CHAPTER - 3

PROTECTION OF RIGHTS OF PERSONS WITH DISABILITIES IN PRE-CONSTITUTIONAL ERA

It is difficult and perhaps next to impossible to trace back the chronological development of various provisions of legislation earlier enacted for the persons with disabilities in India. Though disability has been a common aspect from the very dawn of human civilization, yet hardly there was any legal protection for their security, measures and sincere effort to bring them into the mainstream of the society.

In India researches in history reveals that in the Medieval period i.e. during the Muslim rule, the persons who were sexually handicapped or in other words ‘unac’ were employed to work as spy for the emperor. But such group of individuals was never identified and protected as ‘persons with disabilities’.

It is only in the later phase of British India that is by the end of the sixteenth century, we find legislations containing provisions for persons with disabilities.
So far the origin and legislative provisions to deal with persons with disabilities are concerned the very first Act enacted was the LUNATIC ASYLUMS ACT, 1858 which deals with persons confined in lunatic asylums. The thrust was given only to persons having unsound minds and to no other form of physical disability.¹

THE INDIAN PENAL CODE, 1860 is another Act in this respect where there is no provision as such and the physically challenged persons are precisely not categorized or separated from any other individual in the society. Section 84 of the Act says "nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of act or that he is doing that is either wrong or contrary to law."²

The provision cannot be said to be a direct reference to the disabled persons; but it can be said that since the Code acknowledges 'unsoundness of mind' as a predicament to normal physical activities of a person; therefore, it can be said that one of the earliest legislations of the British period has

¹Bhatt, Usha, Physically handicapped in India; Growing National Problem, Bombay: Popular Book Depot 1963, p.16
² Indian Penal Code 1860
recognised that unsoundness of mind or what we term today as ‘mental illness’, is a form of disability which may excuse the offender from the offence he commits.

Apart from criminal law, THE INDIAN DIVORCE ACT, 1869 is a family law which has considered the in-capabilities of the persons with disabilities as a ground of divorce at the time of marriage.³

Grounds of decree ----- Such decrees may be made on any of the following ground: - that either party was a lunatic or idiot at the time of the marriage.

Suits on behalf of lunatics ------ When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

Hence, it can be said that lunacy or unsoundness of mind can only be a ground for divorce if it persists at the time of marriage. But if the other party becomes lunatic or unsound subsequently, it cannot be a ground of divorce.

³ Singh, A.N.; Enabling the Differently Able, Shipra Publications, 1st ed. 2003, p.17
Almost like the Penal Code, 1860, Section 12 of the Indian Contract Act, 1872 states that a person with unsound mind even after attaining the age of majority makes a contract that will be treated void. So the unsoundness of mind becomes a serious incapability or disability of an individual and indirectly protects them from defrauded activities.

INDIAN EVIDENCE ACT 1872 is also a similar legislation which through various provisions protect persons with disabilities not to be defrauded by anyone and thus doing so these provisions indirectly elevate the prestige of such persons. Under this Act Chapter IX contains provisions relating to witness in courts. Section 118 of the Act provides for the qualification of persons who may testify as witness. It provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions due to tender years, extreme old age, disease, whether of body or of mind, or any other cause of the same kind. The explanation provides that a lunatic is not incompetent to testify,

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4 Indian Contract Act 1872, Section 12
unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers.\textsuperscript{5}

Similarly, \textit{Section 119} of the Act provides for the manner in which a dumb witness may give evidence orally in an open Court. It provides that a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open court. Evidence so given shall be deemed to be oral evidence. This provision thus takes care of the inability of the dumb witness but there is no provision laid down in the Act for blind or deaf witness.

\textbf{THE GOVERNMENT SAVINGS BANKS ACT, 1873} is another piece of social legislation \textit{interalia} economic legislation which seeks to amend the law relating to Government Savings Banks. In this Act, separate provisions have been made with regard to deposits made in Government Savings Banks by or on behalf of minors (\textit{Section 10}), deposits belonging to lunatics

\textsuperscript{5} Indian Evidence Act 1872
(Section 12), and deposits made by married woman (Section 13).\textsuperscript{6}

Section 12 states that “Payment of deposits belonging to lunatics ------If any depositor becomes insane or otherwise incapable of managing his affairs, and if such insanity or incapacity is proved to the satisfaction of the Secretary of the Bank in which his deposit may be, such Secretary may, from time to time, make payments out of the deposit to any proper person, and receipt of such person, for money paid under this section, shall be sufficient discharge, therefore, where a committee or manager of the depositor’s estate has been duly appointed, nothing in this section authorizes payment to any person other than such committee or manager”.

