the relevant judicial case laws.

5.4.1: Expansion of the Scope & Definition of Disability

Under Section 2(i) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 "disability" means the following seven categories of disability -

i. blindness
ii. low vision
iii. leprosy-cured
iv. hearing impairment
v. locomotor disability
vi. mental retardation
vii. mental illness

Further for operational and practical purposes, Section 2(t) states that "person with disability" means a person suffering from not less than 40 per cent of any disability as certified by a medical authority. If percentage of disability is less than 40 percent, the provision of the Act shall not be applicable to such persons. The seven categories of disabilities mentioned above have further been defined in the Act as follows:
Section 2(b): "blindness" refers to a condition where a person suffers from any of the following conditions, namely:

i. total absence of sight; or

ii. visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or

iii. limitation of the field of vision subtending an angle of 20 degree or worse.

Section 2(u): "person with low vision" means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of a task with appropriate assistive device.

Section 2(n): "leprosy cured person" means any person who has been cured of leprosy but is suffering from -

i. loss of sensation in hands or feet as well as loss of sensation and paresis in the eye and eye-lid but with no manifest deformity;

ii. manifest deformity and paresis but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity;

iii. extreme physical deformity as well as advanced age which prevents him from undertaking any gainful occupation, and the expression "leprosy cured" shall be construed accordingly.

Section 2(q): "mental illness" means any mental disorder other than mental retardation.

Quite a number of cases came up before the Judiciary in connection with the scope and definition of disability as contained in the Act. The judiciary, on many occasions, has
given its own interpretation of the definitions from time to time and in this process of interpretation it has in fact enlarged the scope and definition of disability. The judiciary has brought some new categories of disability within the ambit of the Act although the same have not been specifically spelt out or mentioned in the Act. Further, the judiciary seems to have de-linked the definition of ‘disability’ from the ‘disability acquired during the service’, as in the case of the later there is a specific Section (Section 47 (1)) in the Act which bars any establishment in dispensing with, or reducing in rank of an employee who acquires a disability during his service. The Madras High Court, in the case of Management of Tamil Nadu State Transport Corporation vs. B. Gnanasekaran, held that ‘acquisition of disability’ (as mentioned under Section 47 of the Act) is not same as a ‘person with disability’ and it was not necessary for the workman to establishment that he suffered from more than 40 per cent disability.

In the case of M.V. Ramana Rao vs. A.P.S.R.T.C., the petitioner, a driver employed with the respondent, was discharged from service on the grounds of a hearing impairment called ‘tinnitus’, which according to the respondent was not a disability covered under the provisions of the Act. However, the Court held that the petitioner was entitled to benefits of the Act under Section 47 and the respondent was directed to provide a suitable alternative post for the petitioner, protecting his pay scale and service benefits. The Delhi High Court, in the case of Kumar Bharat Prasad Narain Singh

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29 2007 INDLAW MAD 912; cited in Jayna Kothari, supra note 10, p. 118
30 2003 (4) ALT 150 (AP HC) [W.P. No. 3440 of 2003, judgement order dated 10.04.2003]
vs. Airports Authority of India\textsuperscript{31}, similarly upheld the petition of a person suffering from heart ailment in extending the benefit of the Act. There are many other such instances of the judiciary upholding Section 47 and some such important cases have been covered under the theme on employment opportunities for persons with disabilities.

The issue of certification of disability based on percentage of one's disability was questioned in Andhra Pradesh High Court in the case of Rasale Gopal vs. Andhra Bank\textsuperscript{32}. In this case, the petitioner, having total blindness in one eye from birth, applied for a job in the Andhra Bank but was not given the benefit under the Persons with Disabilities Act. He states that person born with one functional eye has invariably been certified as suffering with 30 per cent disability and his contention is that 'blindness' which is defined in Section 2(b) of the Act does not take in its fold the persons with only one functional eye. Another important contention made by him was that he was not being considered at par with candidates without disability. The Court said that anybody not holding a certificate of 40 per cent disability or above as required by the mandate of

\textsuperscript{31} 2005 (120) DLT 545 (Del HC) [W.P. (C) 3890/2003, judgement order dated 16.05.2005]; in this case, the petitioner, during his tenure as a co-pilot with the respondent suffered a heart attack while on duty and as a result was declared unfit to fly. He was given a fresh appointment as an Aerodrome Officer at a lower pay-scale. The High Court found that a person with a heart ailment could be extended the benefits of the law (within the ambit of Section 47) and, accordingly, the respondent was directed to place the petitioner on the pay-scale of a co-pilot and also pay him the arrears at that scale. The respondent was further directed to identify promotional avenues for the petitioner.

\textsuperscript{32} 2003 II LLJ 916 (AP HC) [W P. No. 6974 of 2003, judgement order dated 22.04.2003]
the Act, would be treated at par with all other candidates. Further, and most importantly, the Court directed that the petitioner cannot be discriminated against on the ground of partial disability meaning thereby that he has to be treated at par with candidates without disability.

As mentioned earlier, the judiciary has also de-linked definition of ‘disability’ in terms of percentage of disability from ‘disability acquired during service’. For example, the Delhi High Court in *Dilbag Singh vs. Delhi Transport Corporation*\(^3^3\) upheld the appeal of the petitioner in retaining him in jobs despite having less than 40 percent of disability. The petitioner, a bus driver with DTC, suffered injuries while on duty and was given premature retirement on medical grounds by the respondents. The Commissioner of Disabilities rejected the petitioner’s complaint on the ground that the petitioner’s disability was less than 40 per cent; but the order of the Commissioner was challenged before the High Court. The High Court in construing the scope of Section 47 of the Persons with Disabilities Act held that the provision did not use the term ‘person with disability’ but used the words ‘an employee who acquires a disability’. The Court observed the issue of ‘less than 40 percent disability’ was of no relevance for the purpose of Section 47. The order of the Chief Commissioner was accordingly quashed and the petitioner was ordered to be reinstated to a suitable post of equivalent rank with arrears and continuity of salary and increments. Additionally costs were awarded to the petitioner.

\(^3^3\) 2005 (123)DLT 318 (Del HC) [WP(C) No. 6182/2003, judgement order dated 1-8-2005]
Similar to the case of *Dilbag Singh vs. Delhi Transport Corporation*, the judgement delivered in the case of *Municipal Corporation of Greater Mumbai vs. Srirang Anandrao Jadhav*\(^{34}\) allowed an already employed person to continue in his post under the provision of Section 47 of the Act, despite he acquired disability and was certified to be only 12 percent disabled. It was not necessary for him to prove more than 40 percent disability. In the case of *V. Palanishanmugavel and Others vs. General Manager, Tamil Nadu State Transport Corporation (Madurai) Limited and Others*\(^{35}\), it was further held that for persons already in employment who acquired disability during employment there was no necessity for getting any certificate from the medical authority as contemplated either under Section 2(t) or 2(p) of the Act.

In an important case of the enlargement of the scope and definition of disability under the Act, the issue of exclusion of dwarfs (people of short stature) in the category of orthopaedically handicapped (within locomotor disability) and consequently the denial of entitlement to benefits of the State Welfare Schemes was challenged in the Andhra Pradesh High Court in the case of *Bogga Mallesh vs. The Commissioner, Disabled Welfare Department*\(^{36}\). The High Court observed that it was a matter of decision to be taken by the government, and it, accordingly, directed the State Government to take an appropriate decision within three months on whether or not dwarf persons ought to be

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\(^{34}\) 2010 II CLR 601 (Bom HC) [WP No. 1900 of 2009, judgement order dated 11-05-2010]

\(^{35}\) 2006 INDLAW MAD 2101, as cited in Jayna Kothari, *supra note* 10, p. 119

\(^{36}\) W. P. No. 22440 of 2004 (AP HC), judgement order dated 14.02.2005
included within the category of orthopedically disabled persons. Following this direction from the Court, the Andhra Pradesh government issued order treating dwarfs as orthopaedically-disabled persons.

In an interim order in the case of a public interest petition, the Delhi High Court, in the case of *Disabled Rights Group vs. Delhi University*\(^37\), included dyslexia under the category of mental illness and mental retardation, as an expansive and inclusive scope to the definition under section 2(i) of the PWD Act; and based on this order students with dyslexia were entitled to admission against the seats reserved for disabled candidates. The interim order of the Delhi High Court recognizing dyslexia within the scope of the definition of disability under the PWD Act was further re-affirmed by the significant judgement of the Bombay High Court in the case of *Vincy D'Silva vs. St. Mary's School and Others*\(^38\). In this case, the Bombay High Court recognized learning disabilities under the PWD Act; and, based on the direction of the Bombay High Court, the state government of Maharashtra formulated a scheme to provide facilities to students with learning disabilities of dyslexia (reading), dysgraphia (writing), and/or dyscalculia (mathematics)\(^39\).

In another important case of the enlargement of the scope and definition of disability under the Act, the Rajasthan High Court in the case of *Parmesh Pachar vs. Convener*,

\(^{37}\) CWP No. 10055/2004 (Del HC), interim judgement order dated 16.06.2004

\(^{38}\) W. P. No. 1744/2005 (Bombay High Court), judgement order dated 20.07.2006

\(^{39}\) Jayna Kothari, *supra note* 10, p. 48
Central Undergraduate Admission Board and Principal and Controller of S. M. S. Medical College and Attached Hospitals, included colour blindness within the scope of the definition of disability under the PWD Act and, accordingly, upheld that the petitioner with colour blindness may be granted admission to MBBS Course. However, in the case of Union of India vs. Devendra Kumar Pant, the Supreme Court found that lack of colour perception neither amounted to blindness nor low vision as defined under the Act.

5.4.2: Access to Education for the Disabled

This issue in particular has led to several petitions in Courts, including public interest petitions. However, before moving to the specific judgements involving this issue, let us look at the various provisions of the PWD Act with regard to education. In fact, a whole chapter (Chapter V) has been devoted to the provision of education under the Act. Section-wise provisions for education of the disabled are as follows:

Section 26: The appropriate Governments and the local authorities shall -
   a. ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;
   b. endeavour to promote the integration of students with disabilities in the normal schools;
   c. promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools;
   d. endeavour to equip the special schools for children with disabilities with vocational training facilities.

41 AIR 2010 SC 1253 [Civil Appeal No. 4668 of 2007, judgement order dated 09-07-2009]
Section 27: The appropriate Governments and the local authorities shall by notification make schemes for-

a. conducting part-time classes in respect of children with disabilities who having completed education up to class fifth and could not continue their studies on a whole-time basis;

b. conducting special part-time classes for providing functional literacy for children in the age group of sixteen and above;

c. imparting non-formal education by utilizing the available manpower in rural areas after giving them appropriate orientation;

d. imparting education through open schools or open universities;

e. conducting class and discussions through interactive electronic or other media;

f. providing every child with disability free of cost special books and equipments needed for his education.

Section 28: The appropriate Governments shall initiate or cause to be initiated research by official and non-governmental agencies for the purpose of designing and developing new assistive devices, teaching aids, special teaching materials or such other items as are necessary to give a child with disability equal opportunities in education.

Section 29: The appropriate Governments shall set up adequate number of teachers' training institutions and assist the national institutes and other voluntary organisations to develop teachers' training programmes specialising in disabilities so that requisite trained manpower is available for special schools and integrated schools for children with disabilities.

Section 30: Without prejudice to the foregoing provisions, the appropriate Governments shall by notification prepare a comprehensive education scheme which shall make provision for-

a. transport facilities to the children with disabilities or in the alternative financial incentives to parents or guardians to enable their children with disabilities to attend schools;

b. the removal of architectural barriers from schools, colleges or other institutions imparting vocational and professional training;

c. the supply of books, uniforms and other materials to children with disabilities attending school;

d. the grant of scholarship to students with disabilities;
e. setting up of appropriate fora for the redressal of grievances of parents regarding the placement of their children with disabilities;
f. suitable modification in the examination system to eliminate purely mathematical questions for the benefit of blind students and students with low vision;
g. restructuring of curriculum for the benefit of children with disabilities;
h. restructuring the curriculum for benefit of students with hearing impairment to facilitate them to take only one language as part of their curriculum.

Section 31: All educational institutions shall provide or cause to be provided amanuensis to blind students and students with or low vision.

In addition, Section 39 provides that all government educational institutions and other educational institutions receiving aid from the government shall reserve not less than three per cent seats for persons with disabilities. This important provision under Section 39 has however erroneously been placed in Chapter VI under the heading of 'Employment', leading to certain doubts whether reservation mentioned under this Section is meant for the purpose of admission in academic institutions or not. This doubt was later on explicitly and unequivocally clarified by the Supreme Court pointing in clear terms that the Section 39 is applicable in case of reservation in admission in academic institutions. The particular Supreme Court judgement in this regard has been covered elaborately later on.

Coming to specific case laws, the petitioner in the case National Federation of the Blind vs. Govt. of NCT of Delhi\(^4^2\) questioned the rules followed by a particular government school for blind boys, which stated that free education should be available

\(^{4^2}\) CW 6456 of 2002 (Del HC), judgement order dated 06.11.2003
only to residents of Delhi, till Class 10 and be subject to the financial capacity of the parents. The rules were contested being contrary to the provisions of Section 26 of the Act. The Court struck down the rules saying that Section 26 did not lay down a ceiling figure or area of domicile as preconditions to avail the benefits contained therein. It, instead, provided that it was the duty of the State to provide free education to children with disabilities, till the age of 18 years. The Court also stated in clear and unambiguous terms that financial constraints could be the reason to suffocate statutory provisions but the Union government ought to make the necessary provisions.

