CHAPTER-V
THE JUDICIAL RESPONSE TOWARDS
BASIC RIGHTS OF PERSON WITH DISABILITY
THE JUDICIAL RESPONSE TOWARDS
BASIC RIGHTS OF PERSON WITH DISABILITY

The Convention on the Rights of Persons with Disabilities (CRPD) defines persons with disabilities as, “Those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” The United Nations states, “Everyone is likely to experience disability at some point during his/her lifetime because of illness, accident, or aging.”


Over the decade, the Indian Judiciary has played an outstanding and activist role in recognizing the basic rights of the persons with disabilities in India. The present segment of the research makes a critical analysis of the judicial response towards the basic rights of the persons with disabilities. During last two decades, the protection of persons with disabilities was made mandatory with the passing of certain legislations including the PWD Act (1995) and the Mental Health Act (1987). Employment, education and creating a non-discriminating environment for all persons with disabilities were some of the rights that are given special attention here. It is known that other general legislations also contain provisions that deal with persons with disabilities within the ambit of that law. However, these provisions are not necessarily sensitive. Thus, protection against abuse, social security, custody of children, provision of basic needs such as shelter within the family and marital home are issues that still need to be adequately addressed.
Disability Law and Access to Rights

Access to justice in an egalitarian democracy must be understood to mean qualitative access to justice as well. Access to justice is, therefore, much more than improving an individual's access to courts, or guaranteeing representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.  

'Access to Justice' is vital for the Rule of Law, which by implication includes the right of access to an Independent Judiciary. In the 14th Report of the Law Commission under the Chairmanship of the first Attorney General for India, Shri M.C. Setalvad, it was observed as under:

"In so far as a person is unable to obtain access to a court of law for having his wrongs redressed.... Justice becomes unequal and laws which are meant for his protection fail in their purpose."

"Despite complicated social realities, it is submitted that Rule of Law, independence of the judiciary and access to justice are conceptually interwoven. All the three bring to bear upon the quality of aspirations which are guaranteed under our Constitution. In order to fulfill the aspiration, it is important that the system must be a successful legal and judicial system."

Under the principle of the Rule of Law, adequate protection of the law must be given to all persons and to give meaning to it, there must exist an unimpeded right of access to justice. In the 'Words of Lord Bingham:

"It would seem to be an obvious implication of the principle that everyone is bound by and entitled to the protection of law that people should be able, in the last resort, to go to court to have their civil rights and claims determined. An unenforceable right or claim is a thing of little value to anyone."

The right of access to justice has been recognized as one of the fundamental and basic human rights in various international covenants and charters. The right of access

431 (See United Nations Development Programme, Access to Justice - Practice Note (2004)].
432 (2012) 5 SCC 424
433 TOM BINGHAM, THE RULE OF LAW, Penguin; Reprint edition (2011) at p. 85
434 [See Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR)]
to justice is also recognized under Article 67 of the Statute of the International Criminal Court. In the context of the European Union, Article 47 of the European Charter on Fundamental Rights provides for the right to an effective remedy and to fair trial. With respect to the Council of Europe, the European Convention on Human Rights and Fundamental Freedoms, Article 6 significantly protects this right to access justice.

Article 8 of the Universal Declaration of Human Rights provides that:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Since long, the people with disabilities have been fighting for their rights. In the process they have not only sensitized the minds of the legislatures but also at times knocked at the doors of the judiciary. In the present segment the researcher has made a modest attempt to analyze some of the selective case studies and draw legal implications of such judicial mind.

Scope of Disability Laws

The Indian Judiciary has played a key role in settling controversial issues relating to the rights of the person with disability. The PWD Act coming into existence in 1995. Unfortunately, the provisions of the PWD Act have not been fully implemented till date. Sometimes, the legality of international law has been challenged. Time and again the Court’s intervention has been sought in this area.

Application of International Legal Instruments: Hon’ble Supreme Court of India in Vishaka and others v. State of Rajasthan and others, and M/s. B. R. Enterprises v. State of U. P. and others observed that the international covenants, declarations, and proclamations to which India is a signatory, can be used for construing fundamental rights expressly guaranteed in the Constitution of India, which embody the basic concept of equality in all spheres of human activity. There is no law in India which

436 (1997) 6 SCC 241
437 JT 1999 (3) SC 431
prohibits allotment of land and houses to handicapped persons on concessional rate, but on the contrary the Parliament has framed. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which provides for preferential allotment of land on concessional rate, of houses, setting up business, setting up of special recreation centres, establishment of special schools, establishment of research centres, and establishment of factories by entrepreneurs with disabilities. Hence, international covenants, declarations, proclamations and treaties to which India is a signatory, are bound to be followed by every State.

Apart from the problem of non-implementation, the PWD Act posed another challenge. It created a certain confusion regarding the definition of terminology. Here too the judiciary played a key role in providing this definitional clarification. This intervention was of immense value in situations where either the government departments or the public sector attempted to find loopholes in the law to take shelter under the same. The fact that was slowly brought home by the courts - is that the PWD Act overrides all other legislation. Where there have been clashes between the Act and other existing legislations, and where two interpretations are possible, the one, which advances the objective of the Act has been accepted. Interestingly, the courts also upheld the applicability of the Act in issues relating to incidents before 1995. The Courts have also helped in clarifying the scope of the definition of disability and in a case, had recommended the Airport Authority of India to consider a pilot with heart disease for alternative employment since it can lead to disability later. In another instance, responding to the question whether a person who with disability should be given preference over a person who acquired disability at a later, the Court said that no such difference existed under the Act – and that the only objective of the Act was to encourage disabled people to get the privileges irrespective of the nature of their disability.

In *Union of India v. Hasan Khan*\(^{438}\) the appellant filed a case under Sections 2(i) (t), 47 and 72 of the Persons with Disabilities Act, 1995 for illegal termination on account of medical disability. The Court observed that the argument made on behalf of the Union of India was weak. Examining the relevant provisions, it held that mental retardation was one of the type of disabilities recognised under the Act. Further, after

\(^{438}\) 2003-II-LLJ 779
examining the Section 72 of the Act, the Court noted that the petitioners were suffering from a misconception that the provisions of the Act were in contradiction to the provisions of the Central Civil Rules. Further, holding that the provision under Section 47 was mandatory and hence could be ignored and directed that the Court order be implemented within three weeks.

In Om Prakash Singh vs. Union of India and Others\(^{439}\) the Appellant Omprakash filled the case under Section 18 of the Central Reserve Police Force Act and Section 47 of the Persons with Disabilities Act, 1995. Om Prakash, a CRPF constable had sustained injuries while he was on active duty and on account of such injuries he had acquired a disability. According to the Court, this order was not sustainable under law and was accordingly quashed. The CRPF was directed to consider Om Prakash’s case in accordance with Section 47 of the Act and the provisions of the Standing Order. It was also pointed out that while doing so the CRPF should keep in mind that in case there was any discrepancy between the Act and the Standing Order, then the Act would have an overriding effect upon the provisions of the Standing Order. The writ petition was accordingly allowed.

In another case a petition was filed by A. Seshiah\(^{440}\) against the order of the C.I.S.F terminating his services, which was issued consequent to his acquiring a permanent disability invoking section 33 & 47 Persons with Disabilities Act, 1995. The court held that the notification in reference was issued under proviso to Section 33 of the Act, and not under Section 47. Thus, it emerged that Section 47 of the Act continued to apply to C.I.S.F and other paramilitary organizations. In view of this fact, it was concluded, that the Commandant could not deny the benefit of Section 47, to Seshiah. The importance of the protection accorded by the Parliament, under Section 47 of the Act, to the persons who acquire disability, while in service was emphasized. It was observed that a statutory duty is cast upon, an employer under Section 47, and where two interpretations are possible, the one, which advances the objective of the Act, shall be preferred. For these reasons, the Writ appeal was allowed and it was ordered that Seshiah should be taken back into service.

---

\(^{439}\) 2005 All. L.J. 2419
\(^{440}\) Seshiah v Commandant, Central Industrial Security Force Unit 2005(3) ALD766, 2005(3) ALT 268
This is a petition challenging the order of the Labour Court directing the Delhi Transport Corporation (DTC) to reinstate Harpal Singh, who was working as a Security Guard with the Corporation. He met with an accident while in service and became disabled. He was retired from service prematurely due to the disability so he appealed to the Labour Court. The Labour Court reinstated him under the provisions of Section 47 of the Persons with Disabilities Act. After examining the Statement, Objects and Reasons of the Act, the Court observed that the Act was enacted to create a barrier-free environment for people with disabilities and to remove any discrimination against them in sharing of development benefits. It was also stated that the Act sought to make special provisions for the integration of persons with disabilities into the social mainstream. Thus, it is clear that the Act is a welfare measure and with a view to benefit disabled people.

Rajbir Singh, a driver of DTC was prematurely retired from service on grounds of physical disability, through an accident which had acquired during the course of his employment. When he rejoined service, he was required to appear before the Medical Board of the DTC, which declared him unfit. This led to an order retiring him prematurely from service in view of the report passed by the Medical Board. Rajbir filed a petition against this order, which was rejected. He then filed the present appeal. The Court stated that the Act could be applied retrospectively if the employee was at that time employed with the organization. The Court allowed the writ petition and the order of termination was quashed. The DTC was directed to take Rajbir Singh back into service with full pay protection and arrear pay. It was also mentioned that in case Rajbir was unable to perform the duties of his job effectively and in the manner prior to his accident, then the DTC would have to deal with him in accordance with Section 47 of the Act. The court also held that Rajbir was entitled to a cost of Rs. 3000/-

S. Mohan v. The Presiding Officer, Labour Court and the Management, Thanthi Periyar Transport Corporation the Court held that it was true that the provisions of the Act came into force only on 17.2.1996 but also pointed out that the provisions of the Act

---

441 Delhi Transport Corporation v. Harpal Singh, Ex Security Guard & Anr. 105 (2003) DLT 113
were related to welfare measures to provide relief to the employees who had suffered
disability in the course of performing their duty. Therefore, the duty of the employer to
provide alternate employment was obligatory and the employer had to do so even in the
absence of the Act. Further, it was held that it was not as though such a right of the
employee was envisaged by the Courts only in the context of the provisions of the Act.
Even prior to the passing of the Act such directions had been issued by the Supreme
Court and many High Courts in order to improve the living conditions of the employees.
It was felt improper for the management to terminate the services of their employees, who
had worked for the establishment and to leave them without any job or livelihood only on
the ground that the employee and suffered a disability, ignoring that the disability had
been incurred only while performing his duties for the employer. Moreover, the Court
stated that the employment was always initially on temporary basis and it could not be
denied that after the completion of the probation period, the employees services were
entitled to be made permanent. Thus, such an employee could not be treated as a casual
employee. Otherwise, there would be no justification for receiving various deposits from
him, which included not only caution deposit but also contribution for the Medical
College and Engineering College, which were run by the Corporation. Therefore, the
mere fact that Thanthi had incurred the disability before he could be made permanent
could not result in depriving his right to be made permanent and the rights of a permanent
employee. Thus, the Court directed the Transport Corporation to reinstate Mohan on a
suitable employment. The writ petition was allowed

Delhi Transport Corporation vs. Presiding Officer, Labour Court IV and Anr 444

The Court speculated whether the aforesaid Act could be applied retrospectively and can
apply to the facts of the present case, relied on the judgment of Supreme Court in Ved
Prakash and Baljeet Singh’s case which set down the parameter applicable to the present
case. It was held that the measures needed to rehabilitate handicapped persons have
assumed greater force after coming into force of the said Act in 1996. Accordingly, Ram
Kumar ought to have been absorbed in a post which offered emoluments equivalent to the
post of Driver on which he was employed prior to his premature retirements but it would
not be appropriate to offer all the back wages to him as he had declined the offer of the
lower post. The Court further held that in the interest of justice, 25% back wages payable

444 2003IVAD (Delhi) 421; Baljeet Singh v. Delhi Transport Corporation, MANU/DE/1031/2000

258
to the class IV employee he paid to Ram on or before 1st July, 2003 and he shall also be
reinstated on or before 1st July, 2003

**Definition of Disability**

In *Km. Angna Singhal v Medical Council of India*\(^{445}\) the court considered the
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (No. 1 of 1996). Under Section 2(i), the expression 'disability' has been defined to mean (i) blindness, (ii) low vision, (iii) leprosy cured; (iv) hearing impairment, (v) locomotor disability, (vi) mental retardation, (vii) mental illness. It was urged that there is no better definition of the expression 'disability' as mentioned in the aforesaid Act with reference to the health of a person.

Considering the issue of disability the court observed that: Court does not have the expertise to decide the question whether a patient of Bronchial Asthma is to be treated in the category of 'illness causing disability'. In common parlance, the expression 'disability' means deprivation of ability, i.e., a state of being disabled or incapacitated: absence of physical competency; incapacity, impotence, weakness, a want of competent power, strength or physical ability and may include mental as well as bodily disability. Sometimes, disability may result as well from the condition of the mind and nerves as from other causes and where a man is so inattentive or forgetful as a result of mental disorder that he cannot be trusted to carry on even simple forms of work. The meaning and Import of the expression 'disability' in different forms have been mentioned in *Words and Phrases, Permanent Edition, Volume 12A (St. Paul Minn. West Publishing Co.)* (from pages 198 to 228). The gamut of the varying definitions and meanings is that a person. In order to become 'disabled' should be incapacitated and may have lost the power to work. If his/her ability to do the work stands deprived, then only it would be a case of disability.

In *Pramod Arora v Honble Lt. Governor of Delhi and others*\(^{446}\) the court considered seven categories of disorders or conditions as "disabilities". The 1999 Act meant to cater to specific conditions such as cerebral palsy, mental retardation and

\(^{445}\) 1998 (4) AWC 86

\(^{446}\) THE HIGH COURT OF DELHI, W.P.(C) 1225/2014, pronounced on 03.04.2014

http://www.indiankanoon.org/doc/108860109/
multiple disabilities, in turn defines two other categories autism and mental retardation. Section 2 (h) defines multiple disabilities with reference to the definitions under the PWD Act. Section 2 (o) of the 1999 Act defines disabilities with 80% or more of one or more multiple disabilities to be a "severe disability" for its purposes. Further, a child with disability - for the purposes of RTE Act - is wide enough to cover a child with "disability" under the PWD Act, a child being a "person with disability" under the 1999 Act as well as a child with "severe disabilities". This is evident from the newly inserted Section 2 (ee) of the RTE Act. Before the 2012 amendment, the RTE Act by Section 3 - even while spelling out that all children have the right to free and compulsory education - stated through the proviso to Section 3 (2) that children with disabilities as defined under the PWD Act would have the right to pursue free and compulsory education "in accordance with provisions of Chapter V" of the PWD Act. The 2012 amendment deleted the proviso but in essence retained the same stipulation by enacting Section 3(3) and thus enlarging the scope with reference to the categories which had not been included earlier, i.e., children with autism, mental retardation and multiple disabilities in terms of the 1999 Act. The character and content of these rights remained unchanged as is clear from the retention of the expression "shall ... have the same rights to pursue free and compulsory elementary education which children with disabilities have under provisions of Chapter V of the Persons with Disabilities Act, 1995."