This provision can rightly be called a remarkable example of beneficial legislation enacted to provide financial security to mentally challenged persons.

THE LEPERS ACT, 1898 is another unique piece of social legislation which consider ‘lepers’ to be socially handicapped and are deprived of any right The Act was codified to minimize

\textsuperscript{6} Parmar, S.P. Singh and Shreyas S. Desai; Law of Disability (Medical & Non Medical), Dwivedi & Co., 1\textsuperscript{st} ed. 2003, p.300
the problem, prevent and control the disease and restore the status of these persons. Thus the relevant portions of the Act need to be highlighted.\(^7\) The Act has provided us a nice definition of leper and thus defined as any person suffering from any variety of leprosy. Further, under Section 2(1), 2(a) (b) leper has been defined as a:

(a) Who publicly solicits aims or exposes or exhibits any sores, wounds, bodily ailment or deformity with the object of exciting charity or of obtaining aims; or 
(b) Who is without any ostensible means of subsistence?

In this Act, there is also a provision for the lepers that they are to have proper place for habitation fully equipped with medical facilities. Section 3, authorizes the state government to identify any place to be a leper asylum if it is satisfied that adequate arrangements have been made for the accommodation and medical treatment of lepers.\(^8\)

Despite such provisions, persons suffering from leprosy, still live a secluded life and are not allowed to enjoy full fledged social life. Presently the Persons with Disability Act 1995 also

\(^7\) Supra n. 3  
\(^8\) Supra n. 3
holds that ‘leprosy cured’ persons are disabled and not persons still suffering from leprosy; therefore, they should not live a secluded life but has the right to avail all the rights ensured by the laws dealing with persons with disabilities.

So to bring happiness in the life of the lepers, they need to be rehabilitated in a centre well-equipped with medical and paramedical staff. They should be provided an environment to live in where they would not feel themselves as neglected and condemned entity of the society.

In this respect this Act was the first major attempt to recognize the needs of certain individuals suffering from virulent disease like leprosy. Though the Act was not a comprehensive legislation covering all aspects of disability but it was a sincere attempt on the part of the British government to rehabilitate these people into the mainstream of the society.

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9 Section 2(n) of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act, 1995 states that “leprosy-cured persons” 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.
So towards the end of the twentieth century, these were the few legislations where disabled persons got to some extent a due recognition. But with the beginning of twenty-first century and before the commencement of the Constitution of India in the year of 1950 a number of enactments were made protecting and safe guarding the interest of the persons with disabilities. Such enactments are qualitatively better than the earlier legislations and try to protect the rights of the persons with disabilities.

Among these legislations, the name of THE PRISONER’S ACT 1900 should come first. This is an Act, to consolidate the law relating to prisoners confined by order of a Court\textsuperscript{10}. In this Act, there is specific provision dealing with the manner in which lunatic prisoners have to be dealt with. Section 30 of the Act\textsuperscript{11}


\textsuperscript{11} Section 30 of the Act states that how lunatic prisoners are to be dealt with ------- Where it appears to the State Government that any person detained or imprisoned under any order or sentence of any court is of unsound mind, the State Government may, by a warrant setting forth the grounds of belief that the person is of unsound mind, order his removal to a lunatic asylum or other place of safe custody within the State there to be kept and treated as the State Government directs during the remainder of the term for which he has been ordered or sentenced to be detained or imprisoned or, if on expiration of that term it is certified by a medical officer that it is necessary for the safety of the prisoner or others that he should be further detained under medical care or treatment, then until he is discharged according to law.

(continued)....
explicitly states that due care should be taken by the government for lunatic prisoners or prisoners becoming lunatic. By virtue of the provisions of the Act, it is a duty on part of the governmental authority to provide security, protection and proper treatment to such prisoners.

CODE OF CIVIL PROCEDURE, 1908 is another piece of legislation which now and then arranges some provisions providing rule for filing of suits by or against minors and persons of unsound mind. A minor (one who has not attained the age of eighteen years) can file a suit in his name by a person who in such suit shall be called the next friend of the minor. The

(2) Where it appears to the State Government that the prisoner has become of sound mind, the State Government shall, by a warrant directed to the person having charge of the prisoner, if still liable to be kept in custody, remand him to the prison from which he was removed, or to another prison within the State or if the prisoner is no longer liable to be kept in custody, order him to be discharged.