In the case of Social Jurist, a Lawyers’ Group vs. Union of India⁴³, a petition was filed in Delhi High Court seeking directions to the government, to frame an education scheme in accordance with Section 30 with provisions for transport facilities, removal of architectural barriers in the school, supply of books, uniform and other material, scholarship grants, setting up of appropriate fora for the redressal of grievances of parents regarding the placement of their children, suitable modification in the examination system, to eliminate purely mathematical questions for the benefit of blind/low vision students, and restructuring the curriculum for the benefit of children with hearing impairment to facilitate them to take only one language as part of their curriculum. In view of this appeal, the High Court issued notices in January 2003, on the basis of which the Union government framed an education scheme in accordance with Section 30, containing specific provisions for transport facilities, removal of

⁴³ CWP No. 1342 of 2003 (Del HC), judgement order dated 10.11.2004
architectural barriers, supply of uniform, books etc., grants of scholarships, setting up of redressal for a suitable modification in examination system and restructuring of curriculum, and the same was notified vide notification dated 4.11.2004.

In another important judgement, the Bombay High Court, while making a positive interpretation of the Section 30 of the PWD Act in the case of Dhawal S. Chotai vs. Union of India, allowed the petitioner with cerebral palsy to write the examinations for the Chartered Accountants Course with three extra hours. The Court also directed the institute to extend all cooperation to the petitioner, in continuing with the examination for the three extra hours.

Section 27 (f) of the Persons with Disabilities Act that casts a duty upon appropriate governments to make available special books for the disabled students free of cost. However, owing to the lack of availability of school text books in braille for blind students studying in Classes I to XII in schools of Delhi, the petitioner in the case of All India Confederation for the Blind vs. Govt. of NCT of Delhi sought necessary directions from Delhi High Court. The Court, accordingly, directed the government of NCT of Delhi to ensure that Braille textbooks were made available to students on a priority basis so that they could avail the facility in the forthcoming public examination. The Court was given assurance by the respondents that all the necessary requirements

44 AIR 2003 Bom 316 (Bom HC) [WP (L) No. 1256 of 2003, judgement order dated 30.04.2003]
45 CWP 3944 of 2007 (Del HC), judgement order dated 21.11.2007
with regard to Braille textbooks for the year 2008-09 would be taken care of by the beginning of July 2008.

Some initial interpretations of the judiciary involving the issue of reservation in admission in academic institutions under Section 39 of the Act seemed to be very absurd and fallacious. For example, in the case of *Binita Senapati vs. State of Assam and Ors.*\(^{46}\), the petitioner, who was suffering from locomotor disability with 45 percent disability as certified by the authority of Guwahati Medical College, claimed that she was entitled to reservation for admission in Medical College as per Section 39 of the Act; but she was denied the same. The Court found that Chapter V of the Act that deals with "Education" nowhere provides for reservation of seats in educational institutions; and observed that the legislature in its wisdom did not make any mention of such reservation in this Chapter. Further, the Court pointed out the petitioner in the present case relied on Section 39 which falls under the Chapter VI on "Employment". The Court, accordingly, argued that extending the benefit of the Act for the purpose of admission to Medical College may not be in conformity with intention of legislature.

The writ petitioner in the case of *Naveen Kumar vs. University of Delhi*\(^{47}\), sought direction from the Court for making reservation in admission in B. E. under Section 39 of the PWD Act. It was argued by the respondent that (i) there is no reservation in


\(^{47}\) CWP No. 4657 of 2000 (Del HC), judgement order dated 24.11.2000; (2005) 1 PDD (CC) 69
educational institutions, for Section 39 relates to employment and is mentioned in Chapter VI of the Act under the heading “Employment”; (ii) there is no such reservation in University Bulletin for admission to such courses; and (iii) the petitioner is badly handicapped and may not be able to pursue the course successfully (and thus unnecessarily blocking one seat). The Delhi High Court differed and said that a bad drafting cannot and should not debar the clear intention of the legislator. In its view, the Court observed Section 39 obviously relates firstly to all educational institutions in view of its heading of the Section. The Court further observed, irrespective of the fact that it is not so mentioned or prescribed in the University Bulletin, in view of the statutory provision under Section 39 that every government educational institutions and any other educational institutions receiving aid from the government has to provide reservation in admission under Section 39.

In the case of State of Rajasthan and Anr. vs. Dr. Vijay Kumar Agarwal and Anr.\(^{48}\), the Rajasthan High Court dictated that from 7.2.1996 when the Act was enforced and Section 39 of the Act came into force, all the government educational institutions and government aided institutions were under a legal duty to reserve not less than 3 per cent seats for persons with disabilities. The Court found that there was a gross dereliction of duty to follow the law on the part of the respondents. The Court concurs that reservation had to be provided by following the procedure of framing or amending the Rules; but

\(^{48}\) CSA (W) No. 112 of 2001 (Raj HC), judgement order dated 11.5.2001; (2005) 1 PDD (CC) 76
the argument of the respondent that the procedure was not amended by the University or the State Govt. and therefore reservation being not followed amounts to frustration.

As mentioned earlier, the issue of interpretation of Section 39 of the Act as to whether reservation is applicable to admission in academic institutions or not led to a significant judgement of the Supreme Court in the case of *All Kerala Parents Assn. Hearing Imp. and Anr. vs. State of Kerala and Others*\(^49\). The Supreme Court in this case very stoutly dis-approved a judgement of the Division Bench of Kerala High Court, which came to the conclusion that since Section 39 occurs in Chapter VI dealing with employment, the expression ‘seats’ in Section 39 would really mean ‘post’ and declared that Section 39 is intended to reserve 3 percent vacancies or posts in all government or other educational institutions receiving aids from the government and not for the purpose of reservation for admission, as, education (according to the Division Bench of the Kerala High Court) has been dealt with in Chapter V\(^50\).


\(^50\) Judgement of the Division Bench of the Kerala High Court in the case of *State of Kerala and Others vs. Miss Mary Joseph (Minor) and Others* [2001 AIR, Kerala 356]; this judgement seems to have been influenced by a similar judgement delivered earlier by the Gauhati High Court in the case of *Binita Senapati vs. State of Assam* [2000 AIR Gau 1], where it was held that reservation cannot be claimed by a disabled person in the matter of admission to a medical college by *stretching* Section 39 of the PWD Act (italics mine).
Sharply criticizing the judgement of the Division Bench of the Keral High Court in the case of *State of Kerala and Others vs. Miss Mary Joseph (Minor) and Others*\(^5\), the Supreme Court in the case of *All Kerala Parents Assn. Hearing Imp. and Anr. Vs. State of Kerala and Others* made the following observation:

...Section 39 unequivocally deals with the question of reservation of seats for persons with disabilities in educational institutions of the Government, as well as institutions receiving aid from the Government. The language is clear and unambiguous, which itself indicates the legislative intent. It is well-settled that when the language of any statutory provisions is clear and unambiguous, it is not necessary to look for any extrinsic aid to find out the meaning of the statute inasmuch as the language used by the Legislature is the indication of the legislative intent. We fail to understand as to how and on what principles of construction the High Court has given a construction to the provisions of Section 39 not only by doing violence to language of Section 39, but also rewriting the provisions of Section 39. If Section 39, as has been construed by the High Court, would be interpreted to mean it relates to employment merely because the provision occurs in the Chapter VI dealing with employment then the 'educational institutions' would have to be interpreted to mean the Government post and the question of receiving aid from the Government would not arise at all. Natural and ordinary meaning of words should not be departed from unless it can be shown that legal context in which the words are used, requires a different meaning. We have therefore no hesitation to come to the conclusion that the High Court was wholly in error in construing Section 39 of the Act to mean it relates to reservation in Government employment and not in relation to admission of students with disabilities in the Government institutions as well as educational institutions receiving aid from the Government. Further, reservation in Government employment is provided under Section 33 of the Act. We, therefore, set aside the impugned judgment of the Kerala High Court and hold that Section 39 deals with the reservation of seats for persons with disabilities in Government educational institutions as well as educational institutions.

\(^5\) 2001 AIR, Kerala 356
receiving aid from the Government, and necessarily therefore the provisions thereof must be complied with.

In the case of *Social Jurist, A Civil Rights Group vs. Govt. of N. C. T. of Delhi & Anr.* 52, the Delhi High Court passed several orders/directions in connection with education of children with special needs -- such as maintenance of teacher pupil ratio of 1:5 at the secondary level and 1:2 at the primary level; granting equivalence to B.Ed. (SE) with B.Ed. (General) and to D.Ed. (SE) with D.Ed./TTC for the purpose of appointment of special teachers in all the schools; service conditions of the special teachers to be same as that of the regular teachers holding the qualification of general teachers. In fact, the Court directed for granting preference and priority to candidates holding B.Ed. (SE) and D.Ed. (SE) degrees in appointment of teachers in all their schools. The school authorities were instructed to ensure that each school shall have at least two special teachers and further that necessary teaching aids and reading materials may be provided within six months. In addition, RCI and other concerned authorities were directed to start programmes to train in-service teachers as resource teachers so that they are equipped to take care of disabled children and to start short term orientation programme for principals and educational administrators so as to sensitise them towards the needs of a disabled children.

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The practical application of the Right to Education Act 2009 for the children with disabilities led to a recent significant judgement of the Delhi High Court in the case of *Araav Porwal vs. The Mother International School and Anr.*[^53] In order to give effect to right to education for the children belonging to weaker section and disadvantaged group, the Director of Education, Govt. of NCT of Delhi, issued a Notification dated 07.01.2011 making it mandatory for schools in Delhi to make 25 percent reservation in seats for the children belonging to EWS and Disadvantaged Group (including the disabled children). The petitioner, Master Araav Porwal, being hearing impaired in both ears to the extent of 100 percent and thus a person with disability as defined under the PWD Act was refused admission by the respondent school under the “Disadvantaged Category”. The Court of the Commissioner for Persons with Disabilities observed that respondent school was under an obligation to admit the petitioner in the Disadvantaged Group in the light of the aforesaid Notification dated 7.1.2011 and the school was directed to take necessary steps for the admission of the petitioner. The respondent school stated that no such order could have been passed against an unaided private school under the Act. The Delhi High Court observed that the conduct of the respondent school amounts to frustrating the rightful aspirations of children (under the Right to Education Act 2009) and further observed that if stand of the school is accepted, it would make a mockery of a well-intentioned beneficial piece of legislation and undo all the good that is intended to be achieved through it. The respondent school was, accordingly, directed to grant admission to the petitioner in the academic session 2012-

13. Additionally, the petitioner was allowed costs of `10,000/- imposed on the respondent school, which amount to be adjusted in the school fee to be deposited by the petitioner at the time of his admission.

The Gauhati High Court in a recent case of Miss Rajashree Khound vs. The State of Assam and Others also delivered a very significant and path-breaking judgement with regard to education of the disabled under the Act, including Section 30 of the Act. The petitioner, a hearing impaired student, was selected for MBBS course for the session 2012 on the basis of her performance as un-reserved candidate in the Combined Entrance Examination. However, because of her hearing impairment (approximately 69 percent in the left and 71 percent in the right ear), she was not allowed admission. The respondent while citing the Admission Rules (Regulation for Admission of Undergraduate Students) Rules 2007 (amended up to 2012), and the Medical Council of India guidelines, argued that a candidate must be found physically fit by the Medical Examination Board at the time of admission. The respondents also cited an old Court order which held that Section 39 of the PWD Act has no application for reservation of seats in educational institutions as the said Section falls under the Chapter “Employment”.

Relying on the Supreme Court judgement in the case of All Kerala Parents' Association vs. State of Kerala on the applicability and ambit of the aforesaid Section

39 of the Act 1995, the Gauhati High Court came to a definite conclusion in the case of *Miss Rajashree Khound vs. The State of Assam and Others* that statutory mandate of providing reservation to physically disable persons for admission into educational institutions as provided under Section 39 of the Act 1995 cannot be made subject to restrictive interpretation by the executive or for that matter any authority below the status of the Parliament so as to dilute, marginalize or otherwise impair the absolute right granted to the physically disabled persons by the Central Legislation. It was held by the Court that the terms of Section 39 of the Act 1995 cannot be rewritten by the respondents in the instant case even with the aid of the circulars issued by the Medical Council of India.55 Making a reference to Section 30 under Chapter V of the Act, the Court further observed:

If the intent of the legislature framing the Act, 1995 is sought to be deciphered in the statements of objects and reasons as well as the preface of the Act it will be unfailingly found that Chapter V (Education) and other provisions of the Act has been framed to remove any discrimination against persons with disabilities in the sharing of developmental benefits vis-à-vis non disabled persons, development of strategies for equalization of opportunities for persons with disabilities and to make special provision for integration of persons with disabilities into social main stream....the mandate of the nation is that it is the educational institutions which have to restructure the educational

55 In one of its earlier judgement in a similar case involving admission in Medical College in the case of *Monoranjan Deka vs State Of Assam And Ors.*, the Gauhati High Court, however, had a different view whereby it was held that – This Court cannot prescribe any criterion for admission of its own in departure from the guidelines/directives framed by the Medical Council of India in consultation with the experts. Interference with the decision of the Medical Council appears to be impermissible since no case is made out that the decision is made on irrelevant considerations [2005 (2) GLR 317, available at: http://www.indiankanoon.org/doc/717478/ (visited on March 26, 2013)]
system and curriculum so as to meet the requirements of the students suffering from disability. It is not for the students suffering from disability to come up and struggle to cope up with the existing curriculum or educational system which is by and large designed only for general students without specific and special needs. To deny a student the right to education on the plea of his/her physical disability being the impediment for availing the course of study will be an impermissible negative interpretation of the welfare legislation.....there is no escape from the further inevitable conclusion that 'hearing impairment' of writ petitioner per se cannot subject her to any disqualification for getting admission into MBBS courses which she is otherwise entitled to by dint of her selection in terms of merit. The intention of the authorities to subject her to further medical tests so as to judge her ability to undergo the Medical Courses is wholly impermissible in law being grossly violative of the mandates of Act, 1995.