**Types of Disability:** In the case of *Javedc Abidi v Union of India and Ors*\(^447\) while analyzing types of disability und PWD Act 1995 observed that "the different types of disabilities mentioned in Section 2(i) of the Act and examine the same in relation to the difficulties one may face by traveling by train to far off places, say from Delhi to Trivandrum, those who are suffering from locomotors disability would stand by a separate class itself because of their immobility and the restriction of the limbs. 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 too far off places whereas a person suffering from locomotors disability above certain percentage of the same will find enormous difficulty in travelling by train or bus. We are considering the question of such disabled persons in the context of granting them the facility of concession for traveling by Air. Having considered the affidavits filed by different parties

\(^447\) (1999) 1 S.C.C. 467
and having considered the submissions made by Mr. Sorabjee appearing for Indian Airlines as well as Mr. Abidi, petitioner in person and bearing in mind the discomfort and harassment a person suffering from locomotors disability would face while traveling by train particularly to far of places we are inclined to issue direction to the Indian Airlines to grant them the same concession which the Airlines is giving to those suffering from blindness. But each and every person suffering from such disability would not be entitled to get the concession in question as it would depend upon the degree of disability. We think it appropriate to direct that those suffering from the aforesaid locomotors disability to the extent of 80% and above would be entitled to the concession from the Indian Airlines for traveling by Air within the country at the same rate as has been given to those suffering from blindness on their furnishing the necessary certificate from the Chief District Medical Officer to the effect that the person concerned is suffering the disability to the extent of 80%. Such District Medical Officer wherein the disabled ordinarily reside will constitute a Board with Specialist in Orthopedic and one other Specialist whom he thinks suitable for the purpose and examine the person and would grant necessary certificate for that purpose. We are quite conscious of the financial position of the Indian Airlines but yet we are issuing the aforesaid direction keeping in view the broad objectives of the Act, as already narrated, and keeping in view the fact that concession is already being granted by the Airlines to the persons suffering from blindness". With these direction and observations the Writ Petition is disposed of.

Unsoundness of Mind: In Ram Narain Gupta v Smt. Rameshwari Gupta\(^4^{48}\) and Kollam Chandra Sekhar v Kollam Padma Latha\(^4^{49}\) the Apex court has dealt the issue of mental disorder in the following manner

The question as to "who is normal?" runs inevitably into philosophical thickets of the concept of mental normalcy and as involved therein, of the 'mind' itself. These concepts of 'mind', 'mental-phenomena' etc., are more known than understood and the theories of "mind" and "menton" do not indicate any internal consistency, let alone validity, of their basic ideas. Theories of 'mind' with cognate ideas of 'perception' and 'consciousness' encompass a wide range of thoughts, more ontological than epistemological. Theories of mental phenomena are diverse and

\(^{448}\) 1988 AIR 2260, 1988 SCR Supl. (2) 913
\(^{449}\) (2014) I SCC 225.
include the dualist concept—shared by Descartes and Sigmund Freud—of the separateness of the existence of the physical or the material world as distinguished from the non-material mental-world with its existence only spatially and not temporally. There is, again, the theory which stresses the neurological basis of the 'mental phenomenon' by asserting the functional correlation of the neuronal arrangements of the brain with mental phenomena. The 'behaviorist' tradition, on the other hand, interprets all reference to mind as 'constructs' out of behaviour. "Functionalism", however, seems to assert that mind is the logical or functional state of physical systems. But all theories seem to recognize, in varying degrees, that the psychometric control over the mind operates at a level not yet fully taught to science. When a person is oppressed by intense and seemingly insoluble moral dilemmas, or when grief of loss of dear ones etch away all the bright colours of life, or where a broken-marriage brings with it the loss of emotional-security what standards of normalcy of behaviour could be formulated and applied? The arcane infallibility of science has not fully pervaded the study of the non-material dimensions of 'being'.

In McLoughlin v. O'Brien, [1983] 1 Law Reports 410 at 418 the learned Lord said, though in a different context: "...... Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesised by the courts But the illnesses that are called mental' are kept distinguished from those that ail the 'body' in a fundamental way.

12. 'Schizophrenia', it is true, is said to be difficult mental-affliction. It is said to be insidious in its onset and has hereditary pre-disposing factor. It is characterized by the shallowness of emotions and is marked by a detachment from reality. In
paranoid-states, the victim responds even to fleeting expressions of disapproval from others by disproportionate reactions generated by hallucinations of persecution. Even well meant acts of kindness and of expression of sympathy appear to the victim as insidious traps. In its worst manifestation, this illness produces a crude wrench from reality and brings about a lowering of the higher mental functions. "Schizophrenia" is described thus: "A severe mental disorder (or group of disorders) characterized by a disintegration of the process of thinking, of contact with reality, and of emotional responsiveness. Delusions and hallucinations (especially of voices) are usual features, and the patient usually feels that his thoughts, sensations, and actions are controlled by, or shared with, others. He becomes socially withdrawn and loses energy and initiative. The main types of schizophrenia are simple, in which increasing social withdrawal and personal ineffectiveness are the major changes; hebephrenic, which starts in adolescence or young adulthood (see hebephrenia); paranoid; characterized by prominent delusion; and catatonic, with marked motor disturbances (See catatonia). Schizophrenia commonly—but not inevitably—runs a progressive course. The prognosis has been improved in recent years with drugs such as phenothiazines and by vigorous psychological and social management and rehabilitation. There are strong genetic factors in the causation, and environmental stress can precipitate illness." (See Concise Medical Dictionary at page 566: Oxford Medical Publications, 1980)

But the point to note and emphasise is that the personality-disintegration that characterises this illness may be of varying degrees. Not all schizophrenics are characterised by the same intensity of the disease. F.C. Redlich & Daniel X. Freedman in "The Theory and Practice of Psychiatry" (1966 Edn.)

Right to Education and Disability

Relevancy of Education: "Education is perhaps the most important function of state and local governments. It is the very foundation of good citizenship. Today it (education) is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may
reasonably be expected to succeed in life if he is denied the opportunity of an
education. Such an opportunity, where the state has undertaken to provide it, is a
right which must be made available to all on equal terms. The Constitution of
India guarantees right to education to all children till the age of 14 years under
Article 21 A. Prior to the amendment, the Courts had treated the Right to
education as a part of the Right to life and liberty guaranteed under other
provisions of the Constitution under Article 21. It needs to be remembered that
this is a general right, and perhaps could be perceived as an attempt to make the
State responsible for the education of all children till they reach a certain age.

The Supreme Court in Mohini Jain v. State of Karnataka has held that though
the Right to Education is not explicitly inserted in Part-III of the Constitution as a
fundamental right but Article 21 read with Article 39, 41 and 45 make it clear that the
Constitution of India made it obligatory for the policy makers to provide education to its
citizens.

The Supreme Court in J.P. Unnikrishnan v. State of A.P. has once again
reiterated the Right to Education flowing from Article 21. The constitutional validity of
RTE Act, 2009 was upheld by Supreme Court in Society for Unaided Private Schools of
Rajasthan v. Union of India and Another, and the aforesaid Act, based since it is on
Article 21A of the Constitution, does not apply to the admission made by private unaided
schools in pre-elementary (pre-primary classes and pre-school) classes except to the
extent of 25% admissions to the children, belonging to weaker sections and disadvantage
group, and the remaining 75% admissions to such classes are regulated by the Recognized
Schools (Admission Procedure for Pre-Primary Class) Order, 2007.

Supreme Court’s judgment in Society for Unaided Private Schools of Rajasthan v.
Union of India and Another, wherein it has been held that

“37. Thus, from the scheme of Article 21-A and the 2009 Act, it is clear that the
primary obligation is of the State to provide for free and compulsory education to

450 Brown v. School Board of Topeka 347 U.S. 483 (1954);-
451 (1992) 3 SCC 666
452 (1993) 1 SCC 645
453 (2012) 6 SCC 1
454 (2012) 6 SCC 1

264
children between the age 6 to 14 years and, particularly, to children who are likely to be prevented from pursuing and completing the elementary education due to inability to afford fees or charges. Correspondingly, every citizen has a right to establish and administer educational institution under Article 19(1)(g) so long as the activity remains charitable. Such an activity undertaken by the private institutions supplements the primary obligation of the State. Thus, the State can regulate by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6).” Unlike other fundamental rights, the Right to Education places a burden not only on the State but also on the parent or guardian of every child and on the child itself. Education occupies an important and sacred place in our constitution and culture. It is a tool for betterment of our civil institution, protection of our civil liberties and path to an informed and questioning citizenry.

**Free and Compulsory Education:** On free and compulsory education to school students the Court in *Social Jurist, A Civil Rights v Kendriya Vidyalaya Sangthanan & others*[^1] reiterated Unaided Private Schools of Rajasthan vs. Union of India and Another,: *

> "The intent of the RTE Act is not to subsidize the wards of the rich and influential parents. The main objective of the RTE Act is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds [Statement of Objects And Reasons]. The Supreme Court in Society for Unaided Private Schools of Rajasthan vs. Union of India and Another, (2012) 6 SCC 1 has held as under:- "7. The word "free" in the long title to the 2009 Act stands for removal by the State of any financial barrier that prevents a child from completing 8 years of schooling. The word "compulsory" in that title

[^1]: Delhi High Court, W.P. (C) 2993/2013 Decided on 13 December, 2013
http://indiankanoon.org/doc/50385473/
stands for compulsion on the State and the parental duty to send children to school.”

**Mandatory Reservation:** So far class reservation is concerned, the Supreme Court in *Indira Sawhney v. Union of India* 456 held that “all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as ‘vertical reservations’ and ‘horizontal reservations’. The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped under Clause (1) of Article 16 can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against the quota will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same.”

**Interlocking Reservation:** The mechanism for working out the “interlocking of reservations” was elaborated in *Rajesh Daria v. Rajasthan Public Service Commission*, 457 in which the Court held as follows:

“7. ... Social reservations in favour of SC, ST and OBC under Article 16(4) are ‘vertical reservations’. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are ‘horizontal reservations’. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class.”

456 (AIR 1993 SC 477)
457 (2007) 8 SCC785
Further, the very object and intendment in enacting Disabilities Act is to provide equal opportunities to the disabled and a reading of the decision *Javed Abidi v. Union Of India*[^458] makes it clear that the said provision is mandatory and not directory.

In *Jitender Pal Kaur v. State of Rajasthan and Ors*[^459], the appellant Jitender Pal Kaur filed this writ petition challenging the action of the University of Rajasthan in not reserving 3% seats for the physically disabled persons. The Court contended that the University was bound to implement the provisions of the PWD Act and therefore should have reserved 3% of the total seats for the disabled candidates. The Universities of the State including the University of Rajasthan were directed to amend their ordinance and provide 3% reservation for disabled candidates. The Court also directed the Universities to implement the directions as soon as possible.

In the *Deputy Secretary (Marl), Department of Health and Family Welfare v. Miss Sanchita Biswas and Ors*[^460] the Court taking into view the various provisions of the Constitution and the Persons with Disabilities Act, the Court concluded that the Constitution and the Act cast an obligation upon the state to provide for reservation of seats for handicapped candidates to the extent of 3% of the total seats in educational institutions like medical colleges. With regard to the contention that the reservation for hill council has been made after taking into account various considerations, the Court observed that no official records were produced before the Court and no objectives were shown for making such a reservation. Further, after referring to some of the earlier cases, the Court opined that Sanchita's right bestowed to her under the Constitution was violated.

In the case of *The Secretary, Educational Department, Goverment of Tamil Nadu, The Director of Medical Education and the Directorate of Medical Education v. Master J. Rajkumar (Minor) rep. by his father and natural Guardian, D Joseph*,[^461] J. Rajkumar

[^459]: MANU/RH/0160/2001
[^460]: AIR 2000 Cal 202
was a minor represented by his father and had 50% disability because of a polio attack that he had during his childhood. He appeared in an entrance examination conducted for the Medical/BDS courses. He secured 285.37 out of 300 marks but could not get admission in the Open Category. The points that arise for consideration are a) Whether a writ of mandamus directing the respondents to implement 3% reservation for persons with disabilities in terms of Section 39 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, has to be issued? and b) Whether the petitioner is entitled to issue of a direction directing the respondents to admit the petitioner for admission under the Category of persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995?

After consideration the Court directed the State Government to reserve 3% seats in all Government Educational Institutions or Government aided Educational Institutions in the State in all courses of study for physically disabled. It is for the State Government to prescribe the conditions for the disabled being suitable for such course and the percentage of disability, besides providing guidelines in respect of admission to various professional courses. In this respect the State has already prescribed the standards among the disabled who are eligible to be admitted. The State Government having announced its determination to rehabilitate physically handicapped persons by reserving seats in the Government Medical Colleges, it is bound to implement Sec.39 of Central Act 1 of 1996.

Social Jurist v. Union of India and others 462 a young disabled adolescent girl child was denied admission in a MCD school despite possessing a valid transfer certificate issued by a recognized private school. The MCD School said that the girl was overage and hence not eligible for admission. The Court held that there is no doubt that Section 16 of the Delhi School Education Act, 1973 prescribes a minimum age of 5 years for admission in Grade I, but does not specify any maximum age for admission. Such a limit is also not provided by any other legislation. Further, Sholey being a disabled child has the fundamental right to have access to free education in an appropriate environment till she attains the age of 18 years as guaranteed to her under Articles 21 and 45 of the Constitution of India; and the above as read with the provisions of Section 26 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full

462 C.M.6736/2000 in C.W. 3956 of 2000 (Delhi HC),
Participation) Act, 1995, where it is the legal duty of the government to provide free educational facilities till the age of 18 year.

In Govt. of India through Secretary and Anr. v. Ravi Prakash Gupta and Anr.⁴⁶³ and Union of India (UOI) and Anr. v. National Federation of the Blind and Ors.,⁴⁶⁴ consider the nature of rights recognized under the PWD Act, as well as the duty of the courts to give effect to them, through a liberal – though ultimately textual – interpretation of the statute.

Right to Education for Child with Special Needs

In Pramod Arora v. Honble. Lt. Governor of Delhi and Ors.⁴⁶⁵ the petitioner is parent of a child with special needs. He states that he got his ward admitted with great difficulty in a school in Delhi in 2013. The child could not progress and was neglected on account of lack of proper attention and infrastructure. He claims to be deeply concerned about welfare of such CWSN and that parents of several such children have been in touch with him since they have been placed at a disadvantage in more ways than one with the advent of the amendment to the RTE in 2012, especially the impugned order of 18th December 2013. It is stated that several letters and communications were addressed to the respondents but have yielded no response. The petition alleged that in their anxiety to ensure free education available to the largest possible numbers, the needs of CWSN who have to face multiple disadvantages have been overlooked, thus marginalizing them completely. The impugned order, it is stated, clubbed the CWSN with those children belonging to “economically weaker sections” and “disadvantaged group” as defined under the RTE Act (“EWS” and “DG”) for the purpose of admission to pre-primary and other classes governed by the Delhi School Education Act, 1973 and Rules framed under it. The petitioner highlights that the number of schools/institutions equipped with infrastructure and personnel to handle CWSN is very few and further, that the nature of the guidelines is such that those children have very little chances of getting admission in these institutions.