(3) The provisions of section 9 of the Lunatic Asylums Act, 1858, shall apply to every person confined in a lunatic asylum under sub-section (1) after the expiration of the term for which he was ordered or sentenced to be detained or imprisoned and the time during which a prisoner is confined in a lunatic asylum that sub-section shall be reckoned as part of the term of detention or imprisonment which he may have been order or sentenced by the Court to undergo.

(4) In any case in which the State Government is competent under sub – section (1) To order the removal of a prisoner to a lunatic asylum or other place of safe custody within the State, the State Government may order his removal to any asylum or place within any other State or within any part of India to which this Act does not extend by agreement with the State Government of such other State and the provisions of this section respecting the custody, remand and discharge of a prisoner removed under sub-section (1) shall, so far as they can be made applicable, apply to a prisoner removed under this sub-section.
Court can also appoint a proper person to be the guardian for the suit for such minor. These provisions also apply to a person of unsound mind.\textsuperscript{12}

According to the code, disabled persons like deaf, dumb, blind, or without limbs or hand need to be present in the court to give witness. But in case of persons having disability or inability to move out of his residence due to old age or illness, the Civil Procedure Code provides for Commission (under Order 26 Rule 1)\textsuperscript{13} which will take the evidence of such disabled persons at their place of residence.

REGISTRATION ACT 1908 considering the difficulty of persons with disabilities while dealing with powers of attorney that are recognizable under the Act, an exception under this Act has been made in Section 33 in respect of persons with physical

\textsuperscript{12} ORDER XXXII Code of Civil Procedure states that Suits by or against minors and persons of unsound mind –Rule 15. Rules 1 to 14 (except rule 2 - A) to apply to persons of unsound mind–Rules 1 to 14 (except rule 2–A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.

\textsuperscript{13} Order 26 Rule 1 of the said Code states that “Any court may in any suit issue a Commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the court or who is from sickness or infirmity unable to attend it.”
disability from attending the registration office or court for the purpose of executing any power of attorney.

It is to be noted that the Registration Act gives special attention for person having physical infirmity apart from mental disability. As per requirement of registration, a person’s physical presence is important; however, a special arrangement has been provided in the Act so that any person with physical inability or incapacity unable to move or use any particular organ of the body can also register a document.

DESIGNS ACT, 1911 is another piece of legislation which in an isolated way give some protection to certain category of persons with disabilities in section 74 of the Act.  

It is a noteworthy fact that both the Prisoners Act and Code of Civil Procedure refer to unsound persons. But the Designs Act, 1911 and more specifically the Registration Act 1908 deal with

14 The said Section states that (1) If any person is, by reason of infancy, lunacy or other disability, incapable of making any statement or other disability, incapable of making any statement or doing anything required or permitted by or under this Act, the lawful guardian, committee or manager (if any) of the person subject to the disability, or if there be none, any person appointed by any court possessing jurisdiction in respect of his property, may make such statement as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of the person subject to the disability.

(2) An appointment may be made by the court for the purpose of this section upon the petition of any person acting on behalf of the person subject to the disability or of any other person interested in the making of the statement or the doing of the thing.
persons having any kind of infirmity. The terms 'etc' and 'other disability' as used in the Design Act (Section 74) denotes that lunacy is one form of disability recognized by the Act, but any other kind of disablement will also be inclusive in the said provision. Similarly the term 'bodily infirmity' in the Registration Act (Section 33) excuses such persons having any kind of physical infirmity from attending the registration office in person.

At this stage, we find a development that is by discarding the principle of recognition of only persons having unsound mind as disabled persons few other legislations including the present one began to recognize both mental and specially physical disability for the legal protection. Here the first time the term 'disability' is introduced by the legislators. Subsequently another Act was also passed exclusively for the lunatics only.

This Act i.e. INDIAN LUNACY ACT, 1912 is to some extent comprehensive in nature and exclusively paid attention to one category of persons with disabilities i.e. lunatic persons. But the
Act however has its inherent limitation.\textsuperscript{15} The Act does not classifies or defines the various kind of mental illness as exist now; neither it distinguish the needs of mentally ill persons or mentally unsound persons; it has a provision that empowers the police to arrest wandering lunatics. Moreover, this Act has differentiated the mentally unsound person from the rest of the society and this principle was adopted in various forthcoming legislations in India during that period. To a certain extent, the researcher feels the Act as little unfair because neither it attempts to protect the rights of the mentally disabled persons or provide security to them instead, it alienates them from the rest of the society, which ultimately makes the process of rehabilitation more difficult to achieve.