The Court, accordingly, directed the respondents to offer admission to the writ petitioner immediately and not to subject her to any further medical tests so as to qualify her for getting the admission. In addition the Court on its own passed an order directing respondent No. 1 (Government of Assam) to comply with the mandatory provision laid down in sub section (g) and (h) of section 30 of the Act, 1995 without any deviation.

5.4.3: Employment Opportunities for Persons with Disabilities

This issue has drawn the maximum number of court cases involving the interpretation of the PWD Act. Like education, employment has also been given an exclusive chapter (Chapter VI) under the Act. Section-wise provisions for employment aspects of the disabled under the PWD Act are as follows:

Section 32: Appropriate Governments shall -
a. identify posts, in the establishments, which can be reserved for the persons with
disability;
b. at periodical intervals not exceeding three years, review the list of posts identified
and up-date the list taking into consideration the developments in technology.

Section 33: Every appropriate Government shall appoint in every establishment such
percentage of vacancies not less than three per cent for persons or class of persons with
disability of which one per cent each shall be reserved for persons suffering from -
i. blindness or low vision;
ii. hearing impairment;
iii. locomotor disability or cerebral palsy, in the posts identified for each disability:

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

Section 34: (1) The appropriate Government may, by notification, require that from
such date as may be specified, by notification, the employer in every establishment
shall furnish such information or return as may be prescribed in relation to vacancies
appointed for persons with disability that have occurred or are about to occur in that
establishment to such Special Employment Exchange as may be prescribed and the
establishment shall thereupon comply with such requisition; (2) The form in which and
the intervals of time for which information or returns shall be furnished and the
particulars, they shall contain shall be such as may be prescribed.

Section 35: Any person authorised by the Special Employment Exchange in writing,
shall have access to any relevant record or document in the possession of any
establishment and may enter at any reasonable time and premises where he believes
such record or document to be, and inspect or take copies of relevant records or
documents or ask any question necessary for obtaining any information.

Section 36: Where in any recruitment year any vacancy under section 33, cannot be
filled up due to non-availability of a suitable person with disability or, for any other
sufficient reason, such vacancy shall be carried forward in the succeeding recruitment
year and if in the succeeding recruitment year also suitable person with disability is not
available, it may first be filled by interchange among the three categories and only when
there is no person with disability available for the post in that year, the employer shall
fill up the vacancy by appointment of a person, other than a person with disability: Provided that if the nature of vacancies in an establishment is such that a given category of person can not be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.

Section 37: (1) Every employer shall maintain such record in relation to the person with disability employed in his establishment in such form and in such manner as may be prescribed by the appropriate government; (2) The records maintained under subsection (1) shall be open to inspection at all reasonable hours by such persons as may be authorised in this behalf by general or special order by the appropriate Government.

Section 38: (1) The appropriate Governments and local authorities shall by notification formulate schemes for ensuring employment of persons with disabilities, and such schemes may provide:

a. the training and welfare of persons with disabilities;
b. the relaxation of upper age limit;
c. regulating the employment;
d. health and safety measures and creation of a non-handicapping environment in places where persons with disabilities are employed;
e. the manner in which and the persons by whom the cost of operating the schemes is to be defrayed; and
f. constituting the authority responsible for the administration of the scheme.

Section 39: All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent seats for persons with disabilities.

Section 40: The appropriate Governments and local authorities shall reserve not less than three per cent in all poverty alleviation schemes for the benefit of persons with disabilities.

Section 41: The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five per cent of their work force is composed of persons with disabilities.
Another very important provision of the Act concerning the issue of employment is the Section 47, which has been placed under Non-discrimination provision of a separate Chapter VIII. It deals with 'disability acquired during service' and has effectively been resorted to for the benefit of disabled in several instances. Section 47 reads as follows:

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service: Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits: Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier; (2) No promotion shall be denied to a person merely on the ground of his disability: Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

The initial interpretation of the PWD Act seemed to have linked reservation of jobs with the issue of identification of posts in particular departments/establishments. The identification of posts as per statutory provision under Section 32 of the Act was in fact one of the major stumbling blocks in implementation of the reservation mandated under Section 33 of the Act. Many departments/establishments simply sat on this delicate and difficult issue of identification of posts. For a quite long time after the Act came into force, they neither identified suitable posts nor reserved posts for employment of persons with disabilities. The major irony was that they argued non-identification of posts as the reason for not implementation of reservation. Many times, the issues of
reservation and identification of suitable posts were raised before the judiciary, which passed on several strictures and orders involving these two issues.

In the case of *Ashok M. Shrimali vs. State Bank of India*\(^\text{56}\), the petitioner, who was blind, sought to be accommodated as a bank officer in a suitable position; but the respondent bank stated that posts beyond level II are not suitable for such persons as they require verification of vouchers, etc. The Bombay High Court stated that there was no constitutional protection when the central government fails to discharge a statutory obligation by not identifying posts suitable for persons with disabilities as required under Section 32 of the Disabilities Act. The Court, however, directed the central government to carry out identification of posts in favour of persons with disability as contained in section 32 and make reservation of posts in favour of such persons as required by section 33 of the Persons with Disability Act, 1995 within a period of six months from the date of order. The Court also granted the petitioner liberty to move the court after the process of identification and reservations of posts is completed and in the interim, the respondents were directed to appoint the petitioner to a post consistent with his qualifications and results in appropriate examinations.

\(^{56}\) 2001 (Supp) Bom CR 132 (Bom HC) [W.P. No. 410 of 1999, judgement order dated 16.06.1999]
The Delhi High Court in its judgement on *Pushkar Singh and Ors vs. University of Delhi*[^57], directed the respondents to calculate the total number of seats that ought to have been reserved and to issue advertisement with specific subject-wise reservations for appointment to teaching posts and also directed that the recruitment for such identified posts for the disabled candidates is to be conducted amongst the disabled candidates by adopting the selection procedure meant for filling up such posts within a period of six months. Most significantly, the Court clarified that in the absence of sufficient number of posts, the respondents were to create supernumerary posts or terminate the appointments that were made subject to the final adjudication in the present matter.

In the case of *National Federation for the Blind vs. State of Maharashtra*[^58], the Petitioner alleged that the government of Maharashtra did not take any measures to implement sections 33 and 37 of the Act. The Bombay High Court in hearing the case directed the re-constitution of the Committee (to be headed by a person who is closely connected to one of the leading disability institutions or by a person with a disability) for the purposes of identification of posts in various government and semi-government organizations for the disabled. It was further directed that the Committee shall not

[^57]: C.W.P. No. 2549 of 1995 (Del HC), judgement order dated 30.01.2001; (2005) 1 PDD (CC) 252

[^58]: 2005 (1) Bom CR 740 (Bom HC) [Public Interest Litigation No. 129 of 2003, judgement order dated 22.07.2004]
restrict the identification of the post only to the lower categories but also to prepare a reservation at every stage where there is recruitment to be effected.

In an important case of *R. Manoj Kumar vs. University of Hyderabad*59, the respondent-University had issued an advertisement for 27 posts of Lecturer, without making any reservation under Section 33 of the Disabilities Act. The respondent sought to justify its action on the pretext that the matter of identification and notification of post for reservation was pending with the executive council of the University; but the Andhra Pradesh High Court rejected such kind of argument and held that the decision of the academic or executive council of the University was required only for pragmatic facilitation of this mandate. The Court was very critical of the approach of the University and remarked that a "social welfare legislation could not be subverted by the leisurely approach of an University". It, accordingly, passed on a strong stricture directing the University to stay further recruitments till it identifies and declares the 3 percent reservation for persons with disabilities, in the total posts advertised.

In yet another important case of *Amita vs. Union of India*60, the petitioner (a visually impaired person) was not allowed to appear examination for the appointment of the post of probationary officer in a public sector bank, stating that blind candidates are not recruited as probationary officer. However, it came to the notice of the Supreme Court

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60 WP (C) No. 31 of 2000 [2005 (13) SCC 721], judgement order dated 11.08.2005
that the list of identified posts was not reviewed by the government as per provision of the PWD Act. The Court directed the government to review the list, and based on the direction it was later informed the Court that as per report of the expert committee the post of probationary officer had been identified as suitable for the blind. The Court, accordingly, disposed of the case by granting permission to the petitioner to appear the examination as either a general candidate or a reserved candidate.

It seems that in majority of the cases jobs were identified and accordingly reservation for the disabled was implemented only pursuant to Court orders. In fact, till recently, Courts had to direct identification of suitable jobs for the disabled. For example, pursuant to the filing of a PIL petition in Gauhati High Court61, seeking implementation of Sections 32 and 33 of the Persons with Disabilities Act, the government of Arunachal Pradesh constituted an expert committee to identify posts for persons with disabilities and a notification was issued reserving 3 percent posts in the A, B, C, and D groups for persons with disabilities.

From the above readings of various Court cases, it is obvious that the identification of posts was largely a delicate and difficult issue. It had significant negative effect on the most audacious provision of reservation under the Act. When jobs were identified it was found that there were several discrepancies in identification of jobs among the state

61 Tami Taniang vs. State of Arunachal Pradesh [PIL No. 11 of 2007 (Gua HC), judgement order dated 28.06.2007]
governments and between the central government and state governments. While there is a statutory obligation to identify posts, what are the posts to be identified is left to the discretion of the government. There is no uniformity in the pattern or guideline for identification of jobs, and appropriate governments have been given almost free hand to decide on their own, based on the nature of the posts and the requirements of particular establishment.

The identification of posts was almost arbitrary. Many times, petitions were filed in Court and the Court had to decide the suitability of specific cases of disability in some specific establishments and directed such establishments to reserve posts as per provision of the PWD Act. The case of Ravi Arora brought to the fore the crux of the

62 Jayna Kothari, *supra note* 10, p. 96; the arbitrary pattern followed in identification of posts was highlighted in the case of *Akhila Karnataka Andha Shikshakarungala Kshemabhibriddhi Sangha vs. Election Authority* [W.P. No. 16396 of 2006 (PIL) (Kant HC), judgement order dated 29.06.2007]. In this case, the petitioner challenged the government circular calling applications for 4767 posts of primary teachers in Kannada that barred visually impaired persons from applying to the said posts on the grounds that the exclusion was completely arbitrary and unreasonable. It was submitted by the petitioners that the central government had identified posts of primary teachers as suitable for blind persons, and further that in all other States in the country, blind persons were being recruited as primary school teachers, particularly in Tamil Nadu where 2 percent of teaching posts were reserved for the blind. The Karnataka High Court found the government circular untenable, and held that visually disabled persons were entitled to take part in the recruitment process and directed the government to withdraw the same as they ran contrary to the provisions of the Persons with Disabilities Act.

63 Id, p. 97

64 *Ravi Kumar Arora vs. Union of India and Another* [2004 (111) DLT 126, CWP No. 6706 of 2002, judgement order dated 15.04.2004]
problem of the identification of posts for persons with disabilities in the field of employment. Arora, a non-gazetted employee, qualified the UPSC Civil Services mains examination in 2000 but failed to get through the interview. In 2001, he successfully qualified; however, he appeared again in 2002 in the preliminary examination to improve his rank. In the meantime, he was declared medically unfit owing to an adverse medical report on his ‘sub-standard vision’. Armed with an interim Court order allowing him to write examination, he wrote the mains in 2002 again. However, to his surprise, he had not been appointed for the second time not because he had not qualified but because suitable posts for candidates with visual disabilities had not been identified. Nevertheless, the Court ordered his appointment with full retrospective benefits based on the 2001 Civil Services Examination. The respondent was also asked to pay him Rs. 20,000 as cost of the proceedings. Similar judgement was also delivered by the Delhi High Court in the case of **UPSC vs. T.D. Dinakar**.

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65 In the case of **T. D. Dinakar vs. Union of India** [WP(C) 4574 of 2003 (Del HC), judgement order dated 04.04.2005], the petitioner appeared for the UPSC Civil Services Examination in 2001 as a visually impaired candidate and secured 1185 marks. The petitioner was considered as general category and was not accordingly appointed by the UPSC based the cut off marks for the general category. Aggrieved for not being appointed against a vacancy reserved for visually impaired persons as per Section 33 of the Disabilities Act, the petitioner filed a petition in the High Court of Delhi. Based on the earlier judgement of the Delhi High Court in the case of **Ravi Kumar Arora vs. Union of India**, the single Judge in the present case directed the respondents to appoint the petitioner to a Civil Services post and also ordered that costs of Rs. 20,000 to be paid to the petitioner. The UPSC preferred an appeal, i.e. **Union Public Service Commission vs. T.D. Dinakar** [LPA 588/2006 (Del HC), judgement order dated 19.09.2006] against the order of the single Judge in the case of **T. D. Dinakar vs. Union of India** on the grounds that the respondent had not qualified for the CSE 2001 as he had failed to meet the standards fixed for
In view of several cases before the Courts and the very casual and lackadaisical approaches of the appropriate governments in identification of posts, it became apparent that if the statutory provision for reservation as per the Act was to be given full effect then statutory requirement of identification of posts had to be dispensed with.