⁴⁶³ 2010 (7) SCC626
⁴⁶⁴ 2013 (10) SCC772
⁴⁶⁵ Decided On : Apr-03-2014 ,Delhi High Court, legalcrystal.com/1136375

269
In the above case, the reading of Section 26, PWD Act and Section 3, RTE Act, the Court emphasizes however that the content of the right does not depend upon the number of CWSN in Delhi. Every child, irrespective of numbers, is entitled to an education. The law exists to protect and empower all, whether a majority or minority, and indeed, in such cases, where the constituency being affected is routinely unable to voice its opinion, greater emphasis must be laid on ensuring that the State fulfils its mandate. Simply discussing the content of the right, divorced from the statistical background, however, would render the right ineffective, and one that exists only on paper. The mechanism through which this right is to be brought to fruition must consider the prevailing reality, and the facts and figures. The mandate of the State to provide education under Section 26, PWD Act read with Section 3, RTE Act is an obligation that must match the demand of education of CWSN and the supply, through public and private institutions. The obligation cast upon the Government, along with a concomitant right of all CWSN, to have a right to education at the entry level, is currently a hollow promise. The infrastructure and mechanism to effect this right is as important as a statement of its content. In achieving the mandate imposed by Section 26, the State must bank on all available avenues and resources to reach that stated end. Clauses (b), (c) and (d) of Section 26 are best viewed as means to meet the obligation under clause (a), which is standalone and distinct. Given this, all CWSN must be admitted into public and private institutions that have the capacity to cater to them.

As regards public institutions, the mandate of Section 39, which provides for a 3% reservation, is one measure that is statutorily provided. This, however, does not and cannot exhaust the scope of Section 26. As is clear from the statistics, sufficient seats in public institutions are not available. If anything, these institutions’ capacity has already been exceeded, in many cases by more than twice the available seats. Two avenues thus remain open for the State: either to augment the capacity to intake CWSN in public institutions by creating the necessary infrastructure, and alongside, the mandate that CWSN be admitted into private institutions with the capacity to cater them. The former is a matter of policy, and the Court does not propose to indicate the manner in which such infrastructure is to be created, but only indicate that the legal obligation upon the State under Section 26 of the PWD Act remains in danger of being unfulfilled in the absence of necessary action. As regards the latter, the Court notes that Section 12 of the RTE is an
enabling provision which permits – to the limited extent of 25% – State interference with private unaided institutions. Several private unaided institutions have the capacity to cater to CWSN, and through the prism of Section 12, RTE Act, the mandate of Section 26, PWD Act, is to be effected, notwithstanding the judgment in Jatin Singh (supra), as discussed above. Accordingly, given the circumstances, and in view of the legal obligation under Section 26, PWD read with Section 3, RTE, what is essential is to match the demand for schools for CWSN with the supply of seats in educational institutions (public and private). In order to ensure that these legal rights are not frustrated, the Court proposes an admission and reporting mechanism for the admission of CWSN in primary and 1st grade, i.e. entry level classes.

The Court viewed that above mechanism shall be a single window clearance centre through which all CWSN application shall be routed. The Court accordingly directs the GNCT, through the Principal Secretary, Directorate of Education, to:

(a) Create a list of all public and private educational institutions catering to CWSN. This list shall be created zone wise. It shall include full details as to the nature of disability the institutions are able to cater to, the facilities available, whether residential or day-boarding, and the contact details for the concerned authority in that institution in case of any clarifications.

(b) Create a Nodal Agency, under the authority of the Department of Education (DoE) GNCT, for the processing of all applications pertaining to admission of CWSN. This Nodal Agency shall structure a single form to be utilized by parents and guardians of CWSN for admissions into public and private institutions, including all relevant details required for the purposes of admission. Such forms shall be submitted to the Nodal Agency, which shall prescribe regulations for such process, and be forwarded to the concerned institutions. Any amendments or clarifications or modifications to the application, if the need arises, shall be made through the Nodal Agency. The ultimate decision, once made by the concerned institution, shall be conveyed to the parents/guardians through the Nodal Agency.

(c) The Nodal Agency shall keep a record (including a digital record) of all applicants and institutions, and collate statistics at the end of every admissions cycle. This shall include figures as to the number of applicants, the nature of their disability, place of
residence (zone-wise); and as to the number of institutions, their location (zone-wise), the nature of disabilities they cater to and the number of available seats. Statistics as to the number of CWSN who have dropped out of school during the academic session shall also be collated, in coordination with the schools, at the end of every academic session. This list shall be duly forwarded to the Directorate of Education, which shall endeavour to investigate the reasons for the withdrawal of the child, and assist in re-admission in the next admissions cycle, keeping in view the specific needs of the child.

(d) The Nodal Agency shall also prescribe a uniform mechanism and guidelines for the certification of CWSN by authorized persons.

(e) All applications for admission of CWSN to institution, if such admission is regulated by Section 12, RTE Act (Government owned, aided, or unaided private schools), shall be conducted through the Nodal Agency. Each such institution may nominate a liaison officer to the Nodal Agency, to ensure smooth functioning of the admissions process.

(f) If, at any point during the admissions cycle, any CWSN is unable to be placed in a school catering to his or her special needs, the matter shall be forthwith intimated to the Chief Commissioner of Persons with Disabilities, and the Principal Secretary, Directorate of Education, in order to ensure that the mandate under Section 26 to place the child is fulfilled.

(g) All details mandated to be collated in this order shall be made publicly available on main page of the website of the Directorate of Education, and other public locations, for the maximum dissemination.

(h) The Nodal Agency shall also provide – by itself or through other agencies – appropriate counselling facilities for parents and guardians, if requested by them. The facility of such a counselling shall be made known to all parents/guardians approaching the Nodal Agency. Likewise, the Nodal Agency shall put in place a complaints mechanism and a mobile helpline to provide assistance.
**Merit or Disability:** In *S. Murali Krishna and Ors v. the Principal Secretary to Education Department, Government of A.P. & Ors* the Court considered the question ‘whether seats/posts reserved for disabled persons should be given to them on the basis of their academic merit or on the basis of their relative disability.’ It was further observed that a person with 100% visual impairment would find it as difficult to compete with a person with 75% visual impairment as he would with a non-disabled person. Therefore, a person with a higher degree of disability would always find it more difficult to secure a job than would a person with a lower degree of disability. The Court also considered the earlier Judgment, the implementation of which had been requested by Murali and others. Finally, the Court held that although merit could not be sacrificed but at the same time, the disability had to be the deciding factor in offering jobs or seats to the disabled. It was therefore decided that a minimum benchmark merit criterion would be fixed and all those who secured the benchmark marks or more would then be appointed on the basis of their degree of disability and not their score.

**Provision of Friendly Environment:** The issue of providing friendly environment to persons with disability soon found part of the judicial pronouncement by the Hon’ble Supreme Court in *National Federation of Blind v. Union Public Service Commission & Ors* The judgment gave right to visually handicapped persons to compete on equal footing for job opportunity and the Government of India and the Union Public Service Commission were directed to permit blind and partially blind eligible candidates to compete and write the civil services examination in Braille-script or with the help of scribe.

The judgment of the Honble Supreme Court in *Satish Rawat v. Union of India and Others* is relied upon by learned counsel for applicant to take a stand that even if the selection of private respondents is not to be disturbed, the applicant should be adjusted by creating a supernumerary post. In view of the judgment *M. Dinesan v. State Bank of India, Bhubaneswar, Orissa* and the view taken by Ministry of Finance as also by the Ministry of Social Justice and Empowerment, we are of the view that the applicant to

---

466 2005 (4) ALD 225, 2005 (4) ALT 216
468 ( 2002 ) 7 SCC 29)
469 ILR 1999 KAR 3411, 2000 (3) KarLJ 369
whose allocation to IRS (C&CE) the two Ministries have no serious objection and who stood sufficiently high in merit (Rank 815) should not be deprived of consideration for allocation to the service for which she is actually considered suitable by the Cadre Controlling Authority.

Thus, to administer justice to a physically handicapped female candidate and being guided by the judgment of Hon'ble Supreme Court in Satish Rawat v. Union of India and Ors 470 we quash order dated 26.04.2012 with direction to respondents to give the applicant the benefit of and consider allocating her IRS (C&CE) in view of her position in merit in CSE-2010 against a future available vacancy by treating the same as supernumerary post for the examination in question as expeditiously as possible preferably within a period of three months from the date of receipt of a copy of this order. The selection of respondent Nos 5 to 10 is not interfered. 471

Student and Teacher Ratio: In U.P. Vishesh Shikshak Association v. State of U.P. 472 the Petitioner had filed a PIL before the Allahabad High Court contending that the pupil-teacher ratio so far as specialized teachers and children with disabilities was concerned was not adequate and claimed that the government circular on Integrated Education for Disabled Children Scheme mandated a pupil teacher ratio of 8:1. It also claimed that the Rehabilitation Council of India Act, 1992 imposed a statutory duty on the State to make arrangements for adequate number of teachers for persons with disabilities. The Allahabad High Court recognized the statutory duty of the State to “provide all necessary help and assistance to physically disabled students.” 473 However, in response to an argument that orthopaedically handicapped children do not require specialized teachers, it held that the right to education and right to livelihood being the fundamental rights enshrined under Articles 21 and 21-A of the Constitution, the State Government has to make all efforts to provide necessary assistance to all disabled persons. Taking into consideration the meager strength of 1291 teachers, we

---

470 (2002 (7 SCC 29).
473 Ibid at para 12
cannot presume that State Government may be able to impart education to disabled students."

Disabled Students Admission on Transfer Basis: In *Major Saurabh Charan and others etc. v. Lt. Governor, NCT of Delhi and others etc.* 474, the appellants were transferred to Delhi from different States of India. As a result of which many parents have to give up the admission of their children in previous places and have to shift to Delhi in the mid of the session and because of that, their children did not get admission in any of the schools in Delhi and lost one academic year. On 18.12.2013, Lt. Governor of NCT of Delhi made order to amend Recognised Schools (Admission Procedure for Pre- Primary Class) Order, 2007, according to which admission to open seats in the schools shall be made only on the basis of following fixed parameters and points and further clarifying that vacant/unfilled seat(s), if any, shall be filled by draw of lots - on 14.2.2014, guidelines were issued by the Directorate of Education to eliminate any possible malpractices under interstate transfer category cases. The Department instructed schools to be extra vigilant about possible manipulations under interstate transfer category and make due diligence to verify the genuineness of transfer certificates, including verification from the source of issue of such a certificate. The Court direct that these 24 candidates shall get admission, if not at all admitted, being the successful candidates under the Inter- State Transfer category under Notification dated 18th December, 2013. This order would only ensure to the benefit of those who had approached the Court

Choosing the Mother Tongue and Medium of Instruction: In the case of *State of Karnataka & another Appellants v. Associated Management of (Government Recognized – Unaided – English Medium) Primary & Secondary Schools & others* 475, it has been held that Article 350A cannot be interpreted to empower the State to compel a linguistic minority to choose its mother tongue only as a medium of instruction in a primary school established by it in violation of this fundamental right under Article 30(1) — State has no power under Article 350A of the Constitution to compel the linguistic minorities to choose their mother tongue only as a medium of instruction in primary schools.

474 2014 SCCL.COM 238(Case No: Civil Appeal No.5379-5380 of 2014 (Arising out of Special Leave Petition(C) Nos.10265-10266 of 2014)

475 2014 SCCL.COM 239
Hostel Facilities to Disable Students: In Lalit and Others v Govt. of NCT and Another 476 the petition was filed by 12 inmates of the hostel attached to Andh Mahavidyalya, New Delhi, an institution for visually impaired students, seeking a direction that they may not be expelled or dispossessed from the hostel. Out of these 12 inmates, expulsion orders were issued by the Respondents against 5 inmates on the ground that the hostel was meant for only students up to Class VIII and the petitioners had overstayed beyond this class. Many of them were between 25-35 years old and it was alleged that there was a shortage of space for deserving younger visually impaired students and that they were also intimidating the younger students. One of the main issues before the Court was whether the hostel was obligated to accommodate the petitioners because of their disabled status even if it resulted in a disadvantage to the other disabled students. The court observed .."In the context of the inviolable human rights of the disabled, it is necessary to take note of the binding and mandatory provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (specifically Sections 26 and 30) ('PDR Act') and the Convention on the Rights of Persons with Disabilities ('CRPD') which has been ratified by India. In particular, Article 7 which set out the obligations of the States towards children with disabilities, Article 9 which obliges the States to take appropriate measures to ensure access to "schools, housing, medical facilities', and Article 24 which deals with the right to education are relevant."

The court relied upon Article 24 of the CRPD which guaranteed the right to education and held that in the context of a disabled child housed in a state-run institution there are a cluster of laws all of which can be traced to the fundamental rights to liberty and a life with dignity. It held that in the context of a young person receiving education in a state-run institution as a resident scholar, the right to shelter and decent living is an inalienable facet of the right to education itself and when the State takes over the running of an educational institution that caters to the needs of the disabled, it has to account for the 'cascading effect' of multiple disadvantages that such children face. The court thus directed the Respondent authorities to take every possible effort to see if all the 5 inmates who were given expulsion orders could be accommodated in any of the other institutions in Delhi. Sufficient time of 6 months should be given to them to make alternative

476 W.P. (C) No. 3444/2008, Judgment dated 7.5.2010 (Delhi High Court).
arrangements and assistance should be given to help them find alternative accommodation. The court also observed that this case should act as a wakeup call for the government to monitor the functioning generally of all institutions under its control, particularly for the disabled. This case illustrates the incorporation of the CRPD principles with regard to reasonable accommodation and right to education of children. The court was called upon to balance the two rights, which it ultimately did by taking into account the level of disabilities faced by each group demanding accommodation.

Disability and Higher Education: In *Manjunatha v. Government of Karnataka and Ors* 477 the petitioner, who was completely blind sought to apply for the B. Ed. Course under the government quota of seats in Karnataka. However, he was denied admission by reason of the condition that persons with disability greater than 75 per cent would not be eligible for admission. The announcement issued by the respondent permitted applications from persons with disability but restricted it to such applicants who had a disability exceeding 40 per cent but below 75 per cent. The Karnataka High Court allowed the petition by holding that such a provision in the announcement ran counter to the PWD Act. The respondent government argued that the upper limit in the announcement was based on a similar provision in Karnataka Selection of Candidates for Admission to Teachers Certificate Higher Course (TCH) and Bachelor of Education Course (B.Ed.) Rules 1999 and therefore such a notification could not be challenged. The bench however, rejected this contention and held that even the Rules run contrary to the PWD Act and the state government could not rely on the Rules to deny admission to candidates having more than 75 per cent disability. The court ruled in favour of the petitioner and held that he was entitled to take up CET for admission to B.Ed. course and further declared that he shall not be denied admission on the basis of his disability exceeding 75 per cent. The observations of the court strengthened the protection for persons with disabilities as it effectively held that the disability legislations would take precedence over administrative rules of the government.