\textbf{WORKMAN’S COMPENSATION ACT, 1923} opens a new chapter in the history of protection of the rights of the person with disabilities in the work place. This is the first, comprehensive legislation where the disability caused due to accidents has been recognised on the basis of it’s nature and extent.\textsuperscript{16} Infact the Act articulated and provided few such

\textsuperscript{15} \textit{Supra} n.6, p.25
\textsuperscript{16} \textit{Supra} n.6, p.350
concepts regarding disability matter which has created a great impact for the persons with disability. The definitions of partial disability, permanent partial disability aptly proves the same.

Partial disability has been defined as, where the disability is of a temporary nature, such disability which reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disability. Section 2 (1) (g) of the Workmen’s Compensation Act defines what is “partial disability” and further adds a provision by stating that every injury specified in Part II, Schedule–I, shall be deemed to result in permanent partial disability.

By virtue the provision of this Act Permanent partial disability is a case, where workman sustains injuries in the course of employment and get treatment as in–patient in government hospital. Permanent partial disability is assessed to the tune of 26 percent. It is such disability of a permanent nature that reduces the earning capacity of an employee in every employment in which he was capable of undertaking at the time of the accident resulting such disability: provided that every injury specified in Part II of the Second Schedule shall be
deemed to result in permanent partial disability. At the same time "Total disability" under this Act means such disability, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disability. Provided that permanent total disability shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries in Part II thereof where the aggregate percentage of the loss of earning capacity as specified in the said Part II against those injuries, amounts to 100 percent or more.

As per Section 2(1)(i) 'total disability' must be such disability whether temporary or permanent nature, as it would incapacitate a workman for all work which he was capable of performing at the time of the accident resulting in such disability. However, there is a proviso which puts out an exception to the main part of the section and as per the proviso if it is in injury specified in Part I of Schedule I, it will be deemed to result in total disability.

17 'Ramakrishnan vs. Employee's State Insurance Corpn. , 2001 ACJ 119 (Ker)'
18 "Lingampalli Rajam vs. Colliery Manager, Morgan's Pit Singareni Collieries Co. Ltd., 2001 ACJ 350 (AP)"
The Act also provides the procedure and principles for the assessment of total disability. It provides that if injured is unable to perform all the work he was engaged in, it amounts to total disability. The fact that he can do some other work elsewhere is no ground to state that he is not totally disabled. Assessment of "Total disability" should also be made with reference to work which the employee was to perform at the time of accident, irrespective of the fact that he can elsewhere do some other work.19

The Act at the same time as a security measure provided all method of determining of total permanent disability or partial disability, calculation of earning capacity, loss of earning etc. by various methods - The case of total permanent disability or permanent partial disability has to be determined by the Labour Officer, i.e., the Commissioner for workmen’s compensation and not by the Medical Officer. Where the case is one of permanent partial disability within Clause (c) of Section 4 (1) of the Workmen’s Compensation Act 1923, it directs the percentage of the compensation payable would be such as would

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19 R. Phanumantha Gowda vs. Devaraju, 1995Lab IC 2301 (Kant)
be proportionate to the loss of earning capacity as assessed by the qualified medical practitioner.\textsuperscript{20}

The provision of proof of Percentage of disability secures the position of person who has become disabled in service if his disablement can be aptly proved. For proving percentage of disability a medical officer is to certify the same. He has to take into consideration the nature of injuries and the loss of earning capacity. However, it is not necessary that the Medical Officer should reflect the same in the certificate itself.

Calculation of Earning capacity in awarding compensation under Section 4 (1) (c) (ii) of the Workmen’s Compensation Act, 1923, should be estimated by the loss of the workman’s earning capacity caused by the accident is to be estimated and not simply loss of his physical capacity. A doctor might well estimate the loss of his physical capacity for work, but the loss of his earning capacity must be estimated by some other person, the best estimate can be given by the employer himself who has the opportunity of seeing the workman’s work before and after the accident.

\textsuperscript{20} \textit{Supra} n.6, p.352
Loss of earning and Loss of earning capacity are conceptually different from each other. There is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earning is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.²¹

Assessment for loss of earning capacity ---- In view of the specific requirement of the provision of Section 4 (1) (c) (ii)²² of the Act the loss of earning capacity is to be assessed by a

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²¹ Supra n.11, p.252
²² In relation to compensation the Section 4 of the Act states that
(1) Compensation under Section 4 shall be paid as it falls due.
(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.
(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall ------
(a) Direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the official Gazette, on the amount due; and
(b) If in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty percent of such amount by way of penalty:
Provided that an order for the payment of penalty shall not be passed under Clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.
qualified medical practitioner. The qualified medical practitioner also cannot assess the loss of earning capacity by his guess work unless the considers the nature of injuries, the percentage of physical disability, the capacity of the injured to perform the nature of work with specific reference to the type of work he was engaged in and several other such factors with regard to the loss of earning capacity. In this view, in absence of the evidence of the doctor it is not permissible for the Court to find out only from the evidence of physical disability the extent of loss of earning capacity.