The difficulties in identification of posts and non-compliance of the Sections 32 & 33 led to a very important and landmark judgement of the Supreme Court in the case of Govt. of India through Secretary vs. Ravi Prakash Gupta66. In this case the respondent (petitioner in the case of Ravi Prakash Gupta vs. UPSC67), a totally blind person, qualified UPSC Civil Services examination in 2006. However, he was not given the IAS cadre despite ranking 5th on the merit list for the visually disabled and there being more than five vacancies in his category. He filed petition in the Central Administrative Tribunal (CAT), which dismissed the same and subsequently he approached Delhi High Court challenging the order of the CAT and praying for the implementation of Section 33 of the Persons with Disabilities Act. Based on the Writ Petition filed by the petitioner in the case of Ravi Prakash Gupta v. UPSC, the Delhi High Court directed general category candidates and there was no vacancy reserved for visually impaired candidates. However, the Review Petition was dismissed. The Court in fact pulled up the Secretary, Ministry of Social Justice and Empowerment (MSJE) on the aspect of identification of posts and conveyed its un-satisfaction with the stand taken by the Ministry and further observing that the laudable Parliamentary object of the Persons with Disabilities Act to benefit the disabled had been thwarted for a decade by the Executive by not identifying posts.

66 SLP No. 14889 of 2009, judgement order dated 07.07.2010
67 W. P. (C) No. 5429 of 2008 (Del HC), judgement order dated 25.02.2009
the respondents to offer the petitioner an appointment to the said post by issuing appropriate appointment letter within six weeks; and also directed that the petitioner be given seniority along with his batch mates who took the examinations in the year 2006 and that his pay be fixed notionally on that basis. Additionally, the Court awarded costs of Rs. 25,000 to the petitioner payable by respondent.

The Government of India being aggrieved by the order of the High Court in the case of Ravi Prakash Gupta vs. UPSC approached the Supreme Court through a Special Leave Petition in the case of Govt. of India through Secretary vs. Ravi Prakash Gupta. The Supreme Court, however, did not find any merit in the contention of the Government of India that Section 33 of the Persons with Disabilities Act, 1995 could only be implemented after identification of posts suitable for such appointment under Section 32. Supreme Court observed that the Legislature did not intend that Section 32 be used as a tool to deny the benefits of Section 33 to persons with disabilities and that it could not allow implementation of the Act to be deferred indefinitely by bureaucratic inaction. It concluded that reservation under Section 33 was not dependant upon identification under Section 32. The Court did not find reason to interfere with the order of the Delhi High Court and directed the petitioners to implement the impugned order within eight weeks. Here too the petitioner was also directed to pay the respondent’s cost in the petition. This is a very important and landmark judgement considering the fact that non-identification of posts can no longer be any ground for non-implementation of reservation provision under the Act.
In addition to the non-identification of suitable posts for employment of disabled persons, there also seemed to have some reluctance on the part of certain establishments to either employ disabled persons or retain in their establishments an employee that acquired disability during the service in the establishment. Many establishments in fact did not make any provision for reservation of the disabled till recent time. For example, in the case of National Federation of the Blind vs. Union of India and Ors.68, the Petitioner approached the Court alleging that several advertisements that had been issued from 1996 to 2006 for government posts did not contain any provision for reservation for the blind and persons with low vision. It was also contended by the Petitioners that none of the Department of Personnel and Training and Public Grievances, Ministry of Social Justice and Empowerment, and Office of the Chief Commissioner for Persons with Disabilities was monitoring the implementation of the scheme of reservation for persons with disabilities provided under the Persons with Disabilities Act.

The Delhi High Court while noting serious failure on the part of the government in implementation of the provisions of Section 33 of the Act, directed the respondents in the case of National Federation of the Blind vs. Union of India and Ors. to constitute a Committee to compute the backlog of posts and undertake a special recruitment drive to fill up posts identified. The Court also interpreted that the 3 percent reservation for the disabled had to be computed on the basis of the total cadre strength of posts in the

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establishment and rejected the view of the government that 3 percent was to be interpreted as 3 percent of the vacancies in the identified posts. In addition, the Court also stayed all recruitment in departments/public sector undertakings till such time as reservation for disabled persons was provided for.

In an important judgement in the case of *Dilip Baruah vs. State of Assam and Ors*[^69], it was pointed out that the petitioner (suffering from traumatic paralysis on the left hand and certified as 60 per cent disabled) was working on temporary basis in a government establishment since 26.2.1988. His service was continuously renewed/extended from time to time till 25.4.1996 and thereafter he was not allowed to continue in his job. It was argued by the petitioner that he was entitled for his appointment under reserved quota for disabled persons. The single judge of the Gauhati High Court found it very unfortunate that the petitioner being a disabled person has not been accommodated in the reserved quota as per the Statute though the services of the petitioner had been availed by the authority from time to time since 1988 against the temporary vacancy. In the considered view of the judge the petitioner has made out a fit case for consideration of this case for appointment in any existing vacancy and, accordingly, the respondent was directed to consider the case of the petitioner for appointment in reserved quota of disabled persons (loco motor disability) with the similarly situated persons taking into account his experience as other factors, within a period of 2 (two) months.

[^69]: W.P. (C) No. 1065 of 2000 (Gau HC), judgement order dated 4.1.2001; (2005) 1 PDD (CC) 197
One of the most significant aspects of the PWD Act is that while it makes 3 percent reservation for the disabled it also ensures that persons with different kinds of disabilities can actually share the benefit of reservation. Accordingly, the 3 percent reservation has further been sub-categorized as follows: 1 percent each for persons with blindness or low vision; hearing impairment; and locomotor disability or cerebral palsy. This was to ensure that no discrimination can be made among the different categories of persons with disability; and also to avoid arbitrariness in choosing persons from a particular category of disability alone that suits the interests of an establishment.

The sub-categorization of the reservation within the 3 percent of the total reservation for the disabled was firmly justified in the judgement of the Division Bench of the Allahabad High Court in the case of Dr Ravindra Kumar Pandey vs. State of UP and Others. The Division Bench stated: “the categorization of physically handicapped, it appears, is founded on the intensity of deprivation or handicap. The Legislature therefore, while categorizing the disability, determined the order in which they should be treated if there were lesser vacancies.” In fact, the Allahabad High Court went ahead further and held that if there was only one vacancy available to be filled from the disabled category, it should first be offered to the candidate suffering from blindness or low vision; and if no such candidate is available, then it should go to the next category of disability, that is, hearing impaired and thereafter to persons with locomotor

70 Writ Petition No. 12603/2003
71 as cited in Jayna Kothari, supra note 10, p. 106
disability\textsuperscript{72}, i.e. according to the order of the categories of disabilities under Section 33 of the Act.

The issue of sub-categorization in the reservation was also an important matter in another earlier judgement of the Andhra Pradesh High Court in the case of \textit{Perambaduru Murali Krishna and Ors vs. State of Andhra Pradesh and Ors.}\textsuperscript{73}. In this case, the Andhra Pradesh High Court declared the rules and employment notification (for recruitment of primary and secondary grade school teachers) issued by the respondents, providing therein a 3 percent block reservation for the disabled persons as void and inconsistent with Section 33 of the Act. The reservation ought to have been in the proportion of 1 per cent each for blindness or low vision; hearing impairment; and locomotor disability or cerebral palsy. The Court held that the petitioner was deprived of his legitimate right for such selection and appointment; and directed the respondents to create a supernumerary post and accordingly appoint the petitioner as secondary grade teacher. In yet another important judgement on \textit{Mahesh Gupta vs. Yashwant Kumar Ahirwar}\textsuperscript{74}, the Supreme Court held that a person with a disability constituted a special class and that there cannot therefore be any further reservation based on caste or religion for the disabled candidate.

\textsuperscript{72} Id.

\textsuperscript{73} W. P. No. 3997 of 2002 and 4041 of 2002 (Andhra HC), judgement order dated 20.12.2002; (2005) 1 PDD (CC) 231

\textsuperscript{74} 2007 (8) SCC 621 [Civil Appeal No. 3984 of 2007, judgement order dated 30.08.2007]
In the case of *Sri Mantu Kumar Das vs. The State of Assam and Others*\(^75\), the respondent in its department made 1 percent reservation on the basis of identified as applicable only in respect of the locomotor disabled person. The petitioner, having locomotor disability, wanted a direction from the Court for making a provision of the total 3 percent reservation as mentioned under Section 33 of the Act. If only 1 percent is applied, the petitioner may not come within the zone of consideration whereas 3 percent reservation would lead to more posts reserved for physically disabled persons and in that event the petitioner will come within the zone of consideration. The Court preferred not to issue any direction to the respondents considering the fact that the remaining 2 percent reservations are divided as 1 percent each for the category of blindness and hearing impaired. The Court was of the view that the petitioner is orthopaedically handicapped person and thus cannot intrude upon other two categories.

The issue of promotion in employment for the disabled has also been found to be problematic on several occasions and judiciary had to play its role in this issue as well. For example, in the case of *Union of India through G.M. Northern Railway vs. Jagmohan Singh*\(^76\), the respondent, an orthopaedically disabled person with a 55 percent disability, was appointed as a lower division clerk and after due promotions reached the rank of Office Superintendent. His next promotion was to be in the post of


\(^76\) 2008 (3) SLJ 80 (Del HC) [Writ Petition (C) Nos. 11818 and 13627-28/2004, judgement order dated 07.12.2007]
Chief Office Superintendent; but the same was denied to him on the grounds that reservation in promotion is not allowed. The Central Administrative Tribunal ordered that the petitioner was entitled to a promotion against a reserved post for the disabled and the Railways challenged the order of the Tribunal before Delhi High Court. The Court found that the policy decision of the Railways was arbitrary and irrational and upheld the judgment of the Tribunal.

In another case of reservation in promotion in the case of Chandrabhan Tadi vs. Life Insurance Corporation of India\textsuperscript{77}, the petitioner, a totally blind employee (telephone operator) of LIC, applied for a promotion after having completed over five years of service as per the eligibility norms under the LIC Rules. However, for about ten years from his entitlement, the petitioner was continuously denied his promotion. The petitioner challenged the action of the respondent by filing a writ petition in the Bombay High Court and thereupon the LIC decided that the petitioner would be considered for the promotion and was subsequently promoted.

In yet another important case of Union of India vs. Sanjay Kumar Jain\textsuperscript{78} involving promotion of employees from Group C to Group B posts in the Railways an employee successfully cleared the written test but was not called for the interview on the ground that he had ritinitis pigmentose The Central Administrative Tribunal quashed the said

\textsuperscript{77} W.P 1184 of 2006 (Bom HC), judgement order dated 13.11.2006

\textsuperscript{78} Civil Appeal No. 5173 of 2004 (SC), judgement order dated 11.8.2004; (2005) 1 PDD (CC) 405
order of the petitioner. The petitioner challenged the order of the Tribunal before the Delhi High Court, which confirmed the order of the Tribunal and directed the petitioner to interview the respondent and appoint him to the said post or a suitable equivalent post if the respondent fared better than the other candidates.

Aggrieved at the Delhi High Court order in the case of Union of India vs. Sanjay Kumar Jain, the petitioner approached Supreme Court. It was contended before the Supreme Court that sub-Section (2) of Section 47 of the Act permits appropriate government to exclude by notification any establishment from the provisions of the Section. However, the Supreme Court countered this argument and made the following observation:

Though several documents were referred to contend that the intention of the employer was to exclude certain establishments, a bare perusal thereof shows that they have no relevance and do not in any way fulfill the requirements of the proviso to Sub-section (2) of Section 47. It goes without saying that if a notification in this regard is issued by the appropriate Government the same shall be operative in respect of the establishment which is specifically exempted. This is not the position so far as the present case is concerned. Therefore, the order of the Tribunal as affirmed by the High Court by the impugned judgement suffers from no infirmity to warrant our interference.

This judgement of the Supreme Court assumes importance as it explicitly bars an establishment from issuing a notification according to its convenience and exempting itself (the establishment) from the provisions of Section 47 of the Act. Any notification for exemption under Section 47(2) might necessarily require statutory approval.
Disabilities acquired during service in the establishments brought in several litigations before the Court. The Court delivered its judgements in most such cases in favour of the disabled persons taking the advantage of the clear and most unambiguous provisions under Section 47 of the Act. In the case of Omvati Kalshan vs. Delhi Development Authority\textsuperscript{79}, the petitioner, a DDA employee, was certified as visually impaired and found it difficult for deskwork due to her deteriorating eyesight. Consequently she was offered a post at a lower grade and she was placed on a separate seniority list that did not have any avenue for promotion. The petitioner was also denied conveyance allowance. The Delhi High Court held that the respondent's action of demoting the petitioner and placing her on a separate seniority list was contrary to the provisions of Section 47 of the Act and directed it to treat the petitioner as eligible to the next higher grade, subject to her being otherwise qualified.

In the case of O.P. Sharma vs. Delhi Transport Corporation\textsuperscript{80}, the petitioner, a conductor with the DTC, had a paralytic attack which led to severe impairment of his leg. He was thereafter subject to medical treatment, and found to be medically unfit for the job. He was later on prematurely retired from his post on the ground of being medically unfit to perform his job. The Delhi High Court ordered that he was entitled to reinstatement and directed the respondent to assign him suitable alternative duties with pay protection and continuity of service as per the provisions of section 47 of the Person with Disabilities Act. The respondent was also ordered to provide the petitioner with

\textsuperscript{79} 2005 (125) DLT 57 (Del HC) [WP(C) No. 879/2005, judgement order dated 19.10.2005]
\textsuperscript{80} 2005 (125) DLT 742 (Del HC) [WP(C) 3779/1990, judgement order dated 26.09.2005]
other benefits that he was entitled to like annual increments, promotion etc. Further, the petitioner was awarded costs.