In *Kritika Purohit and Anr. v. State of Maharashtra and Ors.* 478 The petitioner was a visually impaired student who sought admission to the course in Bachelor of Physiotherapy but was not permitted to apply for the same. The petitioner contended that

477 W.P. 35969/2010, judgment dated 29-09-2011 (Karnataka High Court).
478 W.P. 979/2010, Bombay High Court.
although the post of a physiotherapist was considered to be suitable for blind persons, the denial of courses in physiotherapy for blind persons ran counter to Section 39 of the PWD Act and that the respondents were obliged to make all accommodations for the Petitioner in conformity with Article 24(2) of the CRPD. The court found that the petitioner had completed the first exam and had secured 62 per cent in the same. Therefore, it held that she should be allowed to be admitted and complete the course. However, the court noted that the state government had accepted the guidelines of the Maharashtra State Council for Occupational Therapy and Physiotherapy that visually impaired candidates are not fit for the physiotherapy course. On this, it noted the contentions of the Petitioner and also Xavier's Resource Centre for the Visually Challenged who claimed that a physiotherapist is not required to perform all the functions of physiotherapy and visually impaired physiotherapists can perform all functions with assistance if necessary. They also pointed out various physiotherapists who were working in Maharashtra successfully for many years. The court held that "the stand of the respondent authorities is clearly discriminatory and adversely affects the Right to Life and equal opportunities of the petitioner as also other such students similarly situated. The fact that petitioner though being visually impaired not only passed her first year examination with 62% marks and is successfully studying in 2nd year, and several visually impaired persons have been working as professional physiotherapists in India as well as abroad appeals to us not to allow the petitioner as also others in the same position to be discriminated against or disqualified on that ground." Thus, the court stayed the decision of the state government and directed the respondents to consider candidates with visual disability for admission to the course in physiotherapy.

In the case of Ranjana Verma v. AIIMS the petitioner is a young girl of 26 years having 50% permanent disability being physically handicapped. She obtained a degree of Bachelor of Science(Hons.) Nursing from AIIMS in 2009 and then applied for M.Sc in nursing in AIIMS for the current session beginning August 2011. The grievance raised by the petitioner is that the respondent AIIMS has made no provision for reservation for the disabled/handicapped persons and are thus violating the provisions of

---

479 W.P.(C) No. 4465/2011, Delhi High Court, Decided on 15.07.2011
Section 39 of the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995.

The court in the case refused to pass any direction in the belated to make provision for 3% reservation for the physically handicapped category as already the process of admission for the said course is complete. However, the court commented that the said reservation of 3% for the handicapped in the nursing courses of M.Sc would not have been advantageous for the petitioner alone but for many other physically handicapped candidates who could have availed the benefit of the said reservation and tried their luck to seek admission in the said course. In any event of the matter, the Chief Commissioner for the persons with disabilities as appointed under the said Act is directed to take an action in this regard in consultation with the Nursing Council of India or any other concerned authorities on the issue of making such a provision of 3% reservation in terms of Section 39 of the Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 for future admissions in the said nursing course in the respondent AIIMS. Steps in this regard shall be initiated by the Chief Commissioner immediately as to how the respondent has not implemented the provisions of the said Act and to ensure that the decision is taken after given an opportunity to the respondent to present its case. The registry is directed to send a copy of this order to the Chief Commissioner appointed under the Persons with Disabilities Act immediately.

In *K. Kiran Kumar v. Union of India* a Writ Petition challenging the selection procedure for admission into MBBS and BDS Courses adopted by the University of Health Sciences, with respect to the seats reserved for the physically handicapped persons. The Government of India had issued instructions that for admission to Medical and Dental courses the benefit of reservations to the physically handicapped should only be given to those persons having handicap to the lower limbs up to 50% - 70%. These instructions were issued on the basis of directions issued by the Medical Council of India. Kiran Kumar and some other candidates, all of whom were suffering from some form of locomotor handicap or another, challenged this selection procedure followed by the University. They contended that they had been issued certificates from the concerned District Medical Officers or other Authorities constituted under the provisions of the

---

480 2005 (6) Andhra Law Times Reports 361

279
Persons with Disabilities Act and claimed that the admissions should be on the basis of these certificates. The Court observed that although the Act provided for reservation of seats in educational institutions in favour of physically handicapped persons, the requirements of a course and the parameters of fitness of the candidates to study the course, could not be ignored. The Court observed that the necessities peculiar to a course assume predominance over the requirement of extending social protection to the physically handicapped candidates. The Court also observed that the circulars issued by the Government of India had not been challenged in the Writ Petition. The Court observed that once the circulars provided that the assessment of physical disability should be carried out by an authority constituted by the University, the certificates issued by other authorities could not be taken into consideration for this purpose. The Court therefore directed that Kiran and the other petitioner's handicap should be assessed by the Committee constituted by the University. The Court directed that their cases along with other eligible candidates should be considered against the available seats reserved for the physically handicapped, in accordance with the circulars issued by the Government of India and the Medical Council of India.

Similarly, in *Sh Fahad Ansari v. All India Institute of Medical Sciences (AIIMS)* 481 the petitioner a physically handicapped person, had appeared for the admission test for the MBBS course at AIIMS. He obtained 39% marks and was not granted admission to the institute. He approached the Office of Chief Commissioner for persons with disabilities asking for admission to AIIMS. The Court observed that the Supreme Court had recognized the MCI as the statutory authority in all matters relating to medicine in India so AIIMS could not consider itself above or independent of the Council. Further, the fact that there had been no appeal or that no specific order had been issued to the Institute did not mean that it could ignore other judgements passed by the Supreme Court in similar matters. The law declared by the Supreme Court is binding on all Courts within the territory of India. When a judgment is passed in a case it automatically applies to all similar cases and there is no need for each case to be individually appealed for/against. The Court thereby observed that AIIMS had clearly ignored the statutory provisions of the Persons with Disabilities Act, 1995. Further, the practice being followed by AIIMS where individual marks of candidates were not

declared and only the results of those who were successful were declared was not justified. The Court observed that all candidates have a right to know how they fare in an examination. AIIMS was directed to produce the mark sheet of Fahad Ansari at the next hearing. They were also directed that if AIIMS wished to file any Counter Affidavit, they should do so within four weeks of this decision.

**Right to Employment under the PWD Act**

Most of the provisions referred above are specific in nature, with limited scope for application for those only who are already in employment and do not make any general provision such as reservation for employment of persons with disabilities. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (briefly, the PWD Act) is the first major legislation in India that legally made explicit recognition of certain basic rights and entitlement for persons with disabilities, including reservation in employment. This Act came to be an important legal tool for persons with disabilities and formed an important basis in pronouncing judicial verdicts. Issues pertaining to employment of persons with disabilities have led to several petitions in courts, including public interest petitions (PILs). The major issues that led to intervention of judiciary included identification and reservation of jobs; promotion, retention and service avenues for disabled employee; disability acquired during the service of an employee; pre-mature retirement of disabled employees; and so on. Identification of posts as per statutory provision under Section 32 of the Act was in fact one of the stumbling blocks in implementation of the reservation mandated under Section 33 of the PWD Act. For a quite long time, after the coming into effect of the Act, establishments neither identified suitable posts nor reserved posts for employment of persons with disabilities. Ironically, they argued non-identification of posts as the reason for non-implementation of reservation.

In the case of *Ashok M. Shrimali v. State Bank of India* 482, 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. The Bombay High Court directed the central government to carry out identification of posts and granted the petitioner liberty to move the Court after the process of identification and

---

482 2001 (Supp) Bom CR 132 (Bom HC)
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.

In the case of Amita v. Union of India\textsuperscript{483}, the petitioner (a visually impaired person) was not allowed to appear examination for the appointment of the post of probationary officer. However, it came to the notice of the Supreme Court 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 Bombay High Court in its hearing in the case of National Federation for the Blind v. State of Maharashtra\textsuperscript{484} directed constitution of Committee for the purposes of identification of posts in various government and semi-government organizations for the disabled. It further directed that the Committee shall not 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 the case of R. Manoj Kumar v. University of Hyderabad\textsuperscript{485}, 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 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 three percent reservation for persons with disabilities, in the total posts advertised. It seems that in majority of the cases jobs were identified and accordingly reservation for the disabled was implemented only pursuant to

\textsuperscript{483} 2005 (13) SCC 721
\textsuperscript{484} 2005 (1) Bom CR 740 (Bom HC)
\textsuperscript{485} WP No. 70074/2002 (AP HC), judgement order dated 18 November 2002

282
Court orders. 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. There were several discrepancies in identification of jobs among the state 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.

The case of Ravi Arora brought to the fore the crux of the problem of the identification of posts. Arora qualified the Civil Services Mains of Union Public Service Commission (UPSC) in 2000 but failed to get through the interview. In 2001, he successfully qualified; however, he appeared again for UPSC Preliminary in 2002 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 UPSC Mains of 2002. 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 and also granted him Rs. 20,000 as cost of the proceedings.

Similar judgement was also delivered by the Delhi High Court in the case of UPSC v. T.D. Dinakar. The casual and lackadaisical approaches of the appropriate governments in identification of posts, and the difficulties in identification of posts and non-compliance of the Sections 32 and 33 led to a very landmark judgment in the case of Govt. of India through Secretary v. Ravi Prakash Gupta, wherein the Supreme Court did not find any merit in the contention of the Government of India that Section 33 of the

---

487 Id., p. 97
488 Ravi Kumar Arora vs. Union of India and Another [2004 (111) DLT 126]
489 T. D. Dinakar vs. Union of India [WP(C) 4574 of 2003
490 SLP No. 14889 of 2009, judgement order dated 7 July 2010

283
PWD 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 dependent upon identification under Section 32. This is a very significant judgment considering the fact that non-identification of posts can no longer be a ground for non-implementation of reservation provision under the Act.

The Delhi High Court in its judgment on Pushkar Singh and Ors vs. University of Delhi, 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 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 who acquired disability during the service in the establishment. Many establishments in fact did not make any provision for reservation of the disabled long after the coming into effect of the PWD Act. Delhi High Court while noting serious failure on the part of the government in implementation of the provisions of Section 33 of the PWD Act, directed the respondents in the case of National Federation of the Blind v. 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 stayed all recruitment in departments/public sector undertakings till such time as reservation for disabled persons was provided for.

In the case of Dilip Baruah v. State of Assam and Ors 492, a government establishment availed the service of a disabled person from time to time against the temporary vacancy by way of continuously renewing/extending his service term and thereafter he was not allowed to continue in his job. 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; and directed the respondent to consider the case of the petitioner for appointment in reserved quota of disabled persons within a period of 2 (two) months. One of the most significant aspects of the PWD Act is that while it makes 3% reservation for the disabled it also ensures that persons with different kinds of disabilities can actually share the benefit of reservation. Accordingly, the 3% reservation has further been sub-categorized as follows: 1% each for persons with blindness or low vision; hearing impairment; and locomotor disability or cerebral palsy.

This sub-categorization has firmly been justified in the judgment of the Division Bench of the Allahabad High Court in the case of Dr Ravindra Kumar Pandey v. State of UP and Others. 493 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” 494. In fact, the 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 disability 495, i.e. according to the order of the categories of disabilities under Section 33 of the Act.

492 W.P. (C) No. 1065 of 2000 (Gau HC), judgement order dated 4 January 2001; (2005) 1 PDD (CC) 197
493 Writ Petition No. 12603/2003
495 Id
The issue of sub-categorization in the reservation was also upheld in another earlier judgement of the Andhra Pradesh High Court in the case of Perambaduru Murali Krishna and Ors v. State of Andhra Pradesh and Ors 496.

The Supreme Court in Mahesh Gupta v. Yashwant Kumar Ahirwar 497 held that person with disability constituted a special class and that there cannot be any further reservation based on caste or religion within disabled candidates. 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 498, an orthopaedically disabled employee was denied promotion on the ground 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 v. Life Insurance Corporation of India 499, the petitioner, a totally blind employee (telephone operator) of LIC, was allowed promotion only after the filing of the writ petition in the Bombay High Court. Disabilities acquired during service in the establishments brought in several litigations before the judiciary. In most such cases, the judiciary delivered judgements in favour of disabled persons taking the advantage of the clear and most unambiguous provisions under Section 47 of the PWD Act.

In Omvati Kalshan v. Delhi Development Authority 500, 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

---

497 2007 (8) SCC 621
498 2008 (3) SLJ 80 (Del HC)
499 W.P 1184 of 2006 (Bom HC), judgment order dated 13 November 2006
500 2005 (125) DLT 57 (Del HC)
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*\(^{501}\), 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 other benefits that he was entitled to like annual increments, promotion etc. Further, the petitioner was awarded costs.

The landmark judgment 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 of the PWD Act is the case of *Kunal Singh vs. Union of India and Anr.*\(^{502}\). 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. The petitioner went to Supreme Court making an appeal based on section 47 of the Act and 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 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.”

\(^{501}\) 2005 (125)DLT 742 (Del HC)

\(^{502}\) Civil Appeal No. 1789 of 2000 (SC), judgement order dated 13 February 2003; (2005) 1 PDD (CC) 373
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.

In fact, the Supreme Court cited Section 72 of the PWD Act in this regard, commented that 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* judgment, as mentioned above, formed the basis of many subsequent judgments of the Courts concerning with similar identical question in law and involving the interpretation of Section 47 of the PWD Act.

In another very significant judgement of the Supreme Court in the case of *Bhagwan Dass v. Punjab State Electricity Board*, an employee acquiring disability during service was not aware about the beneficial provision under Section 47 and was retired from service in 1999 despite a circular of the Board that an employee acquiring

---

503 In the case of *Dalip Kumar v. AIIMS* [WP(C) No. 8926/2005 (Del HC), judgment order dated 14 January 2008], the Delhi High Court also upheld the Disabilities Act as a lex specialis; and, therefore, it was held that in cases where the rights of the persons with disabilities are involved, it will take precedence over other general legislation.

504 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 State of Haryana vs. Narender Kumar Chawla [1994 (4) SCC 460], 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

505 AIR 2008 SC 990
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 and Haryana dismissed his petition and he later on filed a special leave petition before the Supreme Court, which made the following observation: “The appellant was a class IV worker and preferred to opt for retirement when he realized 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”. 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 Indian judiciary also brought relief to mentally disabled employees by applying the provision of Section 47 of the Act. For example, in an important case of Ashwini Ashok Desai v. Chattrapati Shivaji Maharaj General Hospital\(^5\), the petitioner, an employee in a government hospital developed a mental illness in 1999 and was under medication for schizophrenia. Later on, he was pre-maturely retired from service. 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. However, the Bombay High Court, relying on the Kunal Singh judgment of the Supreme Court, differed and 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 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 transfer the petitioner to Pune as his family resided at Pune.