A brief survey of the provisions of the WORKMAN’S COMPENSATION ACT, 1923 which relates to disable workers reveals that it is good effort on the part of the legislators to make the right regime for disable workmen, more transparent accountable and responsive for the healthy growth of disable workmen in particular and persons with disabilities in general.

In this context, it is also to be noted that the provision to give compensation to the persons who have become disabled in the course of their employment is a positive outcome of the
influence of international events on Indian legislation specially the First World War and Industrial Revolution.

Thereafter the INDIAN SUCCESSION ACT, 1925 is another good piece of legislation which consolidates the law applicable to intestate and testamentary succession in Chapter II where it deals wills and codicils makes a residuary provision protecting the right of persons with disabilities.

Section 59 of the Act states that every person of sound mind not being a minor may dispose of his property by Will, thereby protecting the right of unsound minors not to the defrauded. It also provides that disabled persons like blind, or insane persons are not debarred from making disposition of their property as long as they understands and apprehends what they are disposing and to whom. The enactment certainly protects the right of the disabled person in their property.

PARSI MARRIAGE AND DIVORCE ACT, 1936 is another important piece of family law which dedicates few provisions
for the persons with unsound mind.\textsuperscript{23} Section 32 of the Act states that (1) Any married person may sue for divorce on any one or more grounds (2) That the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit (3) the defendant has been incurably of unsound mind for a period of two years or upwards immediately preceding the filing of the suit or has been suffering continuously or intermittently from mental disorder of such an extent that the plaintiff cannot reasonably be expected to live with the defendant.

Here it is worthy to mention that in the previous Acts whereby insanity or unsoundness of mind are duly recognized in law but this Act mental disability has been identified and stated in detail like incomplete development of mind or psychopathic disorder or schizophrenia; considering all as different kinds of inability for which it becomes a valid ground for divorce.

\textbf{EMPLOYEES STATE INSURANCE ACT, 1948} is another kind of social security legislation for working class having provisions framed in similar line with \textbf{WORKMAN'S COMPENSATION ACT, 1923}. This Act defines the various

\textsuperscript{23} \textit{Supra} n.11, p.232
categories of disableness that arises out of employment like permanent partial disability or permanent total disability and the like. Moreover, according to Section(2), Sub-Clause(18) of the Act, 'Employment injury' means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contacted within or outside the territorial limits of India. At the same time Section 51 of the Act deals with compensation for temporary disabled person. The various insurance schemes provided under the Act for the workers is basically a social security measure taken for their protection so that the right and dignity of the workers in course of their

24 (a) It states that a person who sustains temporary disability for not less than three days (excluding the day of accident), shall be entitled to periodical payment, at such rates and for such periods and subject to such condition as may be prescribed by the Central Government;
(b) A person who sustains permanent disability, whether total or partial, shall be entitled to periodical payment, at such rates and for such period and subject to such conditions as may be prescribed by the Central Government.
Section 54 deals with the determination of question of disability.
(a) Whether the relevant accident has resulted in permanent disability; or
(b) Whether the extent of loss of earning capacity can be assessed provisionally or finally; or
(c) Whether the assessment of the proportion of the loss of earning capacity is provisional or final; or
In the case of provisional assessment, as to the period for which such assessment shall hold good; shall be determined by a Medical Board constituted in accordance with the provisions of the regulations and any such question shall hereinafter be referred to as the “disability question”.

employment can be guaranteed and at the same time vigorously protect the social security intent of disable persons.

The overall survey of the enactments protecting the rights of the persons with disabilities in pre independence era conclusively suggest that in protecting such rights all these enactments more or less adopted a 'cryptic approach' and considered such category of people as mere 'residual category'. However, two important Acts enacted during this period i.e. WORKMAN’S COMPENSATION ACT, 1923 and ESI Act, 1948 created an awareness and such an expanding environment whereby it was felt that something should be done for them by codifying their needs and requirement through legislations. Truly speaking such an outlook also set the environment whereby the needs of these category of people was broadly reflected and got focused in the Indian Constitution in Chapter III and IV which in turn subsequently laid the foundation of many enabling and offspring legislations protecting the rights of the persons with disabilities in the post Constitutional era.