The landmark judgement with regard to the interpretation of Section 47 of the Act and the one which later formed the basis for most of the subsequent cases involving interpretation of Section 47 is the case of Kunal Singh vs. Union of India and Anr. 81. The appellant in this case was a Constable in the Special Service Bureau (SSB) and suffered an injury in his left leg when he was on duty. He was invalidated from service by the respondents. He filed a writ petition in the High Court challenging the validity and correctness of the said order on the ground that it was arbitrary and that he could have been assigned with alternative duty which he could discharge keeping in view the extent of his disability. However, the High Court dismissed his petition holding that he had been permanently invalidated on the basis of the medical opinion and as such there was no scope for him to continue any further in service of any kind in the SSB. The petitioner then went to Supreme Court making an appeal based on section 47 of the Act.

The Supreme Court made the following observation:

It must be remembered that person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature.... In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full

81 Civil Appeal No. 1789 of 2000 (SC), judgement order dated 13.2.2003; (2005) 1 PDD (CC) 373
participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act.

In Supreme Court’s view, the language of Section 47 is plain and certain in casting statutory obligation on the employer to protect an employee acquiring disability during service. The Supreme Court also observed that the Act is a special legislation, and the doctrine of generalia specialibus non derogant would apply. It thus ruled that Rule 38 of the Central Civil Service (Pension) Rules 1972 (on the basis of which it was argued before the Supreme Court that the appellant was getting invalidity pension) cannot override Section 47 of the Act\[82\]. In fact, the Supreme Court cited Section 72 of the PWD Act in this regard, which reads as follows:

...The provisions of this Act, or the rules made there under shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued there under, enacted or issued for the benefits of persons with disabilities.

The Supreme Court held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay-scale and service benefits; if it was not possible to adjust him against any post, he could be kept on supernumerary post until a suitable post was available or he...
attains the age of superannuation, whichever is earlier. It, accordingly, directed the respondents to give relief in terms of section 47 of the Act.

The *Kunal Singh judgement*\(^83\), as mentioned above, formed the basis of many subsequent judgements of the Courts concerning with similar identical question in law and involving the interpretation of Section 47 of the Persons with Disabilities Act such as: *Inder Das* vs. *DTC*\(^84\); *Sunil Kumar* vs. *Delhi Transport Corporation*\(^85\); *A. John Peter* vs. *The General Manager, Tamil Nadu Transport Corporation (Kumbakonam Division III) Limited*\(^86\); *Baljeet Singh* vs. *Delhi Transport Corporation*\(^87\); *Virender Kumar Gupta* vs. *Delhi Transport Corporation*\(^88\); *Tarlochan Singh Aujla* vs. *Delhi Transport Corporation*\(^89\); *Syed Shah Musebulla Alvi* vs. *Secretary General*

\(^83\) It is important to note that the *Kunal Singh* judgement was not the first case where the Supreme Court held that the persons acquiring disability during service would enjoy the same pay-scale and service benefits even after they are rendered physically handicapped. In fact, before coming into effect of the Disability Act, Supreme Court in the case of *Narendra Kumar Chandla* vs. *State of Haryana and Ors.* [1994 (4) SCC 460, Civil Appeal No. 874 of 1994, judgement order dated 04.02.1994; (2005) 1 PDD (CC) 367], held that in case of employees rendered physically handicapped during the course of employment, the Court has power to give directions regarding observation of such employee carrying a pay scale equal to that of his original post.

\(^84\) Writ Petition No. 3700 of 1997

\(^85\) 2005 (120) DLT 499 (Del HC)

\(^86\) WP 4310 of 2001 (Mad HC)

\(^87\) 2000 (83) DLT 286 (Del HC)

\(^88\) 2002 (61) DRJ 355 (Del HC)

\(^89\) WP (C) 2798 of 1998 (Del HC)
In a significant judgement, the Court, in the case of Delhi Transport Corporation vs. Harpal Singh, Ex. Security Guard and Anr., applied the provision of Section 47 of the Act with retrospective effect. In this case, Harpal Singh, security guard, was rendered disabled in an accident in June 1991 while in service. Subsequently, he was retired prematurely from service in February 1994. The Labour Court ordered his reinstatement on the basis of Section 47 of the Disabilities Act, which was challenged by DTC before the Delhi High Court contending that Harpal Singh, who was retired prematurely on 22\textsuperscript{nd} February, 1994, could not be covered by an enactment that came into force only on 7\textsuperscript{th} February, 1996. The Court, however, held that since the reference

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90 WP 23323 of 1998 (AP HC)
91 2005 (123) DLT 318 (Del HC)
92 2005 (120) DLT 545 (Del HC)
93 2002 (101) DLT 499 (Del HC)
94 CW 4200 of 1993 (Del HC), judgement order dated 16.5.2003; (2005) 1 PDD (CC) 365
95 Case No. 636/Com-2009), Commissioner (Disabilities) West Bengal, judgement order dated 15.06.2010
96 C.W.P. No. 2735 of 2003 (Del HC), judgement order dated 25.4.2003; (2005) 1 PDD (CC) 395
was made after the Act came into force, the benefit of the Act was available to Harpal Singh in any case and giving him the benefit under the Act could not in any event be termed a retrospective operation of the Act.

In the case of *Hiralal Khatik vs. Central Railway*\(^9^7\), an employee with the Central Railways was left with a locomotor disability due to an accident while on duty. The Medical Board declared him medically unfit and as per Indian Railway Establishment Manual (IREM) the employee was declared totally incapacitated for further service. The employee filed a complaint before the Chief Commissioner of Disabilities requesting that his case be re-examined as per the provisions of Section 47 of the Persons with Disabilities Act, 1995. Based on the complaint, the respondents were directed to show cause as to why the complainant should not be retained in service and why the provisions of Indian Railway Establishment Manual should not be brought in line with the mandatory provisions of Section 47 of the Act. The employee was directed to be reinstated in a supernumerary post of appropriate level by the respondent, which was also directed to regularise the employee’s period of employment under the rules.

In yet another interpretation of the Section 47 of the Act, the Allahabad High Court in the case of *Om Prakash Singh Son of Shri Sharda Prasad Singh vs. Union of India*\(^9^8\), observed that in case of a conflict between the standing orders of the department and the

\(^9^7\) Case No. 3238 of 2006 (CCPD), judgement order dated 16.08.2007
\(^9^8\) 2005 (3) ESC 1869 (All HC) [Civil Misc. Writ Petition No. 53528 of 1999, judgement order dated 20.04.2005]
provisions of Section 47 of the Act, the statute would prevail as the standing orders were only administrative instructions of the department while the Section 47 was mandatory in nature. In this case, the petitioner, a CRPF Constable, met with an accident and suffered a fractured knee and also injured his backbone while he was undergoing a counter insurgency course. His services were consequently terminated. The petitioner approached the High Court challenging the order of his termination. The respondents were ordered to consider the petitioner's case in light of Section 47 of the Act.

The Supreme Court judgement in the case of *Bhagwan Dass vs. Punjab State Electricity Board*\(^9\) assumes very significance as it highlights a situation where an employee acquiring disability during service was not aware about the beneficial provision under Section 47. The employee lost his eyesight while in service and was retired from service based on his own request asking for retirement under which letter he also requested that a suitable job be given to his wife in his place. He was retired from service in 1999 despite a circular of the Board that an employee acquiring a disability during service could not be retired from service. Subsequently, the employee became aware about the provision that he is entitled to protection under Section 47 of the Act and, accordingly, made repeated requests to the respondent for rejoining service; but his request was not considered. The High Court of Punjab & Haryana

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\(^9\) AIR 2008 SC 990 [Civil Appeal No. 8 of 2008 (arising out of SLP (C) No. 26357/2005), judgement order dated 04.01.2008]
dismissed his petition and he later on filed a special leave petition before the Supreme Court. The Supreme Court made the following observation:

The appellant was a class IV worker and preferred to opt for retirement when he realised that he had become completely blind. It was for the officers of the respondent to explain the correct legal position to him and his entitlement to protection under Section 47 of the Act. However that instead of doing so, the officers picked-up a line of request for retirement in his letter and took it out of context. In light thereof and in view of the express provision of section 47 of the Act, it was held that the action of the Board in terminating the appellant’s service was bad and illegal.

The Supreme Court held that the appellant could continue in service till the date of his superannuation and that he would be entitled to all service benefits. The respondent was directed to reinstate him and further to adjust the terminal amounts paid to him against the salary payable to him and that the balance if any was to be recovered from him in easy monthly installments from future salary.

In another significant and very important judgement involving the promotion of a disabled person to a higher post under Section 47 of the Act, the Supreme Court, in the case of *Union of India vs. Devendra Kumar Pant*[^100^], held that promotion to a higher post cannot be claimed automatically based on Section 47 of the Act. While examining the case of a colour blind person (which according to the Court neither amounted to blindness nor low vision as defined under the Act and was therefore not a disability under the Act), the Supreme observed that Section 47(2) did not provide that even where the disability came in the way of performance of higher duties and functions

[^100^]: AIR 2010 SC 1253 [Civil Appeal No. 4668 of 2007, judgement order dated 09.07.2009]
associated with the promotional post, promotion shall not be denied. The Court found that Section 47(2) barred promotion being denied to a person on the ground of disability, only if the disability did not affect his capacity to discharge the higher functions of a promotional post and that where the employer stipulated minimum standards for promotion keeping in view safety, security and efficiency, and if the employee were unable to meet the higher minimum standards on account of any disability or failure to possess the minimum standards, in such a case, Section 47(2) would not be attracted.

In *Shree Satish Prabhakar Padhye vs. Union of India*\(^\text{101}\) case, a Division Bench of the Bombay High Court had held that some provisions of the PWD Act, such as those relating to non-removal of a person acquiring disability during work from employment (Section 47), access to transport (Section 44), and provision of amanuensis (Section 31) would be applicable to certain private establishments as well. However, the Supreme Court reversed this judgement in the case of *Dalco Engineering Pvt. Ltd. vs. Shree Satish Prabhakar Padhye*\(^\text{102}\). The Bombay High Court was of the view that a company incorporated under the Companies Act would be included within the scope of the Act and it accordingly issued order directing the private company under Section 47 of the Act to reinstate a terminated employee who acquired disability during the service and to shift the employee to a suitable post, with the same pay scale and service benefits as


\(^{102}\) AIR 2010 SC 1576 [Civil Appeal Nos. 1858 of 2007, judgement order dated 31.03.2010]
also with back-wages from the date of his termination. Being aggrieved by this order of the Bombay High Court, the employer approached the Supreme Court. Upon an examination of the provisions of the Act, the Supreme Court found that the Legislature had not intended the said provisions to be made applicable to private employers and observed that despite the fact that a socio-economic legislation ought to be interpreted liberally, the interpretation could not be carried to levels unintended by the Legislature. The Supreme Court, accordingly, concluded that private sector employers were not 'establishments' within the meaning of section 2(k) of the Act (as was interpreted by the Bombay High Court to be so) and hence it said that Section 47 would not be applicable to them.

5.4.4: Accessibility, Barrier-free Environment & Land, Housing, etc. for the Disabled

Sections of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 dealing with these issues are as follows:

Section 30: ...the appropriate Governments shall by notification prepare a comprehensive education scheme which shall make provision for-

a. transport facilities to the children with disabilities or in the alternative financial incentives to parents or guardians to enable their children with disabilities to attend schools
b. the removal of architectural barriers from schools, colleges or other institutions imparting vocational and professional training

Section 42: The appropriate Governments shall by notification make schemes to provide aids and appliances to persons with disabilities.
Section 43: The appropriate Governments and local authorities shall by notification frame schemes in favour of persons with disabilities, for the preferential allotment of land at concessional rates for -
   a. house
   b. setting up business
   c. setting up of special recreation centres
   d. establishment of special schools
   e. establishment of research centres
   f. establishment of factories by entrepreneurs with disabilities.

Section 44: Establishments in the transport sector shall, within the limits of their economic capacity and development for the benefit of persons with disabilities, take special measures to-
   a. adapt rail compartments, buses, vessels and aircrafts in such a way as to permit easy access to such persons;
   b. adapt toilets in rail compartments, vessels, aircrafts and waiting rooms in such a way as to permit the wheel chair users to use them conveniently.

Section 45: The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide for -
   a. installation of auditory signals at red lights in the public roads for the benefit of persons with visual handicap
   b. causing curb cuts and slopes to be made in pavements for the easy access of wheel chair users
   c. engraving on the surface of the zebra crossing for the blind or for persons with low vision
   d. engraving on the edges of railway platforms for the blind or for persons with low vision
   e. devising appropriate symbols of disability
   f. warning signals at appropriate places.

Section 46: The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide for -
   a. ramps in public building
   b. adaptation of toilets for wheel chair users
c. braille symbols and auditory signals in elevators or lifts
d. ramps in hospitals, primary health centres and other medical care and rehabilitation
institutions.

One of the important judicial cases that was filed to seek implementation of the various
the provisions of the PWD Act and the one which happened to be most cited case
involving the issue of disability is the case of *Javed Abidi vs. Union of India and
Ors*\(^{103}\). In the writ petition of this case, the petitioner prayed for the following relief:

(a) direct Indian Airlines to immediately provide for aisle chairs in every aircraft;
(b) direct Indian Airlines to provide ambu-lift at all the airports of the country;
(c) direct Indian Airlines to provide 50% concession to all disabled persons as defined in
Section 2(1) of the Act because to provide this concession only to visually impaired
persons is discriminatory and directly violative of the fundamental rights of the other
disabled, as guaranteed under Article 14 of the Constitution of India;
(d) direct the Central Government to appoint only disabled persons defined under Section
2(1) of the Act as per the provisions of Section 3(2)(I) and not to include any other
person who is not a disabled person under the Act;
(e) direct the Union of India to immediately appoint the Chief Commissioner and
Commissioners as per section 57 of the Act;
(f) direct the Central Government to immediately constitute the Central Executive
Committee as defined under Section 9 of the Act;
(g) direct all the States of the country to form their own State Coordination Committees as
defined under Section 13 of the Act;
(h) direct all the State Governments to immediately constitute their respective State
Executive Committees for the implementation of the Act;
(i) direct the State Governments to appoint Commissioners for their respective States for
proper implementation of the Act in the States of the Country.