In yet another recent and significant judgment involving mental disability, the Madras High Court while taking recourse to Section 47 of the Act, in the case of C. Narayanan v. The Deputy Director-cum-Principal In Charge, Government Industrial

\(^5\) W.P No. 3545 of 2005 (Bom HC), judgement order dated 5 August 2005
Training Institute, Chennai & Anr.\textsuperscript{507}, said that mental disability cannot be a ground for removal of an employee. Additionally, Indian judiciary has also upheld the rights of reasonable accommodation for the disabled employees.

In its judgment in the case of Syed Bashir-ud-din Qadri v. Nazir Ahmed Shah and Others\textsuperscript{508}, the Supreme Court said that the doctrine of reasonable accommodation would require the provision of aids and appliances to enable a disabled person in employment to carry out his duties effectively\textsuperscript{509}. Before this, Bombay High Court upheld reasonable accommodation in employment the case of Ranjit Kumar Rajak v. State Bank of India \textsuperscript{510} by applying the provisions of the UN Convention on the Rights of Persons with Disabilities (which India had ratified but is yet to incorporate in its municipal law).

**Employment rights under the proposed new disability legislation:** In order to harmonize the provisions of the UN Convention on Disabilities (to which India is a party) with the Indian municipal laws a draft Rights of Persons with Disabilities Bill 2011 (RPDB) has already been prepared and if this draft Bill is approved and enacted as a new legislation by the Parliament, it will replace the existing PWD Act. The RPDB seems to have been influenced by several verdicts of the Indian judiciary, which has made positive interpretation of the PWD Act in order to provide specific relief for employment of persons with disability. RPDB contains several specific provisions for work and employment opportunities of persons with disability. A brief summary of the important Sections of the draft RPDB on employment is given below.

Section 56, provides that no establishment shall directly or indirectly discriminate against any person with disability in any matter relating to employment including but not limited to recruitment, promotion and other related issues arising in the course of or through the length of employment in any establishment. No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during service, such employee may if required by the nature of disability, be shifted to another post with the same pay scale and service benefits. Provided further that if it is not possible to adjust the


\textsuperscript{508} Civil Appeal Nos. 2281-2282 of 2010, judgement order dated 10 March 2010

\textsuperscript{509} Kothari, Jayna (2012): p. 130-131

\textsuperscript{510} Writ Petition No. 576 of 2008 (Bom HC), judgement order dated 8 May 2009

290
employee against any post, then such employee may be kept on a supernumerary post until a suitable post is available or the age of superannuation whichever is earlier.

Every establishment shall facilitate reasonable accommodation of persons with disabilities by taking adequate measures\textsuperscript{511} to guarantee that persons with disabilities are not disadvantaged in any manner at any stage of employment. Any person with disability, if eligible for any post which is sought to be filled, shall have the right to appear for selection and hold the post if selected. An establishment shall not ordinarily post and transfer a person with disability in a place other than his or her native place or within the vicinity of such place unless such transfer becomes necessary due to exigencies of the job and expertise possessed by the person with disabilities. The appropriate governments may frame such rules and regulations as may be necessary from time to time for the purposes of achieving the objectives outlined above. Every establishment undertaking an exercise of retrenchment or declaring its staff surplus shall as far be not include persons with disabilities in such exercise or process. In the event of persons with disabilities being included in such exercise or process, enhanced benefits shall be payable to them.

Section 57 provided that 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; g) Persons with Low vision and persons who are hard of hearing. Provided that posts identified under Section 32 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995 (Act No 1 of 1996) shall operate as guidelines for implementing this reservation.

\textsuperscript{511} adequate measures' include, but are not limited to the provision of necessary aids and equipment, adequate healthcare facilities, necessary physical changes in buildings to ensure accessibility at workplaces, flexible work timings, continuous monitoring with regard to necessary support, or any arrangements or facilities created for equality with regard to competitive public service examinations and other such service related tests.
Section 58 mandates that all establishments shall put in place an Equal Opportunity Policy detailing measures and commitments initiated by the Establishment. An Equal Opportunity Policy shall: a.) delineate measures taken in order to comply with the provisions of the Act; b) provide strategies to increase employment opportunities with specific attention to all schemes and reasonable accommodation measures; c. specifically detail measures taken and strategies employed to reasonably accommodate and increase employment opportunities for women with disabilities.

Section 59: (1) Every establishment shall maintain records in relation to employment, facilities provided and other necessary information in such form and in such manner as may be prescribed by the appropriate government; (2) These records shall specifically include information on women with disabilities in relation to their employment, facilities provided and other information as prescribed; (3) Every employment exchange shall register in accordance with prescribed procedure and thereby maintain records of persons with disabilities seeking employment. These records shall specifically include data on women with disabilities; (4) Such records shall be relevant and authentic evidence of a person with disability seeking unemployment allowance under Section 64 (6) (d) of this Act; (5) Any person authorized by the State Disability Rights Authority may inspect the records during the working hours of the establishment.

Section 60: (1) The appropriate governments shall take all necessary measures with respect to formulation of schemes and programmes to facilitate and support employment of persons with disabilities, with special reference to self-employment and vocational training of persons with disabilities; (2) The appropriate governments shall establish in each district work centres where persons with disabilities in rural areas can be imparted necessary skills and provided work opportunities in different trades including rural trades; (3) The appropriate governments shall ensure imparting of skills through convergence in existing training centers and institutions and establish centers where none exists so that persons with disabilities in rural areas can be imparted necessary skills in crafts, trades and domiciliary occupations and provide work; (4) The appropriate governments shall provide adequate loans at concessional rates under the existing micro-credit and loan schemes to persons with disabilities in order to facilitate self-employment schemes; (5) If, in the opinion of the person recruited, there is a need to impart specific training prior to recruitment in order to ensure that a person with disability has adequate
support, then such facilities should be made available; (6) The appropriate governments shall institute suitable schemes to promote and support the creative skills of persons with disabilities in rural and urban areas by establishing networks between the artisans and marketing federations and handicraft boards.

Section 61: The appropriate governments shall provide incentives to all establishments to ensure that at least ten per cent of their work force is composed of persons with disabilities.

Section 63: (1) The appropriate governments may retain the special employment exchanges established under Section 34 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and establish new exchanges.

In addition, the RPDB also includes a specific provision for employment of disabled woman under Section 8, which reads as follows:

Section 8: (1) No woman with disability shall be directly or indirectly discriminate against in recruitment, promotion, or any other related matter arising in the course of through the length of employment; (2) The appropriate governments shall take all effective and appropriate measures, including formulation of schemes and programmes, to ensure that women with disabilities have access to opportunities for employment, vocational training, micro-credit and self-employment on an equal basis with others.

Disability does not imply inability. Persons with disability do have their own specific talents, capabilities and skills and may, in fact, turn out to be very productive members of the society if suitable works and employment opportunities are available for them. However, the attitude of employers/society, lack of adequate government policies for secure employment, ignorance of the provisions of law, non-availability of affordable aids and appliances and inaccessible work places still remain the major concerns with regard to works and employment opportunities for persons with disabilities. Finding and holding employment opportunities of their choice is really a problem for person with disabilities. As per the original provision of the PWD Act, the three percent reservation under the Act is limited to only three categories of disability (namely blindness or low
vision; hearing impairment; and locomotor disability or cerebral palsy, with 1% reservation for each category). The PWD Act has defined disability narrowly and many categories of disabled persons have, in fact, been left outside its scope. The Act provides reservation for the employment of the disabled persons in government sector only; and that too with provisions of “exemption clause” for certain establishments. The requirement of ‘identification of jobs’ under the PWD Act was a major stumbling block for implementing reservation as many establishments cited, till recently, the non-identification of jobs as the reason for non-implementation of reservation. Further, non-compliance by appropriate authorities does not impose any specific sanction or responsibility to such authorities.

In case of the private sector the provision for reservation of jobs has remained at recommendation level as the Act only talks about the “incentive policy”, which has not been properly spelt out so far. The Indian judiciary has, of course, played a significant role in upholding the employment rights for persons with disability through its positive interpretation of the PWD Act. Based on the experience gained through judicial interpretation of the PWD Act, the draft of the new disability legislation (as mentioned above) has also come out with several explicit provisions in order to address various employment related rights of the persons with disability. It is important that this new legislation be enacted at the earliest after incorporating all the important provisions of the UN Convention on Disabilities. Most importantly, employers and their establishment need to change their attitude and work culture. It is very essential that they nurture and nourish the skills and capabilities of persons with disabilities.

512 Amendment to the Act further expanded this to 5% with additional 2% reservation for mentally retarded, cerebral palsy and autism.
513 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.
Disability and Right of Equality

In A. Mohammed Yasin v The Government of Tamil Nadu and others\textsuperscript{514} an orthopaedically physically handicapped petitioner having both legs affected by post-polio paralysis was denied to take admission on the ground of lack of institutional facilities. It was contended that institutions in our country are designed to meet the requirements of normal persons or persons with moderate disability. For example, the classrooms, Laboratories, Library, etc. are either situated at different floors and/or far removed from each other. Hence it is impossible for severally handicapped persons to move from one place to another without assistance which cannot be provided by the institutions. a number of complaints had been received by the Government by various Engineering institutions expressing their difficulties in giving admission to students with severe disabilities like the petitioner as their institutions are not designed and equipped to meet the special requirements of the severely handicapped/disabled. Apparently because of this, the co-ordination committee set up by the Government under the Single Window System has decided not to admit students having severe disability as the existing provisions in the existing institutions are not designed to meet the needs of such students.

Reacting to the above proposition the Court observed that

"In view of the above admission in the counter, the disability is not with the petitioner, but with the institution. If he is qualified to get admission under that quota as per the Guidelines and also as certified by the Medical Board, he is not liable to be excluded. In the result, the order (letter) of the 4th respondent dated 23.7.1998 is quashed. I direct the respondents to forthwith recall or the petitioner to undergo First Year Engineering Course in Computer Science in any one of the Government Colleges under the Control of 2nd respondent. I direct the respondents to issue necessary orders making such re-allotment, within a period of one week from to-day. I further direct respondents 1 and 2 that whatever facilities that are required for a physically handicapped persons like the petitioner herein, must also be provided in the college wherever he is admitted. Respondents 1 and 2 are not permitted to plead that such facilities are not available to admit a candidate of this kind of disability. They are bound to provide necessary funds for making

\textsuperscript{514} (1999) 3 MLJ 112
necessary infrastructural facilities. The writ petition is allowed as indicated above, however, without any order as to costs. Connected W.M.Ps. are closed.”

In Rajesh Kumar v. Hindustan Aeronautics Ltd and Ors 515 a Scheduled Caste and physically disabled person who completed his apprenticeship in the Hindustan Aeronautics Limited, Kanpur division was deprived from appointment on the ground. The lawyer on behalf of Hindustan Aeronautics Ltd. contended that according to the provisions of Section 33 of the Act it was the task of the 'Appropriate Government' (Central or State) to identify posts that could be reserved for persons with disabilities in an establishment. The trade of electronic group 'B' had not been identified by the Appropriate Government as a post in which reservation for physically handicapped could be given. Therefore, it was argued that Rajesh could not be considered under the physically handicapped quota. The lawyer on behalf of Hindustan Aeronautics Ltd also argued that this company was a defense establishment, which required excellence and perfection in the job as it had the safety of the nation at stake. It was stated that a person selected for the job would have to be fit enough to get into the aircraft and cockpit and perform many other tasks that could not be done by a person suffering from physical disability. However, the court referred the matter to the Commissioner who had full authority to take a decision regarding this matter.

In Deaf Employees Welfare Association and Anr v. Union of India and Ors. 516 a Writ petition has been preferred by two Associations representing the Deaf and Dumb persons seeking a Writ of Mandamus directing the Central and State Governments to grant transport allowance to its government employees suffering from hearing impairment in equal with that is being given to blinds and orthopedically handicapped government employees and also for further consequential relief. In the above circumstances the Court observed that

“The Disabilities Act does not create any barrier or discrimination among persons with disabilities. The Disabilities Act deals with a well defined class i.e. “persons with disabilities” mentioned in Section 2(i). The nature of disability may differ from person to person included in Section 2(i), but all such persons have been

515 The High Court of Allahabad, MANU/UP/0168/2002; Decided on 01.02.2002(unreported)
516 Supreme Court of India, Decided on : Dec-12-2013, legalcrystal.com/1100228

296
categorized as a group of “persons with disabilities” under Section 2(i) read with Section 2(t) of the Act. In our view, the differentia sought to be canvassed by the Ministry of Finance has no rational relation to the object sought to be achieved by the Disabilities Act, which envisages to give equal opportunities, protection and rights to the “persons with disabilities”. Equality of law and equal protection of law be afforded to all the “persons with disabilities” while participating in Governmental functions. Transport allowance is given to Government employees since many of the Government employees may not be residing in and around their places of work. Sometimes, they have to commute long distances to and fro. There has been an unprecedented increase in the commutation time between the residence and place of work which effects the work environment in offices adversely as the employee spend much of their energy in commuting and, in the case of persons with disabilities, the situation is more grave. The deaf and dumb persons have an inherent dignity and the right to have their dignity respected and protected is the obligation on the State. Human dignity of a deaf and dumb person is harmed when he is being marginalized, ignored or devalued on the ground that the disability that he suffers is less than a visually impaired person which, in our view, clearly violates Article 21 of the Constitution of India. Comparison of disabilities among “persons of disabilities”, without any rational basis, is clearly violative of Articles 14 of the Constitution of India. In our view, the recommendation made by the Ministry of Health and Family Welfare for extending the benefit of transport allowance to the Government employees suffering from hearing impairment in equal with blinds and orthopaedically handicapped Government employees is perfectly legal and is in consonance with Articles 14 and 21 of the Constitution of India. Under such circumstances, we are inclined to allow this writ petition and direct the Respondents to grant transport allowance to deaf and dumb persons also on par with blinds and orthopaedically handicapped employees of Central and the State Governments and other establishments wherever such benefits have been extended to the blinds and orthopaedically handicapped employees”
In Nishant S. Diwan v. High Court of Delhi Through Registrar General and Others\(^{517}\) the petitioner is an advocate who claims to be a disabled. He suffers from what is termed as "FOLLOW UP CASE OF HYDROCEPHALUS WITH STUNT SURGERY WITH MYOSITIS OSSIFICANS HIP WITH ANKYLOSED HIP". This condition, the petitioner says, is described as "locomotor disability" under the Disabilities Act which entitles him to benefits under that law, especially Section 33. The petitioner contends that in terms of an old 1977 Central Government notification, reservations to the extent of 3% for persons with disabilities was provided for in Group-C and Group-D posts and in Central Public Service Undertakings. There was a continuous demand to extend that benefit to Group-A and Group-B posts eventually leading to litigation under Article 32 of the Constitution which culminated in the decision reported as National Federation of Blind v. Union Public Service Commission and Others AIR1993SC1916. The Supreme Court, in its judgement, directed the Central Government to consider the feasibility of extending the reservations to Group-A and Group-B posts. The petitioner relies upon Section 33 of the Disabilities Act to urge that with its enactment, every appropriate government is obliged to appoint in every establishment not less than 3% of the vacancies, of the posts from amongst persons or class of persons with disabilities such as blindness or blurred vision, hearing impairment or locomotor disabilities or cerebral palsy.

The Supreme Court has been categorical about the imperative nature of the Disabilities Act's provisions vis-à-vis reservation of posts in various establishments. Considering the rulings of National Federation of Blind v. Union Public Service Commission and Others,\(^ {518}\) Ravi Kumar Arora v. Union of India (UOI) and Anr.\(^ {519}\) and Union of India (UOI) and Anr. v. National Federation of the Blind and Ors\(^ {520}\), the court observed that

"The reservation and appointment shall be regulated by the statutory notification, if any, issued by the Government of India. The Committee has in this regard taken note of Notification No. 16-25/99-NI-I dated 31.05.2001 as amended vide

\(^{517}\) High Court of Delhi, Decided On: Mar-25-2014, legalcrystal.com/1135274
\(^{518}\) AIR1993SC1916
\(^{519}\) (111)2004DLT126
\(^{520}\) 2013 (10) SCC772
Corrigendum No.39-14/2006/DD-III dated 25.07.2006 issued by the Ministry of Social Justice and Empowerment, Government of India, New Delhi, identifying the posts of “Judges/Magistrates Subordinate in Lower Judiciaries” as the jobs identified for being held by persons with specified disabilities...” However, the Committee did not positively rule-out reservations in DHJS. The operative direction was premised on the need to take a decision on the recruitment for DJS vacancies.

The second reason why this Court feels compelled to reject the respondent’s argument is that as between DJS officers (who are Judges) and DHJS officers (who are also Judges certainly not less so) there is and can be no difference for the purposes of reservation under the Disabilities Act. The mere use of the word (“Magistrates”) in Sl. No 466 in the circular of the Central Government was not meant to limit the benefit of reservation under the Act to only the Civil Judges/Magistrates cadre or posts. Both categories of holders of posts’ workload is fairly described as “Deal with Civil and Criminal cases by adopting established procedure both under Civil and Criminal Codes. Records evidence and pass necessary orders/judgments.”

Likewise, the notification (of the Central Government) goes on to mention in the last column, i.e “working conditions/remarks” that work is performed inside and the working conditions are well lighted. These descriptions apply equally to those in the Delhi Higher Judicial Service, who also exercise appellate jurisdiction over the decisions of DJS officers. Furthermore, the circular of the Central Government also describes Income Tax Appellate Tribunal members’ posts as those which are subject to reservations under the Disabilities Act. The decision of the Committee (of this Court) dated 09-03-2007 surely was not intended to result in such discrimination.

The Supreme Court had unequivocally held that the doctrine of classification, which can be legitimately used to examine complaints of discrimination and violation of Article 14, itself cannot produce inequality, through under-classification or undue emphasis as the basis of drawing distinction when none exist.
This aspect was considered in Roop Chand A dlakha and Ors. v. Delhi Development Authority and Ors., 521

"7......The process of classification is in itself productive of inequality and in that sense antithetical of equality. The process would be constitutionally valid if it recognises a pre-existing inequality and acts in aid of amelioration of the effects of such pre-existent inequality...The process cannot merely blow-up or magnify in-substantial or microscopic differences on merely meretricious or plausible. The over-emphasis on the doctrine of classification or any anxious and sustained attempts to discover some basis for classification may gradually and imperceptibly deprive the article of its precious content and end in re-placing doctrine of equality by the doctrine of the classification..."

In The State of Gujarat & Anr v Shri Ambica Mills Ltd., Ahmedabad & Anr. 522 again, the Supreme Court dwelt on the same aspect, in the following words:

"4. A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase "similarly situated" mean?. The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good."

A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended

521 AIR1989SC307
522 [(1974) 4 SCC656,
with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.”

In the present case, there is no material to suggest that DHJS officers perform duties and functions which are radically different from those in DJS. Indeed, their positions answer to the description of “Judges” of “Subordinate courts” (the latter being the expression used by the Constitution itself). Other posts whose holders discharge judicial functions such as members of ITAT too have been accorded the benefit of disability reservations under the Act. In these circumstances, the Court held that the non-inclusion of DHJS cadre posts for the purposes of reservation under the Disabilities Act, cannot be upheld; it amounts to discrimination.

Legal Aid and the Disable: Sheela Barse v Union of India and Ors 523 the Apex Court directed each district judge will give utmost priority to this direction..

".....We would also direct the State Legal Aid & Advise Board in each State or any other Legal Aid Organisation existing in the State concerned, to send two lawyers to each jail within the State once in a week for the purpose of providing legal assistance to children below the age of 16 years who are confined in jails. If there are any other persons confined in jails who are there merely because they are suffering from some handicap (physical or otherwise) they should be released immediately and placed in appropriate home or place where they can receive suitable medical assistance or other educational training. " [Vide order dated 15.4. 1986]

"Meanwhile, there are a few matters which need our urgent directions. It seems that there are a number of children who are mentally or physically handicapped and there are also children who are abandoned or destitute and who have no one of take care of them. They are lodged in various jails in different states ...." " ...The State Governments must take care of this mentally or physically handicapped children and remove them to a Home where they can be properly looked after and so far as the mentally handicapped children are concerned, they

523 JT 1988 (3) 15
can be given proper medical treatment and physically handicapped children may be given not only medical treatment but also vocational training to enable them to earn their livelihood. Those children who are abandoned or lost and are presently kept in jails must also be removed by the State Governments to appropriate places where they can be looked after and rehabilitated . . . ."

In Shri Shamson Robinson Khandagle v Unknown the applicant was a widow of the deceased employee and an indigent woman who was practically illiterate and she could file the application only with the help of a free legal aid. Accordingly, the Tribunal permitted to avail free legal Aid and the learned counsel for the widow appeared as per the instructions of District Legal Aid Committee, Thane.

Right to Freedom

Barrier-Free Environment: The PWD Act makes provisions to create a barrier free environment for all persons with disability and to encourage them to be fully participating members of the society. Broadly, the term ‘barrier free environment’ would mean removing obstacles and providing access to all. Chapter VIII of the Act deals with the provisions relating to this principle. Some of the provisions in this Chapter include providing auditory signals on roads, taking special measures in the transport sector to make the rails, aircrafts and vessels easily accessible to wheel chair users, to provide ramps in public buildings, medical care and rehabilitation centres, Braille symbols and auditory signals in elevators and lifts.

In Javed Abidi v. Union of India. In the Writ Petition the petitioner prayed for the reliefs that include :- (a) Direct the Indian Airlines to immediately provide for aisle chairs in every aircraft; (b) Direct the Indian Airlines to provide ambulift in all the airports of the country; (c) Direct the Indian Airlines to provide 50% concession to all the 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

---

525 AIR1999SC512;
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 Committee as defined under Section 13 of the Act; (h) Direct all the State Governments to immediately constitute their respective State Executive Committee for the implementation of the Act; (i) Direct the State Government to appoint a Commissioner for their States for proper implementation of the Act in the States of the Country"

One of the major grievances of the petitioner is that the Indian Airlines is not giving any concession to such disabled persons for their movement by air even though such concessions are being given to only blind persons, who are also disabled persons under the Act. The court thought it appropriate to direct that those suffering from the aforesaid locomotor disability to the extent of 80% and above would be entitled to the concession from the Indian Airlines for travelling by air within the country at the same rate as has been given to those suffering from blindness on their furnishing the necessary certificate from the Chief District Medical Officer to the effect that the person concerned is suffering the disability to the extent of 80%. Such District Medical Officer wherein the disabled ordinarily reside will constitute a Board with Specialist in Orthopaedic and one other Specialist whom he thinks suitable for the purpose and examine the person and would grant necessary certificate for that purpose.

Privileges in examinations: In Dhawal S Chotai v Union of India & Ors 526 a petition is filed by a person who suffers from 'Cerebral Palsy'. In spite of the handicaps, the petitioner has completed his education upto graduation in commerce and has also passed the examination for Foundation Course for the Chartered Accountants Examination. He wants now to appear for the Intermediate Examination known as 'Professional Education-II'. The petitioner apprised the court that during B.Com examination the Mumbai university permitted extra time of three hours but in in Chattered Accountant examination he was only granted half an hour extra time.

526 AIR2003Bom316;
The learned Court viewed that 'the spastics are those who are suffering from cerebral palsy. This is a disorder of movement and posture appearing in the early years of life due to damage to that part of the brain which controls his or her motor or physical functions or the failure to develop normally in a small part of brain controlling movement which causes an interference with the normal functioning of bones, muscles and joints, thereby affecting communication.'

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 by the Parliament with a view to give effect to the proclamation on the full participation of the people with disabilities in the Asian and Pacific Region held at Beijing in December 1992. The Act makes the provisions which are principally for appropriate opportunities in the matter of employment. Chapter V of the Act makes beneficial provision in the matter of education. Section 27 directs the Appropriate Government and Local authorities to make schemes and programmes for non-formal education of these children. The overall tenor of Chapter V of the Act is to make all necessary facilities available to the persons suffering from these disabilities even in the matter of education. Since respondent falls under the definition of Article 12 of the constitution, the court directed to permit extra three hours time to the appellant.

Privileges in Railways: In Kaukab Naqvi v. Union of India and Others the petitioner by this writ petition impugns the Circular/decision published in the Hindustan Times dated 11.5.1997, regarding concessions made available in rail fare to certain categories of handicapped persons. Petitioner is aggrieved as deaf and dumb persons, though eligible for 50% concessional fare, have not been provide the facilities of any rail concession for an attendant/escort accompanying the deaf and dumb passenger. This facility of concessional fare for the escort/attendant has been confined to blind persons, T.B. patients, mentally retarded persons, thalassamia and major disease patients as well as cardiac patients etc. Petitioner's sister was earlier allowed to have an escort but pursuant to the impugned circular/notice, which appeared in the Hindustan Times, deaf and dumb persons, though eligible for concession of 50% themselves were not included in the category, which allowed a concession for the escort/attendant. Further, grievance of the petitioner is that as against 75% concession given even to T.B. Patients, Orthopedic

\[527\] AIR2002Delhi240;
handicapped person, mentally retarded person, thalassamia major disease patients and cardiac patients etc., here the extent of concession given was only 50%. The learned court considering the submission of the petitioner directed the Railway Authority the followings

1. There should be a booth established at all the major railway stations/junctions having a prominent pictorial sign that assistance is available to physically handicapped/challenged persons; 2. The booth should be manned by attendants, who would make available wheel chair/trolley, stretcher etc., as required. Folding canes should be provided for the blind. Moveable ramps should also be provided so that there is no difficulty in boarding or alighting. 3. At the time of issuance of concessional tickets to each physically handicapped/challenged person or a person, who is blind, deaf and/or dumb, information regarding the complete particulars of the passenger name, address and telephone number of the contract person to be contacted in case of emergency should be obtained. 4. The Railway Authorities on the basis of information so obtained will print out a card giving the full particulars of the passenger name and address of the passenger as well as that of contact person to be contacted in case of emergency. The boarding station as well as the destination to be printed out/typed out in bold letters. 5. Each physically handicapped/challenged person, blind, deaf or dumb or otherwise sick person traveling on concessional fare should carry the card to enable seeking assistance from fellow passengers/travelers in case of need. 6. The Train Ticket Examiner/Guard or the concerned staff should be given a duplicate copy of the card and made responsible to ensure that physically handicapped/challenged person has no difficulty in boarding or alighting from the train or during travel. 7. These are the few of the basic amenities, which are to be provided and are not intended to be exhaustive or limited in any manner to what the Railways or their experts may find suitable to provide in addition. The provision of the above facilities considering the limited number of physically handicapped/challenged person, who may travel in a train should not pose any major difficulty.

**Capacity to Driving a Vehicle:** In *M. Lakshma Reddy v State of A.P. and Ors.* a physically challenged person had personal cars in which he was driving them for last 16

---

528 2007 (1) ALD 252, 2007 (1) ALT 232
years. But, when he purchased the Octavia (AT) the authorities refused to grant him permission showing it to be unfit. In the context the learned court observed that

11. Numerous studies have established the fact that disabled drivers, in particular those with impairment of the limbs, are neither more accident-prone nor otherwise more conspicuous in road traffic than the non-disabled. The view that the driver with a physical disability poses particular risks, has been invalidated by extensive factual data and thorough literature review (vide In re Fittness for a automobile driving of physically handicapped patients by Ekkernakamp A, Gerlach D).

12. To sum up, the petitioner has been driving cars from 1990 onwards viz., for the last 16 years. Now he intends to go for much more technically advanced Skoda Octavia Rider (Automatic Transmission). The manufacturer says that the car is suitable for the petitioner to drive. He further clarified that it is manufactured by the very company. The very petitioner in his representation, dated 3.3.2006, made a mention as to the suitability of the said car. The authority can as well evaluate the petitioner's capability of driving such a car. The reason for refusal to grant exemption is on extraneous consideration. There was no basis for him to come to such a conclusion. In the circumstances, the impugned memo is liable to be struck down as illegal.

Right to Vote: In Disabled Rights Group v. The Chief Election Commissioner and Anr. apart from making provisions for ramp at public building and polling stations the Hon'ble Supreme Court directed that advance and sufficient publicity should be given in print and electronic media about the availability of the facilities for the electors with disability to exercise their franchise. Further, the Court also directed that the personnel at the polling station to ensure that physically challenged electors are given priority for entering the polling station, without having to wait in the queue for other electors and all necessary assistance as may be required should be provided to them at the polling station. Full facility should be provided for such electors to take their wheel- chair inside the polling station. In the polling stations where permanent ramps have not been provided, temporary ramps should be provided as per the order dated 19th April, 2004, of the Hon'ble Supreme Court The polling personnel should be specifically briefed about the.

529 Supreme Court of India in WP (Civil) No. 187 of 2004
provisions of Rule 49N of the Conduct of Elections Rules, 1961, which provides for permitting a companion to accompany a blind/infirm elector to assist him/her to cast the vote. At the training classes for the polling personnel, they should be sensitized about the special needs of the disabled, for courteous behavior towards them and for providing necessary support to them at the polling station. Electors with speech and hearing impairment should also be given special care as in the case of other disabled persons.

Right to Privacy and Matrimony

**Right to Reproduction:** The disable person’s right to reproduction also came in to judicial scanner. In *Bhupinder Kumar v. Angrej Singh*\(^{530}\) arising out of *Suchita Srivastava and Anr v. Chandigarh Administration*\(^{531}\) wherein the Division Bench of the High Court of Punjab and Haryana in C.W.P. No. 8760 of 2009, by orders dated 9.6.2009 and 17.7.2009, ruled that it was in the best interests of a mentally retarded woman to undergo an abortion. In this a case an inmate of a government-run welfare institution who was an orphan and mentally retarded was found to be pregnant as a result of an alleged rape by two security guards of the institution. After the discovery of her pregnancy, the Chandigarh Administration, which is the respondent in this case, had approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child. The High Court had the opportunity to peruse a preliminary medical opinion and chose to constitute an Expert Body consisting of medical experts and a judicial officer for the purpose of a more thorough inquiry into the facts. In its order dated 9.6.2009, the High Court framed a comprehensive set of questions that were to be answered by the Expert Body. In such cases, the presumption is that the findings of the Expert Body would be given due weightage in arriving at a decision. However, in its order dated 17.7.2009 the High Court directed the termination of the pregnancy in spite of the Expert Body's findings which show that the victim had expressed her willingness to bear a child.