\(^{103}\) W.P. (C) No. 326 of 1997 (SC), judgement order dated 17.12.1998); (2005) 1 PDD (CC) 155
However, since the Central and several State governments formed the Central and State Co-ordination Committees during the pendency of the petition, the Supreme Court dealt only with the specific grievances of the petitioner, Mr. Javed Abidi, who is orthopaedically handicapped with locomotor disability and sought relief for concession by Indian Airlines for all the disabled persons traveling by air, as the same is already applicable only to the blind. Mr. Soli J. Sorabjee, the learned Attorney General appearing for Indian Airlines impressed upon the Court that the concession to the blind people was being given since prior to the commencement of the Act; and argued the economic condition of Indian Airlines is such that it is not feasible to grant any further concession to any other category of disabled people. Sorabjee further pointed out that the Act itself postulates for providing facilities to the disabled persons within the limits of economic capacity. The Court seemed to agree with the argument of Sorabjee; but at the same time it was emphasized by the Court that the true spirit and object with which the Act was enacted cannot be ignored. The Court observed:

To create barrier free environment for persons with disability and to make special provision for the integration of persons with disabilities into the social mainstream apart from the protection of rights, provision of medical care, education, training, employment and rehabilitation are some of the prime objectives of the Act.

In its considered view, the Supreme Court found that the difficulties faced by persons with locomotor disabilities while travelling by train to far off places would make this category of disabled people a separate class itself because of their immobility and the restriction of the limbs. For the Court, while it may not be difficult for a person with low vision or a person with hearing impairment or mental retardation or a person
suffering from leprosy to travel by train even to far off places, a person suffering from locomotor disability above certain percentage of the same will find enormous difficulty in travelling by train or bus. The Court, accordingly, directed Indian Airlines that those suffering from the aforesaid locomotor disability to the extent of 80 percent and above would be entitled to the concession from Indian Airlines for traveling by air within the country at the same rate as has been given to those suffering from blindness.

The issue of accessible and barrier-free environment is the basic minimum rights which the persons with disabilities can simply expect from a just government. However, the governmental authorities seemed to have simply ignored even the basic entitlement for barrier access by the disabled persons. Even after the enactment of the PWD Act, the concerned governmental authorities did little and that too only when they were pampered by Court orders. Based on an interim order of the Delhi High Court in the case of *Social Jurist vs. Govt. of NCT of Delhi*\(^{104}\), the Education Department of the Municipal Corporation of Delhi had undertaken to provide ramps in all the schools under its management and also assured to provide adapted toilets in all its schools.

In the case of a PIL petition filed by the ILS Law College Legal Cell in March 2004 for the enforcement of all access-related provisions of the PWD Act, the Bombay High Court ordered the Brihanmumbai Electric Supply and Transport (BEST) to purchase within three months 30 new buses with facilities for the disabled. In the same *ILS Law*  

\(^{104}\) CWP No. 1611/2001, (Del HC) interim judgement order dated 02.11.2001
College case\textsuperscript{105}, the Bombay High Court directed on 6\textsuperscript{th} May 2005 that all government buildings, schools, hospitals and other public places including courts, both at the district and village level, were to have ramps, railings, and toilets that were fully accessible to the disabled within a period of six months.

In another public interest petition filed by the Disabled Rights Group, the Delhi High Court asked railways and airlines to respond as to what steps they had taken for ensuring full access to persons with disabilities. Based on the report submitted by the Railways, the Court directed Railways to make efforts to have all their express trains with accessible coaches within a period of two years\textsuperscript{106}. Earlier in the case of Kaukab Naqvi \textit{vs. Union of India}\textsuperscript{107}, the Delhi High Court already issued some guidelines for the Railways to provide certain facilities at railway stations for all persons with disability.

The issue of easy accessibility in trains (including facilities in trains and station areas for the disabled) was also taken care of by several judgements of the judiciary such as the judgements of the Courts in the cases of \textit{Jan Sangarsh Manch vs. Union of

\textsuperscript{105} ILS Legal Aid Center \textit{vs. State of Maharashtra} [PIL No. 70 of 2002, (Bom HC) judgement order dated 06.05.2005]

\textsuperscript{106} Disabled Rights Group \textit{vs. Union of India and Others} [W. P. (C) No. 13781/2004 (Del HC), judgement order dated 20.02.2006]

\textsuperscript{107} 2002 (63) DRJ 207 (Del HC) [Civil Writ Petition No. 5053 of 1998, judgement order dated 20.12.2001]
India\textsuperscript{108}, India Centre for Human Rights & Law vs. Union of India\textsuperscript{109}, Kaukab Naqvi vs. Union of India\textsuperscript{110}, etc. The judgements of the judiciary in the cases of Dinesh Gupta vs. Ministry of Transport\textsuperscript{111}; Chairmaine Lobo vs. State of Goa\textsuperscript{112}; Bhuneshwari Devi vs. Andaman & Nicobar Administration\textsuperscript{113}; I.L.S. Legal Aid Centre vs. State of Maharashtra\textsuperscript{114}, etc. addressed some of the important issues of accessibility of public transport and public buildings.

In an important public interest writ petition in the Supreme Court in the case of Disabled Rights Group vs. Chief Election Commissioner\textsuperscript{115}, the petitioner prayed for adequate facilities to make elections accessible for the disabled. It was prayed for making available wooden ramps at polling stations; braille numbers in the electronic voting machines to enable visually impaired voters press the appropriate button to cast the vote; separate queues and special arrangements for persons with disability at polling stations; and assistance by polling staff to disabled persons. The Court recorded that although the Election Commission had already given the necessary instructions to all State governments and Union territories, it was not being followed by the different States and therefore that it was necessary for the Election Commission to ensure

\textsuperscript{108} Special Civil Application No. 19438 of 2006 (Guj HC), judgement order dated 31.01.2007
\textsuperscript{109} PIL Writ Petition No. 27 of 2007 (Bom HC), judgement order dated 23.08.2007
\textsuperscript{110} AIR 2002 Del 240
\textsuperscript{111} Case No. 58/1999 (CCPD)
\textsuperscript{112} Writ Petition 539 of 2004 (Bom HC)
\textsuperscript{113} Writ Petition No. 180 of 2008 (PIL) (Cal HC)
\textsuperscript{114} PIL No. 70 of 2002 (Bom HC)
\textsuperscript{115} Writ Petition (Civil) No(s). 187 of 2004 (SC), judgement order dated 05.10.2007
compliance of its instructions. The Court directed that the Commission give appropriate
directions to the officials manning the polling stations, regarding the special facilities
for the physically disabled electorate at all polling stations well-in-advance and further
that sufficient publicity be given in the print and electronic media about the availability
of such facilities so that the persons with disabilities are made aware of the facilities. It
was further recorded that the absence of such facilities should be notified to the
respective governments for remedial/future action.

In an interesting and significant case of easy accessibility of temples by the disabled
devotees, a writ petition was accepted by the Madras High Court in the case of *B. Meenakshi vs. State of Tamil Nadu*¹¹⁶. The petitioner in his writ petition sought to
highlight the inaccessibility of the temples in Tamil Nadu. In view of this writ petition,
the Hindu Religious and Charitable Endowment Department of the respondent issued a
circular to all executive offices of temples under its control to make temples accessible
and to submit periodical reports to the department of the progress made. The High
Court directed that the said circular be widely publicized and that the department ensure
due compliance of the orders.

In yet a very important PIL petition in connection with access and barrier-free
environment, Javed Abidi brought before the court the problems of access in public
buildings and transport facilities in Delhi. Abidi in his petition in the case of *Javed

¹¹⁶ Writ Petition 7027 of 2006 (Mad HC)
Abidi vs. Union of India\textsuperscript{117} sought directions from the Delhi High Court to make all public places disabled-friendly. The High Court by a series of orders directed the public authorities in Delhi such as the government of National Capital Territory (NCT) of Delhi, Municipal Corporation of Delhi (MCD), the Delhi Development Authority (DDA), the Railways, the Airlines, Airport Authorities, and the University Grants Commission (UGC) to make all the public infrastructure and facilities accessible including inter alia installation of ramps, lifts in public buildings, installation of proper audio systems in all public places including roads, construction of accessible toilets for disabled persons, and provision of ambulifts and wheelchairs at the airports.

In its order dated 21.1.2008 in the same case of Javed Abidi vs. Union of India, the Delhi High Court directed that the respondents shall in keeping with the Section 46 of the PWD Act, 1995 take adequate steps within the limits of their economic capacity and development to provide for ramps in public buildings, adaptation of toilets for wheelchair users, braille symbols and auditory signals in elevators or lifts, ramps in hospitals, primary health centres and other medical care and rehabilitation institutions. It also directed Secretary to Government of India, Ministry of Social Justice and Empowerment and Secretary to Government of India, Ministry of Human Resource Development to issue proper circular/ directions to all concerned in regard to the statutory obligation created in terms of Section 46 of the Act and the order passed by this Court on the basis thereof. Further, the Court gave liberty to the petitioner to bring

\textsuperscript{117} WP (C) 812/2001 (Del HC), judgement order dated 16.03.2007
to the notice of the competent authority deficiencies, if any, in compliance with the requirement of Section 46 in which event the parties concerned are expected to look into the same and take appropriate steps for removal of deficiencies within a reasonable time.

The issue of concessional and preferential land and house allotment to the persons with disabilities under Section 43 of the Act was raised in several Court cases, including the important judgement in the cases of *Ch. Salil Chaturvedi & Prajwala vs. Union of India; D.D.A. vs. Chief Commissioner for Disabilities; and National Federation of the Blind vs. State of Uttar Pradesh*. In the case of *Ch. Salil Chaturvedi & Prajwala vs. Union of India*\(^\text{118}\), it came to the notice of the Supreme Court that while some states had partially implemented the provision under Section 43 but no State came forward with the specific plea that schemes had been formulated and reservation had already been made in favour of disabled persons. The Court, accordingly, directed that whenever the State governments or local authorities allot land, preferential treatment shall be given to disabled persons and they shall be allotted land at a concessional rate. The Court also directed that while the percentage of reservation may be left to the discretion of the State governments/local authorities; but the total percentage of disabled persons was required to be taken into account while deciding that percentage. Additionally, the Court allowed liberties to them who felt that the State governments/local authorities were not extending the benefits to the persons who are

\(^{118}\) W.P. 56 of 2004 (SC), judgement order 04.03.2009
entitled to get such benefits under Section 43 of the Act to file complaints with the appropriate authorities as envisaged under the provisions of the Act.

The Delhi High Court in *D.D.A. vs. Chief Commissioner for Disabilities*\(^{119}\), while directing the allotment of a flat in terms of Section 43 of the Act, noted with dismay that there was no scheme to provide allotment of land to persons with disabilities in accordance with the mandate of Section 43. The Court ruled that 'the object and intent of the legislature in enacting Section 43 of the Act cannot be defeated by non-framing of the scheme in terms of the mandate of the Section'. In accordance with the ruling of the Court, the DDA notified schemes for the concessional allotment of land to persons with disabilities that came into effect in October 2004.

In the case of *National Federation of the Blind vs. State of Uttar Pradesh*\(^{120}\), the Lucknow Development Authority had circulated an order stating that persons with disabilities should only benefit from preferential allotment (and not entitled to concessional allotment). It was challenged in the Allahabad High Court as being contrary to Section 43 of the Disabilities Act. It was pleaded that the State government had not framed a scheme specifically for the purposes of the Disabilities Act and hence the Lucknow Development Authority was unable to award concession; but the same plea was rejected by the Court. The Court said that neither the State government nor the local authorities could take the benefit of its own inaction; and ordered the development


\(^{120}\) AIR 2000 All 258 [W. P. No. 361 (MB) of 2000, judgement order dated 28.01.2000]
authorities that since concessional allotment schemes are already being advanced to various other groups of individuals, it should do the same to serve the purposes of the PWD Act.

5.4.5: Mental Disability

Other than the definition, no specific provision has been made in the PWD Act for the benefit and welfare of the mentally disabled persons. They have even been kept outside the reservation provision under the Act. Nevertheless, certain cases were filed in the Court involving the issues of mental disability. For example, in an important case of *Ashwini Ashok Desai vs. Chattrapati Shivaji Maharaj General Hospital*121, the petitioner, an employee in a government hospital developed a mental illness in 1999 and was under medication for schizophrenia. Later on, on the basis of a medical report from the Medical Board, the petitioner was made to retire from service from January 2003. The Commissioner for Persons with Disability held that since there was no reservation for the mentally ill under Section 33 of the PWD Act, a person with a mental illness cannot be given the benefit of Section 47 of the Act. The petitioner challenged the order of the Commissioner in the Bombay High Court, which, relying on the judgment of the Supreme Court in the case of *Kunal Singh vs. Union of India*, found that the Commissioner for Persons with Disability had committed an error in concluding that only persons covered under Section 33 were protected under Section 47 of the Act. The Court set aside the order of the Commissioner and the order terminating the petitioner’s

121 W.P No. 3545 of 2005 (Bom HC), judgement order dated 05.08.2005
service; and the respondents were directed to identify a suitable post for the petitioner or create a supernumerary post under Section 47. The respondents were further directed to release the salary of the petitioner from January 2003 and transfer the petitioner to Pune as his family resided at Pune.