---


\(^{531}\) Suchita Srivastava and Anr v. Chandigarh Administration (2009) 9 SCC 1
The legal issue involved was whether it was correct on part of the High Court to direct the termination of pregnancy without the consent of the woman in question.

Even if the said woman was assumed to be mentally incapable of making an informed decision, what are the appropriate standards for a Court to exercise 'Parens Patriae' jurisdiction?

Since at the time of hearing, the woman had already been pregnant for more than 19 weeks whether a late-term abortion would endanger the health of the woman who undergoes the same.

The consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971. The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a 'mentally ill' person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is 'immediately necessary to save the life of the pregnant woman'. Clearly, none of these exceptions are applicable to the present case. The 2002 amendment to the MTP Act indicates that the legislative intent was to narrow down the class of persons on behalf of whom their guardians could make decisions about the termination of pregnancy. It is apparent from the definition of the expression 'mentally ill person' that the same is different from that of 'mental retardation'. A similar distinction can also be found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This legislation treats 'mental illness' and 'mental retardation' as two different forms of 'disability'.

The same definition of 'mental retardation' has also been incorporated in Section 2(g) of The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. These legislative provisions clearly show that persons who are in a condition of 'mental retardation' should ordinarily be treated differently from those who are found to be 'mentally ill'. While a guardian can make decisions on behalf a 'mentally ill person' as per Section 3(4)(a) of the MTP Act, the
same cannot be done on behalf of a person who is in a condition of 'mental retardation'. The only reasonable conclusion that can be arrived at in this regard is that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination of a pregnancy. As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. The Apex Court viewed that

"Our conclusions in this case are strengthened by some norms developed in the realm of international law. For instance one can refer to the principles contained in the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [G.A. Res. 2856 (XXVI) of 20 December, 1971] which have been reproduced below:-

1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.

2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.

4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.

6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.

7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities."

In this regard, the court directed that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care. Since there is an apprehension that the woman in question may find it difficult to cope with maternal responsibilities and the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities under 1999 Act will consult the Chandigarh Administration as well as experts from the Post Graduate Institute of Medical Education and Research (PGIMER) in order to ensure proper care and supervision.

However, in X (Assumed Name of the Victim) v. The State (N.C.T. Of Delhi) & Ors, a contrary situation was considered by the Delhi High Court. Petitioner is not legally married to Kapil and he is already married and has children. Allegedly, he established physical relations with ‘X’ on false promise to marry her. Kapil did not inform ‘X’ his marital status before seeking her consent for physical relationship. She became pregnant as a result of the alleged rape. During her medical examination, it was found that she was pregnant for about six weeks at that point of time. She is living alone


310
with her friend in Delhi and her parents are not aware of her association with Kapil. She
does not want to bear a child as she was cheated by Kapil and intends to punish him.

The Court respecting the consent of the victim observed:

"State has no objection if 'X' gets her pregnancy terminated. Kapil has also not
objected to it. 'X' is major aged about 22 years. She has consultation with her
counsel Ms. Kiran Singh. She understands the consequence of her act. On
21.03.2013, she was medically examined at AIIMS and as per doctors opinion,
pregnancy can be terminated with minimal known risks. The victim has expressed
her willingness to terminate the pregnancy. The Court must respect her decision.

In Suchita Srivastava and anr. v. Chandigarh Administration 533, the Supreme
Court held: "37. As evident from its literal description, the "best interests" test requires
the Court to ascertain the course of action which would serve the best interests of the
person in question. In the present setting this means that the Court must undertake a
careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social
circumstances faced by the victim. It is important to note that the Court's decision should
be guided by the interests of the victim alone and not those of the other stakeholders such
as guardians or the society in general. It is evidence that the woman in question will need
care and assistance which will in turn entail some costs. However, that cannot be a
ground for denying the exercise of reproductive rights." To carry a child in her womb by
a woman as a result of conception through an act of rape is extremely traumatic,
humiliating and psychologically devastating. 'X' hails from the poor strata of the society
and is likely to face innumerable mental, physical, social and economical problems in
future. There are no reasons to prevent her not to exercise her option voluntarily in her
interest.

8. For the forgoing reasons, the petition is allowed with the direction to the SHO
of the concerned police station or any other responsible police officer with lady
police officer to accompany the complainant 'X' and produce her before Medical
Superintendent, AIIMS within three days to get her pregnancy terminated where
Board of two medical practitioners would be constituted by the Medical

533 (2009) 9 SCC 1,
Superintendent on that day itself. The Medical Board would take the decision immediately for termination of the pregnancy and it will be terminated in accordance with the provision of Section 3 of the Act. They shall preserve the fetus and DNA test will be conducted thereupon and its report shall be produced before the Trial Court at the earliest.

9. The petition is allowed in the above terms. Arti, X’s friend shall be permitted to take her care. Needless to say, ‘X’ will be provided proper medicine, diet and nutritious food as may be necessary for her health. Copy of the order be sent to the Medical Superintendent, AIIMS.

**Divorce, Nullity, Marriage and Maintenance**

Under Indian law unsoundness of mind is a justifiable ground for termination of marital relationship. However, they are entitled to receive maintenance. In the following segment some of the important cases have been presented to study the judicial approach towards Divorce, Nullity, Marriage, Maintenance and other related issues.

In *Pankaj Mahajan v Dimple @ Kajal* 534 the wife due to unsoundness of mind gave repeated threatenings such as i.) Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace. ii). Pushing the appellant from the staircase resulting into fracture of his right forearm. iii) Slapping the appellant and assaulting him. iv) Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him. v) Not attending to household chores and not even making food for the appellant, leaving him to fend for himself. vi) Not taking care of the baby. vii) Insulting the parents of the appellant and misbehaving with them. viii) Forcing the appellant to live separately from his parents. ix) Causing nuisance to the landlord’s family of the appellant, causing the said landlord to force the appellant to vacate the premises. x) Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant. xi) Always quarreling with the appellant and abusing him. xii) Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant.

534 (2011) 12 SCC 1
On the above factual matrix the apex court concluded that the appellant-husband had placed ample evidence on record that the respondent-wife is suffering from "mental disorder" and due to her acts and conduct, she caused grave mental cruelty to him and it is not possible for the parties to live with each other, therefore, a decree of divorce deserves to be granted in favour of the appellant-husband. In addition to the same, it was also brought to our notice that because of the abovementioned reasons, both appellant-husband and the respondent-wife are living separately for the last more than nine years. There is no possibility to unite the chain of marital life between the appellant-husband and the respondent-wife.

In the light of the facts and circumstances as discussed above, in our view, the impugned order of the High Court resulted in grave miscarriage of justice to the appellant-husband, more particularly, the High Court failed to consider the relevant material aspects from the pleadings and the evidence, the ultimate conclusion cannot be sustained. The appellant-husband established and proved both grounds in terms of Section 13 of the Act. In the result, the appeal stands allowed. The divorce petition filed by the appellant-husband stands accepted and a decree of divorce is hereby passed dissolving the marriage of the appellant with the respondent from today, i.e. 30.09.2011. The impugned order of the High Court dated 06.08.2009 in FAO No. M-123 of 2006 is set aside. The appellant-husband is directed to pay an amount of Rs. 2 (Two) lakhs as alimony to the respondent-wife in two equal installments within a period of three months from today and to deposit Rs. 3 (Three) lakhs in the name of his daughter in the shape of three FDRs in a nearest nationalized bank in three equal installments commencing from January, 2012 ending with June, 2012. On attaining majority, the daughter is permitted to withdraw the amount. Till such period, the respondent-wife is permitted to withdraw accrued interest once in three months directly from the bank from the said deposit for the benefit and welfare of their daughter.

**Guardianship:** This segment deals with cases filed by or on behalf of persons with disabilities for the appointment of a guardian. It is observed that a large number of cases relate to persons with mental retardation, and fewer instances that relate to the other disabilities - speech and hearing impairment. In general, the questions raised are - who can be appointed as a guardian? what are the basic requirements for grant a guardianship?
what are the responsibilities of the Court before granting guardianship? The validity of a transaction made by a person with mental disability? does a deaf person need a guardian?

**Guardianship of a Person with Mental Retardation**: Raj Kumar, appellant no. 1 is a mentally retarded person. An application through next friend was filed on his behalf for eviction of the respondents from the premises which was owned by Raj Kumar. In reply to the Eviction Petition, it was inter alia stated that the appellant was a man of unsound mind and was not capable of doing any business and as no guardian has been appointed by the District Judge, the father could not act as a guardian. Sections 52 to 55 are contained in Chapter VI of the Mental Health Act, 1987. This Chapter contains provisions relating to "Judicial inquisition regarding alleged mentally ill person possessing property, custody of his person and management of his property." Section 50 provides for an application being made for holding an inquisition with regard to the mental condition of a person which is alleged to be mentally ill and is possessed of property. Such an application can be filed only by the persons or authorities specified in Clauses (a) to (d) of Sub-Section (1) of Section 50. It is pursuant to the proceedings so initiated that the other provisions of the Chapter including Sections 52 to 55 would apply. Section 50 does not contemplate any application being made or a contention being raised by a tenant in a proceeding for eviction against him.

In the instant case what was applicable was Order 32, Rule 1 read with Rule 15. An application for appointment of a guardian in accordance with the said provisions was filed. An application to this effect was filed before the Rent Controller and the father was appointed as the guardian and next friend of the appellant. Nothing more was required to be done and the High Court, in our opinion, was in error in coming to the conclusion that the Eviction Petition was not maintainable and the procedure provided by Sections 52 to 55 of the Mental Health Act, 1987 had not been complied with. For the aforesaid reasons, this appeal is allowed the impugned judgment of the High Court is set aside.

In *M/s Leelason Breweries Ltd v. Beemireddy Lakshminarayana Reddy* 536, wherein it is held:- 'Appointment of guardian. Ground of infirmity of plaintiff. Plaintiff

535 Raj Kumar v. Rameshchand 1999 Supp(3) SCR 345
536 AIR2002AP253
examined himself. Contents of medical certificate proved by evidence of guardian to the mother Sakunthala Devi, who is insane.

*Jai Prakash Goel v. The State* Application for appointment of guardian ad litem. Application made after one decade of filing of probate. A person may not be adjudged as of unsound mind yet the Court may nevertheless consider it appropriate to appoint a guardian *ad litem* under Order XXXII Rule 15. However, the Court is not bound to make a rigorous or formal enquiry as contemplated by the Lunacy Act, and is competent to pass an order as soon as it is satisfied as to the party's mental competence. The Collins/Cobuild English Dictionary defines 'infirm' as weak or ill and usually old. The Concise Oxford Dictionary states that 'infirm' refers to a person who is not physically strong, especially through age. In Black's Law Dictionary 'infirm' has been defined as weak, feeble, lacking moral character or weak of health. The Petitioner failed to take the precaution of filing an application under Order XXXII Rule 15.

**Custody of Disable Child:** In *Smt.Sunanda W/O Iswar Halage v. Iswar S/O Balappa Halage* the appellant and respondent herein were respectively the petitioner and respondent in the Court below and they are husband and wife. Their marriage was solemnised prior to 1990. In the wedlock, a son is born to them on 11.01.1991. The said child is named as Raghavendra Ishwar Halage. It is not in dispute that the said child is born with deformity of spinal cord resulting in underdeveloped mental condition. As such, though the child has attained the age of majority as on the date when the petition in 0 & W No.4/2009 was filed, the child was not mentally matured. It is seen that in view of frequent quarrel between husband and wife, they have been living separately. In that view of the matter, the petition in 0 & W No.4/2009 was filed by the appellant-wife seeking custody of her son. Incidentally, the said petition was filed under Section 7 r/w Section 10 of the Guardians and Wards Act. 1980, by the appellant-wife against the respondent-husband seeking custody of the child Raghavendhra Ishwar Halage. In the proceeding before the Family Court, the Family Court after recording evidence and on appreciation of facts has dismissed the petition on the ground that the child had attained the age of majority as on the date of filing of the petition in 0 & W No.4/2009 and therefore, the

*537 AIR2005Delhi83; 114(2004)DLT222; 2004(77)DRJ187
application seeking custody of the child is not maintainable under the provisions of Sections 7 of the Guardians and Wards Act, 1980. Being aggrieved by the same, the present appeal is filed.

Considering the above fact the court held that it was observed that basically an error was committed by the appellant herein was the petitioner before the Tribunal in invoking the provisions of Sections 7 and 10 of the Guardians and Wards Act, 1980. Admittedly, in the instant case, as on the date of filing of the petition, the child was having severe mental problems resulting in the child to be considered deranged and mentally retarded child. Under the circumstances, the question of seeking custody of the said child is not permissible under Sections 7 and 10 of the Guardians and Wards Act, 1980. The appellant herein ought to have initiated the proceedings by invoking the appropriate provisions of law as provided under the Mental Health Act, 1987. In the absence of Initiating necessary proceedings as provided under law and on the contrary, by Initiating the proceeding under wrong provisions of law, the petitioner before the Court below is not entitled to seek any relief. In that view of the matter, this Court will have to dismiss this appeal as not maintainable.

**Under what circumstances can adoption and inheritance be denied:** In *Malojirao Abajirao v. Tarabai Nathajirao and ors* 539 the suit has been resisted by the defendants upon the grounds (1) that the plaintiff's adoption by Abajirao was invalid as Abajirao was an idiot and of unsound mind and also a leper and that therefore the plaintiff is not entitled to succeed to the estate of Abajirao, (2) that Maruti Tukaram the husband of defendant 1, was adopted by Bai Babai, widow, of Maruti Abajirao as a son to her deceased husband and was thereafter known as Nathaji Maruti, (3) that after the death of Maruti Tukaram, whose name changed to Nathai Maruti after his adoption by Bai Babaisaheb, his widow, defendant 1, adopted defendant 2 as a son to her deceased husband, (4) that the suit properties had become Stridhan properties of Bai Babai by reason of her adverse possession thereof, and (5) that defendants 1 and 2 being the stridhan heirs of Bai Babai are entitled to succeed to the suit properties. That being so according to the well settled law, as Abajirao was not proved to have been suffering from leprosy of a virulent and disgusting nature and was not proved to have been unfit for

539 AIR 1956 Bom 397

316
social intercourse and was not proved to have been suffering from any organic deformity, he was not incapable of making a valid adoption.

**Instances of Dispossession of Inheritance:** In *R Muthammal (Died) & anr v. Subramaniaswami Devasthanam, Tirchendur & others* A Hindu was found to be a lunatic when succession opened. It was claimed that under the texts lunacy must be congenital to exclude from inheritance. Held, under the Hindu law lunacy as distinct from idiocy need not be congenital to exclude from inheritance, if it existed when succession opened.