In yet another recent and significant judgement in the case of C. Narayanan vs. The Deputy Director-cum-Principal In Charge, Government Industrial Training Institute, Chennai & Anr.\textsuperscript{122}, the Madras High Court while taking recourse to Section 47 of the Act said that mental disability can not be a ground for removal of an employee. In this case, the petitioner was working as an Office Assistant in a government establishment in Chennai and was relieved from service on the alleged ground that the Medical Board had recommended unfitness for the petitioner to continue in service due to 'dementia with mood disorder depression', i. e. a form of mental condition. This mental condition was an acquired disability while in service. The Madras High Court found the action of the respondents to be in contravention of Section 47 of the PWD Act 1995; and, accordingly, the respondent was directed to pay full salary to the petitioner including annual increments from the date of his relief till the date of his actual date of reaching the age of superannuation. Additionally, the Court allowed a cost of Rs.5000/- towards legal fees for the learned counsel for the petitioner.

In the case of *Rosily vs. Registration Inspector General*\(^{123}\), the petitioner, an employee with the District Registration Office in Ernakulam, happens to be a mother of a child diagnosed as 90 percent mentally retarded. The petitioner was transferred to Kottayam and she requested for posting back in Ernakulam as her child was undergoing treatment and rehabilitation at a Centre in Ernakulam. The petitioner relied on a government order, which included parents of mentally retarded children in the preferential category for posting in places of their choice. The Court held that this was one of the few cases where the request ought to have been accepted without delay and directed the respondent to take a decision in light of the Court's observations within three weeks of the order. In yet another very serious case involving mental disability, the Supreme Court, in the case of *Death of 25 Chained Inmates in Asylum Fire in T.N., In re vs. Union of India*\(^{124}\), took suo motu action and directed the Cabinet Secretary to frame a national policy to address issues faced by the PWDs under Section 8 (2) (b) of the Act.

**5.4.6: Social Security & Miscellaneous Provisions**

The social security provisions for the disabled have been covered under Sections 66-68 of the PWD Act 1995. The relevant provisions as given in the Act are given below:

*Section 66:* (1) The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, undertake or cause to be undertaken rehabilitation of all persons with disabilities. (2) For purposes of sub-section (1), the appropriate Governments and local authorities shall grant financial assistance to non-governmental organisations. (3) The appropriate Governments and local authorities

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\(^{123}\) WP 30387 of 2007 (Ker HC), judgement order dated 15.10.2007

\(^{124}\) AIR 2002 SC 979 [W. P. (C) No. 334 of 2011, judgement order dated 05.02.2002]
while formulating rehabilitation policies shall consult the non-governmental organisations working for the cause of persons with disabilities.

**Section 67:** (1) The appropriate Government shall by notification frame an insurance scheme for the benefit of its employees with disabilities. (2) Notwithstanding anything contained in this section, the appropriate Government may instead of framing an insurance scheme frame an alternative security scheme for its employees with disabilities.

**Section 68:** The appropriate Governments shall within the limits of their economic capacity and development shall by notification frame a scheme for payment of an unemployment allowance to persons with disabilities registered with the Special Employment Exchange for more than two years and who could not be placed in any gainful occupation.

The important miscellaneous provisions that are relevant for the present purpose are given below:

**Section 69:** Whoever, fraudulently avails or attempts to avail, any benefit meant for persons with disabilities, shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to twenty thousand rupees or with both.

**Section 72:** The provisions of this Act, or the rules made thereunder shall be in addition to and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefit of persons with disabilities.

In addition to the above provisions, it is also important to mention that in exercise of the powers conferred by sub-sections (1) and (2) of Sections 73 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), the Central Government framed certain Rules, which were notified on 31st December 1996 and are referred to as the Persons with Disabilities (Equal
Opportunities, Protection of Rights and Full Participation) Rules, 1996. Rules 4, 5 & 6 of the same have been significant for the present purpose and, accordingly, these rules are reproduced below.

Rule 4: (1) A Disability Certificate shall be issued by a Medical Board duly constituted by the Central and the State Government. (2) The State Government may constitute a Medical Board consisting of at least three members out of which at least one shall be a specialist in the particular field for assessing locomotor/visual including low vision/hearing and speech disability, mental retardation and leprosy cured, as the case may be.

Rule 5: (1) The Medical Board shall, after due examination, give a permanent disability certificate in cases of such permanent disabilities where there are no chances of variation in the degree of disability. (2) The Medical Board shall indicate the period of validity in the certificate, in cases where there is any chance of variation in the degree of disability. (3) No refusal of disability certificate shall be made unless an opportunity is given to the applicant of being heard. (4) On representation by the applicant, the Medical Board may review its decision having regard to all the facts and circumstances of the case and pass such order in the matter as it thinks fit.

Rule 6: The Certificate issued by the Medical Board under rule 5 shall make a person eligible to apply for facilities, concessions and benefits admissible under schemes of the Government or Non-Governmental Organisations, subject to such conditions as the Central or the State Government may impose.

The issue involving social security for persons with disability recently led to a significant decision of the Delhi High Court in a PIL petition in the case of Vikas Gupta vs. UOI & Anr.125. The petitioner in this case sought parity in the maximum sum assured and premium charged from disabled employees in comparison to the non-

disabled employees. It was brought to the notice of the Delhi High Court that the postal Life Insurance Policy issued by the respondents for employees makes a distinction between disabled and non-disabled employees\textsuperscript{126}. This policy, it was argued, was discriminatory and in violation of preamble of PWD Act and the various non-discriminatory provisions of UNCRPD, to which India is a signatory. The Court also found that the same undoubtedly is a violation of the Disabilities Act even though discrimination in the matter of insurance was not expressly provided under the Chapter VIII on “Non-Discrimination”\textsuperscript{127}. The Court, accordingly, directed the respondents to treat persons with disability at par with the non-disabled persons in the matter of Postal Life Insurance by providing them with the same maximum cover and charging them the same premium as being charged from non-disabled persons, regard of course being had to the risk, depending on assessment of individual cases.

The issue concerning the authenticity of disability certificate raised several questions. The Act, under Section 2 (p), provides that the disability certificate is to be issued by competent ‘medical authority’ duly notified by the appropriate government. Once they are issued certificates by the concerned competent authorities there seems to be a

\textsuperscript{126} Whereas non-disabled employees can avail a maximum insurance of 5 lakhs, the maximum sum insured for disabled employees is 1 lakh only; additionally, the disabled employees had to pay an extra premium.

\textsuperscript{127} The PWD Act in the Preamble thereof proclaims to have been enacted to ensure equality for the people with disabilities; but Chapter VIII on “Non-Discrimination” deals with non-discrimination in transport, non-discrimination on the road, non-discrimination in the built environment and non-discrimination in government employment and has not made any specific provision for non-discrimination in the matter of insurance.
prevailing view that no other certification by any other authority is required. However, in practice, it has been found that many academic institutions and establishments make it mandatory for further medical test through their own expert committees for ascertaining the nature of the disability and to find out fitness of a disabled person for their own specific purposes/criteria of admission in academic programmes or job requirements. This approach of expert review has been challenged from time to time. For example, in *Kiran Kumar vs. Union of India*\(^\text{128}\), the writ petitioners challenged the procedure adopted by the respondents in selecting the candidates for admission against the seats reserved for physically handicapped candidates, arguing the procedure contrary to the provisions of the Act. They contended that they had been issued certificates of disability from the concerned District Medical Officers constituted under the provisions of the PWD Act and claimed that admission to medical courses should be on the basis of these certificates. The Andhra Pradesh High Court, however, rejected the plea of the petitioners.

In the case of *K. Kulasekaran vs. Secretary, Education Department*\(^\text{129}\), the petitioner, with locomotor disability, was issued a disability certificate by the District Medical Board assessing his disability at 60 percent. However, the expert committee constituted to confirm the disability certificate issued by District Medical Board assessed his disability at 25 percent and accordingly he was not given admission in the medical course he applied. The constitution of the expert committee was challenged in Madras


High Court, which observed that under the PWD Act and the Rules, only the Medical Board constituted by the central or state government has the authority to issue the disability certificate. The Madras High Court held:

after constitution and notification of a Medical Board as per the State Rules framed under the Act, no other authority is competent to decide about the percentage of disability...Allowing such an expert committee constituted by the Director of Medical Education to oversee or to reject the certificate issued by the notified Medical Board as per the Act would only whittle down the very object of the Act130.

The judgement in the case of Minor Jayeshkumar Dhanabhai Parmar, through his guardian and next friend vs. Dean, B. J. Medical Admission Cell, Ahmedabad131, in fact, seemed to have raised certain doubts with regard to the utility and effectiveness of another expert committee to confirm the authenticity of disability certificates and ascertain the medical fitness of prospective applicants for MBBS Course. The Court in this case found that the expert committee constituted adopted a very casual and unreliable approach; and the decision of the committee does not even record reasons for holding the petitioners unfit for admission. Its report was found to be arbitrary and failed to follow standard procedures that an expert committee is supposed to adhere to. The Division Bench of the Gujarat High Court accordingly rejected such the report and held that the working of the committee did not inspire confidence in the decisions recorded by the committee and directed the state government to admit the petitioner on the reserved seat for the MBBS course.

130 as cited in Jayna Kothari, supra note 10, p. 88

Contrary to the above judgements, the Kerala High Court in its recent judgement in the case of *Ashwathy P. vs. State of Kerala and Others*\(^{132}\) seemed to uphold the validity of expert committee in ascertaining the correctness of disability certificate. In this case while the appellant submitted a disability certificate with 45 percent disability issued by District Medical Board the state level committee constituted by the government assessed the disability at 30 percent. The appellant challenged the constitution of the state-level committee; but the Kerala High Court rejected the appeal of the appellant with the following observation:

The expression ‘medical authority’ as defined under Section 2(p) of the Act means a hospital or institution specified for the purposes of this Act by a notification by the appropriate government. In our opinion, the definition is capable of permitting the government to constitute more than one medical authority depending upon the purposes of such verification. Apart from that, nothing, either in the Act or in any other law, prohibits the State from taking such steps as it deems it necessary to cross-check the correctness of the certificates issued by a body which is otherwise competent to issue such certificates under any law. Such an exercise is obviously undertaken in the larger public interest of ensuring a fair and proper administration of law and the same cannot be held to be illegal unless specifically prohibited by any law\(^{133}\)

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\(^{132}\) W. A. No. 1708/2010 (Kerala HC), judgement order dated 12 October 2010

\(^{133}\) as cited in Jayna Kothari, *supra note* 10, p. 87
In another recent case of *Shri Rima Taipodia vs. The State of Arunachal Pradesh and Others*¹³⁴, involving serious concern in connection with the issue of disability certificate it is important to point out here that the writ petitioner in this case was selected and appointed as a Sub-Treasury Officer, against 3 percent reserved quota, for physically challenged persons, on the basis of selection process and recommendation of the Arunachal Pradesh Public Service Commission (APPSC). The appointment of the petitioner was challenged on the ground of non-submission of proper disability certificate. Accordingly, the writ petitioner was directed by a decision of a single Judge to appear before the State Medical Board of Arunachal Pradesh to ascertain with certainty as to whether the petitioner is a physically disabled person or not. On behalf of the petitioner, it was argued that at the time of issuance of the disability certificate to the petitioner in the year 2003 there was no guideline or mandatory requirement for a Specialist to be a member of a Medical Board. But a division Bench of the Gauhati High Court, upholding the decision of the learned single Judge, again directed the petitioner to appear before the appropriate Medical Board to determine, if the petitioner really suffered from disability and directed that the medical examination be completed within a period of four weeks.

In view of the above directive, the petitioner approached the Chief Medical Officer (CMO); but in view of lack of any official direction to the CMO either from the APPSC

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or from the Court, the medical examination of the petitioner was refused. The petitioner submitted representation for conducting medical examination but the petitioner was never called for by the State Medical Board for medical examination. Since time was passing out and the petitioner was not called for any medical examination by the State Medical Board, to avoid any further confusion and delay, the petitioner approached the District Medical Officer, who examined the petitioner and a disability certificate, certifying the petitioner to be permanently disabled with 60 percent disability, was issued to the petitioner. The petitioner submitted the certificate report to the APPSC and but to the surprise the petitioner was served with the order of termination of service cancelling the recommendation made by the APPSC for appointment of the petitioner in the post of Sub-Treasury Officer.

The Court pointed out that the direction issued by the learned single Judge was not to the petitioner to submit the medical report, the order passed by the Court, specifically directed the APPSC to act on the medical report, submitted before it directly by Medical Board, therefore, the APPSC cannot be heard to say that it had no role to play to obtain the medical report or to take necessary steps in this regard for getting the petitioner medically examined by a medical Board. The Court Court made the following observation:

The moot question for determination by the Medical Board was whether the petitioner was a disabled person or not...APPSC ought not have forgotten that the petitioner was initially found to be disabled person after verification of all necessary certificates, and accordingly after having accepted the physical disability certificate of the petitioner, he was selected and recommend by the APPSC. The question of re-examination and
reevaluation of the petitioner arose on a challenge made before this High Court, suspecting the disability certificates of the petitioner, wherein a direction was issued by the Court to examine and ascertain with certainty, whether the petitioner is at all a disabled person or not. Nobody even whispered either before the APPSC or this Court that the petitioner was not a physically disabled person and all his certificates are false. Apparently, on examination by the Medical Board, the petitioner was once again confirmed to be a disabled person, and thus qualified to be appointed in the disability quota. If the Medical Board would not have found him physically disabled the situation would have been different, but cancellation of recommendation by an Apex body like APPSC on unconvincing ground, like failure to produce the disability certificate in time, is apparently arbitrary, capricious and irrational, when ex-facie the petitioner had no control or role to play except presenting himself for examination on issuing a medical certificate of disability.

The Court said that the action of the APPSC had only warranted interference by the Court in setting aside and quashing the impugned order of APPSC canceling the recommendation of the petitioner.

5.4.7: Office of Commissioner and Implementation of the Act

In order to deal with the grievances of persons with disabilities under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and also to give effect to the various provisions of the Act (including their proper implementation), there is a provision under Chapter XII of the Act for the Chief Commissioner for Persons with Disabilities (CCPD) at the central level and the Commissioners for Persons with Disabilities (CPD) at state level. The Sections that are relevant for the present purpose are reproduced below.

Section 58: The Chief Commissioner shall -
a. coordinate the work of the Commissioners;
b. monitor the utilisation of funds disbursed by the Central Government;
c. take steps to safeguard the rights and facilities made available to persons with disabilities;
d. submit reports to the Central Government on the implementation of the Act at such intervals as that Government may prescribe.

Section 59: Without prejudice to the provisions of section 58 the Chief Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to:

a. deprivation of rights of persons with disabilities;
b. non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities, and take up the matter with appropriate authorities.

Section 61: The Commissioner within the State shall -

a. coordinate with the departments of the State Government for the programmes and schemes for the benefit of persons with disabilities;
b. monitor the utilization of funds disbursed by the State Government;
c. take steps to safeguard the rights and facilities made available to persons with disabilities;
d. submit reports to the State Government on the implementation of the Act as such intervals as that Government may prescribe and forward a copy there of the chief Commissioner.

Section 62: Without prejudice to the provisions of section 61 the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to -

a. deprivation of rights of persons with disabilities;
b. non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities, and take up the matter with the appropriate authorities.

Section 63: The Chief Commissioner and the Commissioners shall, for the purpose of discharging their functions under this Act, have the same powers as are vested in a court
under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:

a. summoning and enforcing the attendance of witnesses;
b. requiring the discovery and production of any document;
c. requisitioning any public record or copy thereof from any court or office;
d. receiving evidence on affidavits; and
e. issuing commissions for the examination of witnesses or documents.

(2) Every proceeding before the Chief Commissioner and Commissioners shall be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code and the Chief Commissioner, the Commissioner, the competent authority, shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

The Court of the Commissioner of Disabilities is the first access point for redressal of the grievances under the PWD Act. Several disability cases came before the Courts of the Commissioners of Disabilities and several of them were disposed at that level itself. As per data collected (in person) from the Office of the Chief Commissioner for Persons with Disabilities, there were a total 1877 disability cases before the Commissioners of Disabilities for the period of 1st April to 31st December 2012, of which 902 were new cases for the for the period referred above and the remaining 975 were unresolved cases of the previous years. Upto 31st December 2012, the Commissioners disposed of 641 cases out of the total 1877 cases. It appears from the data of the Office of the Chief Commissioner that the number of disability cases before the Courts of the Commissioners has been gradually increasing over the years and the cases of unresolved cases continued to increase in each succeeding years.
There are many instances where the parties aggrieved by the decisions of the Court of the Commissioner moved to higher Court. Also many cases were filed directly before the higher Court without first resorting to the Court of the Commissioner. Most of the PIL petitions have in fact directly been filed either with the High Courts or the Supreme Court. Several judgements of the higher Courts seemed to have reinforced the basic authority of the Commissioner of Disabilities under the Persons with Disabilities Act and have in fact upheld some of the decisions of the Commissioners of Disabilities. For example, in its judgement on *Bharat Snachar Nigam Limited vs. Chief Commissioner for Persons with Disabilities*\(^{135}\), the Kerala High Court ruled that the Commissioner was entitled to investigate grievances regarding the deprivation of rights of persons with disabilities

In the case of *Baljeet Singh vs. Delhi Transport Corporation*\(^{136}\), the Delhi High Court however took a different approach and observed that Section 59 of the Act only provides that without prejudice to the provisions of Section 58, the Chief Commissioner may on his own motion or otherwise look into the complaint regarding deprivation of right, non-implementation of law, bye-laws, rules issued by the appropriate Government and the local authorities and the welfare and protection of rights of persons with disabilities and *take up the matter with the appropriate authorities* (italics emphasized).

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The Court further observed that there is no power with the Chief Commissioner or the Commissioner to hold order of termination of service or dispensing the service of an employee or reduction in rank to the invalid and to enforce such an order or to pass order of a prohibitive nature or to compel an establishment to take back the employee whose services have been terminated illegally and in contravention of the mandatory provisions of Section 47 of the Act of 1995. The Court was of the view that even if it is presumed that there is such a power with the Chief Commissioner under Section 59 of the Act, existence of alternate remedy is not an absolute bar for exercising jurisdiction under Article 226 of the Constitution of India.

5.5: Amendment of the PWD Act 1995

In India, currently the legal rights of persons with disabilities are protected by the Persons with Disabilities (Equal Opportunities) Act 1995 (PWD Act 1995). The Government of India appointed a Committee chaired by Dr Sudha Kaul to draft a new law in compliance with the UNCRPD, and this Committee has submitted a draft Rights of Persons with Disabilities Bill 2011 (RPDB). The draft bill is available at the website of the Ministry of Social Justice & Empowerment, Government of India.

The RPDB defines ‘persons with disabilities’ as “persons with any developmental, intellectual, mental, physical or sensory impairments including those mentioned in Schedule 1 of the Act, which are not of a temporary nature, and which in interaction with various barriers may hinder full and effective participation in society on an equal
basis with others”. This definition seems to make a reference to the social model when it talks about various barriers\(^{137}\) that “may hinder full and effective participation in society on an equal basis with others”. The critics, however, still believe that the definition is nonetheless relied on ‘medical model’, because the Schedule 1 mentioned in the definition itself is entirely based on a medical understanding of disability, with no social elements\(^{138}\).

The RPDB draft rules out disability which is temporary. It does not recognise that psychiatric disability can be episodic. The definition also does not make a distinction between illness and disability. Some persons may have mental illness but may not be disabled; or may not regard themselves to be disabled. In fact, the social model as mandated by the UNCRPD is still not clearly included in the proposed definition for the amendment of the PWD Act.

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\(^{137}\) Barrier means any factor that impedes, prevents or obstructs the full and effective participation, of persons with disabilities in society. This will include attitudinal, communicational, cultural, economic, environmental, institutional, political, religious, social and structural obstructions

The salient features of the proposed legislation as mentioned in the draft bill itself are as follows:

- to guarantee equality and non-discrimination to all persons with disabilities
- to recognize legal capacity of all persons with disabilities and make provision for support where required to exercise such legal capacity
- to recognize the multiple and aggravated discrimination faced by women with disabilities and induct a gendered understanding in both the rights and the programmatic interventions
- to recognize the special vulnerabilities of children with disabilities and ensure that they are treated on an equal basis with other children
- to mandate proactive interventions for persons with disabilities who are elderly, confined to their homes, abandoned and segregated or living in institutions and also those who need high support
- to establish National and State Disability Rights Authorities which facilitate the formulation of disability policy and law with active participation of persons with disabilities; dismantle structural discrimination existing against persons with disabilities and enforce due observance of regulations promulgated under this Act for the protection, promotion and enjoyment of all rights guaranteed in this Act
- to specify civil and criminal sanctions for wrongful acts and omissions

While definition of disability is still a matter of debate, the proposed amendment in the RPDB seems to have has come out with several innovative ideas and provisions and has tried to cover several new provisions as per the requirements of the UNCRPD.

The RPDB recognizes that “all persons with disabilities are equal before the law and are entitled to equal protection and equal benefit of the law without any direct or indirect discrimination” (Section 4 (1)). Various provisions highlighting specific rights and
entitlements have been proposed for women and girls with disabilities – such as right to education of women and girls with disabilities (Section 7); right to work and employment of women with disabilities (Section 8); right of women and girls with disabilities to be protected against all forms of abuse, violence and exploitation (Section 9); right of women and girls with disabilities to health (Section 10); right of women with disabilities to home and family (Section 11). Some of the significant rights included in the proposed bill for the persons with disability are right to legal capacity and equal recognition before the law (Section 18); right to life and living (Section 22); right to liberty (Section 23); right to live in the community (Section 24); right to integrity (Section 25); right to home and family (Section 28); reproductive rights of persons with disabilities (Section 30); right to political participation (Section 32).

As in the case of PWD Act, the rights of the disabled for the education (including rights of children with disabilities) have been given wider recognition under the RPDB – such as specific rights for children with disabilities under Section 14; right of children with disabilities to health (Section 15); right of children with disabilities to leisure, culture and sports (Section 16); right to education (Section 35); right to free childhood care and pre-school education (Section 38); right to higher education (Section 49). Most importantly, Section 57 (1) of the proposed bill says as follows:

All establishments shall reserve not less than seven percent of all posts and in promotions for persons with disabilities in accordance with the following banding of disabilities, with each band being entitled to 1% ; a. Persons with blindness; b. Persons with hearing impairment and speech impairment; c. Persons with locomotor disability and leprosy cured; d. Persons with cerebral palsy and muscular dystrophy; e. Persons
with autism, intellectual disability and mental illness; f. Persons with multiple
disabilities, deaf-blindness and multiple sclerosis; and g. Persons with Low vision and
persons who are hard of hearing

Coming to the issue of right to social security, Section 64 (1) of RPDB says:

In furtherance of the right to life and living elaborated in Section 22 and the right to live
independently and in the community in Section 24 of this Act, all persons with
disabilities shall have a right to social security which includes but is not limited to
securing adequate standard of living for persons with disabilities and their families in
terms of food security, shelter, housing, social care, pension, unemployment allowance,
health care, medical support, medical and life insurance”

Right to health (Section 65); right to habilitation (Section 70); right to rehabilitation
(Section 71); right to leisure, culture and recreation (Section 73); right to participation
in sports, games and athletics (Section 74); and awareness raising (Sections 68 & 75)
also assume importance in the new proposed bill. Regarding awareness raising, Section
75 (1) of the draft RPDB says:

All appropriate governments in consultation with the National or State Disability Rights
Authority as the case may be shall conduct, sponsor, encourage, support or promote on
a regular and continuous basis information campaigns and sensitization programmes to
ensure that the rights recognized in this legislation are respected, protected and
promoted. Such campaigns should aim at enabling both state and civil society to
comprehend disability as an integral part of the human condition; to recognize the
capabilities and contributions of persons with disabilities; and to combat the
stereotypes, prejudices and harmful practices which impede the participation of persons
with disabilities on an equal basis with others.
Another significant provision of the RPDB is issue of accessibility, whereby Section 76 (1) says:

All persons with disabilities have the right on an equal basis with others to the physical environment, transportation, information and communications, including appropriate technologies and systems, and other facilities and services open or provided to the public, both in urban and in rural areas.

Reasonable accommodation in the matter of education and employment is another significant aspect of the RPDB. The RPDB provides several focal points for implementation of the provisions made under the new proposed legislation. It has in fact proposed some altogether new implementation machineries. For example, Section 94 (1) says, “There shall be established, for the purposes of promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms of all persons with disabilities, an Authority which shall be called the National Disability Rights Authority”. In addition, Sections 115, 126, 134, 138 & 141 respectively talk about establishment of State Disability Rights Authority; National Fund for Persons with Disabilities; District Disability Rights Tribunal; State Disability Rights Tribunal; and National Disability Rights Tribunal. It is, however, not very clear whether such a huge proposal for implementation mechanism shall get the approval of the Parliament or not.

Most importantly, the RPDB has included a Section 64 (4) whereby it says that “The appropriate government shall formulate schemes to provide for social security benefits, aids and appliances, medicine and diagnostic, corrective surgery without cost to persons
with disabilities belonging to economically weaker sections of society”. If all the provisions made in the RPDB can be implemented, it will go a long way for persons with disability. Everything will depend on how the appropriate authorities make appropriate enabling mechanisms and a positive environment for the implementation of the amended Act.

A brief comparative analysis of the various provisions of the UN Convention on the Rights of Persons with Disabilities, the PWD Act and the draft Rights of Persons with Disabilities Bill 2011 (RPDB) in a tabular format has been attached at the end as Annexure.

Concluding Observation

To begin with, the PWD Act was an important legislation for the recognition and realization of certain basic rights and entitlement for persons with disabilities. It was in fact the first major legislation recognizing rights-based entitlement for persons with disabilities in India. The PWD Act came to be an important legal tool for persons with disabilities and, accordingly, several litigations came before judiciary. For judiciary too, the Act formed an important basis in pronouncing judicial verdicts. The PWD Act thus led to a judicial activism in disability rights and consequently the disability rights movement in India started to take a structural shape.
However, despite being an important legislation in the field of disability rights, the PWD Act seems to be a very poorly drafted legislation. The judiciary played a very important role in positive interpretation (including the removal of anomalies) of the various provisions of the Act as can be seen from the case laws referred above. Important judgements were delivered by the judiciary which mostly went in favour of the persons with disability. A bare perusal of the judicial case laws referred above, however, shows that the judgements of the judiciary are not consistently uniform. In fact, in many instances the judgements of the judiciary seemed to have interpreted and re-interpreted the provisions of the Act in entirely different ways and directions. In many judgements, the judiciary seems to have enlarged the scope and practical operation of Act. But the major problem of such judgments is that they are not supported by the relevant text of the statute. This urgently calls for amending the PWD Act in compliance with the UNCRPD and based on our experience gained through judicial case laws/judgements.