**Criminal Liability and Disability**

Legal insanity as distinguished from medical insanity envisaged and covered by Section 84 IPC is narrower and is applicable if the person accused was incapable of knowing the nature of the act or knowing that what he was doing was either wrong or contrary to law. The proper question, which is to be asked and answered, whenever a plea under Section 84 is raised, is whether the appellant/accused at the time of doing of the act, was incapable of knowing the nature of the act or that what he was doing was wrong or contrary to law. To establish insanity under Section 84 IPC, it has to be established that the accused was laboring under such disability, i.e. unsoundness of mind, as not to know the nature and quality of the act he was committing or the act was wrong/contrary to law. Further, the crucial time for ascertaining insanity is the time when crime was committed i.e. the time when the act or offence was in fact done. Unsoundness of mind after or before commission of the offence is not relevant, though may throw light on whether the accused was unsound when the offence was committed.

---


541 Siddhapal Kamala Yadav v. State of Maharashtra, AIR 200. SC 97

It has been clarified in *Elavarasan v. State*\(^{543}\) that the mere fact that the appellant had assaulted his immediate family members was not ipso facto suggestive of his being an insane person. It further held that:

38. So, also the fact that he had not escaped from the place of occurrence was no reason by itself to declare him to be a person of unsound mind incapable of understanding the nature of the acts committed by him. Experience has shown that different individuals react differently to same or similar situations. Some may escape from the scene of occurrence, others may not while some may even walk to the police station to surrender and report about what they have done. Such post-event conduct may be relevant to determine the culpability of the offender in the light of other evidence on record, but the conduct of not fleeing from the spot would not in itself show that the person concerned was insane at the time of the commission of the offence.

In *Paramjeet Singh v. State*\(^{544}\) appellant pleads to the Court that his conviction should be set aside on the ground of insanity under Section 84 IPC The Court observed that

18. Criminal offences, including Section 302 IPC, mandate and require proof of *mens rea*. Section 84 IPC does not affect the general burden of proof and the prosecution must establish mens rea. The general burden of proof that the accused person had requisite mens rea continues to remain upon prosecution as observed in *Sheralli Wali Mohammed*\(^{545}\) wherein the following passage from *Dahyabhai Chhaganbhai Thakkar*\(^{546}\) has also been quoted:

1. The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea* and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence-oral, documentary or circumstantial, but

\(^{543}\) (2011) 7 SCC 11

\(^{544}\) THE HIGH COURT OF DELHI, Decided on 4th October, 2012, legalcrystal.com/957881

\(^{545}\) Sheralli Wali Mohammed Vs. State of Maharashtra (AIR 1972 SC 2443)

\(^{546}\) Dahyabhai Chhaganbhai Thakkar v. State of Gujarat AIR 196 SC 1563
the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. Failure to prove *mens rea* or absence of *mens rea* when mandated and requirement of an offence, will result in acquittal but this should be distinguished from insanity as defined and granted immunity under Section 84 IPC. These are two separate lines of defences and require distinct considerations. Normally onus to prove *mens rea* is on the prosecution and failure to prove will cause acquittal on merits because no offence is proved to be committed. Question of insanity relates to disease or malfunctioning of mind and the onus is on the accused.

Considering the ratio of *Elavarasan v. State* 547 the appellants plea of insanity, as mandated and stipulated under Section 84 IPC, was rejected. The court did not find any merit in the above appeal and the same is dismissed. The conviction and sentence of the appellant under Section 302 IPC for murder of Jaspreet Kaur and under Section 307 IPC for attempt to murder Balwinder Kaur, Arvin Kaur and Daljit Singh was maintained.

**Degrees of Insanity:** It may be said that between the normal and the abnormal there is only difference of degrees but not of kind. The mind may be unsound, affected by disease, disorderly or disturbed or abnormal. These factors must be of such degree, which renders the accused capable of knowing the nature of his act or that what he is doing is either wrong or contrary to law. It should be obliterate the perceptual or volitional capacity.548

**Mental Status and Execution of Death Sentence:** *Shatrughan Chauhan and Anr. v. Union of India and Ors.*549 and *Devender Pal Singh Bhullar v. State (NCT)*

---

547 (2011) 7 SCC 11  
549 2014 (1) SCALE 437.
Delhi\textsuperscript{550} the Supreme Court of India observed that during mental illness a convict cannot be executed the sentence of death.

**Directions to State Institutions and Disability:** The petitioner alleged that his wife is mentally deranged and, therefore, she cannot claim a right under Section 6(a) of the Hindu Minority and Guardianship Act, to have custody of the child. Taking into consideration the welfare of the child, it should be allowed to continue with him only, and the custody of the child should not be entrusted to its mother. Regarding the demand for Rs. 50,000 etc., he denied all those allegations. He also said that the child after it came to his custody, has regained its health and is happy with him, and no ground has been made out to change the custody. According to him, if the custody is now changed, it will affect the future welfare of the child. The accusation of mental derangement is mentioned in the Divorce petition. The husband repeated the same allegation before me also. He accused her as a person who does not know to differentiate between right and wrong. As I said already, I do not want to go into the merits of the main case. But when we are considering the interim custody of the child, statutory presumption, preferential right as recognised in regard to children of tender years, and the right of the mother to have custody of the child, have to be recognised. The child was very much affectionate towards its mother, and it was visible throughout when the child was in court and also when they came to my chambers. I find that the child's custody with the mother during this tender age will be more protective, than with the father.

**Right to Health**

Article 21 of the Constitution of India casts an obligation on the State to preserve life. Article 21 reads as under: "21. Protection of life and personal liberty.- No personal shall be deprived of his life or personal liberty except according to procedure established by law." The Indian Supreme Court in a catena of cases has held that right to health and medical care is a fundamental right under Article 21 read with Articles 39(e), 41 and 43. It has further held that self-preservation of one's life is the necessary concomitant of the

\textsuperscript{550} (2013) 6 SCC 195.
right to life enshrined in Article 21, fundamental in nature, sacred, precious and inviolable.\(^{531}\)

In fact, in *State of Maharashtra v. Chandrabhan*,\(^{552}\) the Supreme Court held that right to life, enshrined in Article 21 means something more than survival or animal existence. It includes all those aspects of life which go to make a man's life meaningful, complete and worth living. That which alone can make it possible to live must be declared to be an integral component of the right to life. The human right to health is also recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. Therefore, the judiciary views that Article 21 has to be interpreted in conformity with International Covenant on Civil and Political Rights, 1966 as India is a signatory to the same.

In *Kirloskar Brothers Ltd. v. Employees State Insurance Corporation*,\(^{553}\) the Supreme Court of India observed

"Para 9 - The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in the welfare State. The Government discharges this obligation by running hospitals and health centers which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide

---

\(^{531}\) All India Lawyers Union (Delhi Unit) v. Govt. of NCT of Delhi & Ors., 163 (2009) DLT 319 (DB).
\(^{552}\) AIR 1983 SC 803
\(^{553}\) 1996 (2) SCC 682;
timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.”

The Indian Supreme Court in the case of Pt. Parmanand Katara v. Union of India and Others, \(^{554}\) recognized the obligation of the Government to preserve life. In the said case a victim of a scooter accident was denied treatment as the hospital did not have the requisite arrangements for medico-legal cases. Failure to receive timely treatment eventually led to the victim’s death. While interpreting the ambit of the right to life under Article 21 of the Constitution, the Supreme Court held

"Article 21 of the Constitution casts the obligation on the State to preserve life. ......The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way." (emphasis supplied).

In the case of Paschim Banga Khet Mazdoor Samity v State of West Bengal \(^{555}\) a member of the petitioner Mazdoor Samity suffered a brain injury after falling from a train and was denied treatment at several hospitals due to lack of expertise and lack of beds and was forced to seek treatment at a private hospital. The petition was filed for compensation of the expenses incurred. The Supreme Court observed that the obligation to provide medical care was an obligation of the welfare state and held

"The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide

\(^{554}\) (1989) 4 SCC 286  
timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. .......It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done......In the matter of allocation of funds for medical services the said constitutional obligation of the State, has to be kept in view. It is necessary that a time-bound plan for providing these services should be chalked out keeping in view the recommendations of the Committee as well as the requirements for ensuring availability of proper medical services in this regard as indicated by us and steps should be taken to implement the same." (emphasis supplied).

Consequently, right to health and health care access are a part of Articles 21, 38 and 46 of the Constitution. Accordingly, every person has a fundamental right to quality health care -- that is affordable, accessible and compassionate.

It is often argued that the Supreme Court in State of Punjab and Ors. v. Ram Lubhaya Bagga,\(^{556}\) and Confederation of Ex servicemen Associations and Ors. v. Union of India and Ors.\(^{557}\) had diluted the right to health. In Bagga case the Apex court observed

"25. ..........Question is whether the new policy which is restricted by the financial constraints of the State to the rates in AIIMS would be in violation of Article 21 of the Constitution of India. So far as questioning the validity of governmental policy is concerned in our view it is not normally within the domain of any court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitutional, statutory or any other provision of law. When Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if court is asked to test the utility, beneficial effect

\(^{556}\) (1998) 4 SCC 117

\(^{557}\) AIR 2006 SC 2945,
of the policy or its appraisal based on facts set out on affidavits. The court would
dissuade itself from entering into this realm which belongs to the executive. It is
within this matrix that it is to be seen whether the new policy violates Article 21
when it restricts reimbursement on account of its financial constraints.

26. When we speak about a right, it correlates to a duty upon another, individual,
employer, government or an authority. In other words, the right of one is an
obligation of another. Hence the right of a citizen to live under Article 21 casts
obligation on the State. This obligation is further reinforced under Article 47 it is
for the State to secure health to its citizen as its primary duty. No doubt the
Government is rendering this obligation by opening government hospitals and
health centers, but in order to make it meaningful, it has to be within the reach of
its people, as far as possible, to reduce the queue of waiting lists, and it has to
provide all facilities for which an employee looks for at another hospital. Its
upkeep, maintenance and cleanliness have to be beyond aspersion. To employ the
best of talents and tone up its administration to give effective contribution. Also
bring in awareness in welfare of hospital staff for their dedicated service, give
them periodical, medico-ethical and service-oriented training, not only at the entry
point but also during the whole tenure of their service. Since it is one of the most
sacrosanct and valuable rights of a citizen and equally sacrosanct sacred
obligation of the State, every citizen of this welfare State look towards the State
for it to perform it's this obligation with top priority including by way of
allocation of sufficient funds. This in turn will not only secure the right of its
citizen to the best of their satisfaction but in turn will benefit the State in
achieving its social, political and economical goal. For every return there has to be
investment. Investment needs resources and finances. So even to protect this
sacrosanct right finances are an inherent requirement. Harnessing such resources
needs top priority.

29. No State of any country can have unlimited resources to spend on any of its
projects. That is why it only approves its projects to the extent it is feasible. The
same holds good for providing medical facilities to its citizens including its
employees. Provision of facilities cannot be unlimited. It has to be to the extent
finances permit. If no scale or rate is fixed then in case private clinics or hospitals
increase their rate to exorbitant scales, the State would be bound to reimburse the same. Hence we come to the conclusion that principle of fixation of rate and scale under this new policy is justified and cannot be held to be violative of Article 21 or Article 47 of the Constitution of India.

Similar view was taken in *Confederation of Ex servicemen Associations and Ors. v. Union of India and Ors.*[^558] In *Indian Council of Legal Aid and other v. Union of India and Ors.*[^559], a PIL was filed so as to make duty bearers at state or local level work towards providing proper medical facilities to visually impaired people in the country by setting up regular check up camps for them. The Union had of India formulated a scheme for periodical check-ups and treatment of visually impaired persons admitted to blind schools run by Delhi Administration or voluntary organisations for education/rehabilitation of visually impaired persons. Supreme Court opined that the said scheme deserved to be adopted by all States and the Union Territories so that assistance in the shape of medical check-up and treatment was available to visually-impaired people. It would also ensure that none of visually-impaired person’s are denied corrective surgery. The Supreme Court thus issued notices to the health secretaries of all the states and union territories to show-cause why the scheme should not be implemented.

The learned Supreme Court of India observed:

There is no gain saying that health is an important facet of the right to life guaranteed under Article 21 of the Constitution of India and it is an obligation of the State to ensure good health to the citizens. When considered in the light of Article 41 of the directive principles, which casts a duty on the State to make effective provisions for securing inter alia the rights of the disabled and those suffering from other infirmities within the limits of its economic capacity and development, it becomes imperative that all steps should be taken for helping the visually-handicapped to regain their eyesight to the extent possible. While the writ petition filed by the petitioner on the basis of certain news items which appeared in certain newspapers was pending in the High Court, a counter-affidavit was filed.

[^558]: AIR 2006 SC 2945,
[^559]: (2000) 10 SCC 542
by the Union of India along with which a scheme called "Scheme for periodical 
check-up and treatment of visually-handicapped persons admitted to blind schools 
rung by Delhi administration or voluntary organisations for education/rehabilitation of 
visually-handicapped persons" was also filed. This Scheme, to an extent attempts to 
meet the situation arising out of various problems connected with the medical 
check-up and treatment of blind persons. This Scheme, whether as it is or in a 
modified form, deserves to be adopted by all the States and the Union Territories 
in the whole country so that assistance in the shape of medical check-up and 
treatment is available to the visually-handicapped and none of the visually-handicapped 
is denied corrective surgery. We, therefore, consider it desirable to issue notice to 
the Health Secretaries of all the States and Union Territories to show cause why 
the Scheme (attached as Annexure P-4 at p. 48 of the paper-book) either as it is or in 
any modified form be not implemented in all the States/Union Territories.

In *Mohd. Ahmed (Minor) v Union of India and Ors.*560 the issue that arised for 
consideration was whether a minor child born to parents belonging to economically 
weaker section of the society suffering from a chronic and rare disease, gaucher, is 
entitled to free medical treatment costing about rupees six lakhs per month especially 
when the treatment is known, prognosis is good and there is every likelihood of petitioner 
leading a normal life. Despite financial assistance from Delhi Arogya Kosh, hospital 
authorities and Lawyers of Delhi, the Secretary (Health), Ministry of Health & Family 
Welfare and Secretary (Health), Government of NCT of Delhi along with other 
Government officials could not device a mechanism to extent the cost of the treatment

Considering the submissions of the parties the court observed and directed that,

"On account of lack of Government planning, there is 'pricing out' of orphan drugs 
for rare and chronic diseases, like Gaucher. The enzyme replacement therapy is so 
expensive that there is a breach of constitutional obligation of the Government to 
provide medical aid on fair, reasonable, equitable and affordable basis. By their 
inaction, the Central and the State Governments have violated Articles 14 and 21 
of the Constitution.

560 THE HIGH COURT OF DELHI, W.P.(C) 7279/2013, Decided on 17 April, 2014
Just because someone is poor, the State cannot allow him to die. In fact, Government is bound to ensure that poor and vulnerable sections of society have access to treatment for rare and chronic diseases, like Gaucher especially when the prognosis is good and there is a likelihood of the patient leading a normal life. After all, health is not a luxury and should not be the sole possession of a privileged few.

Although obligations under Article 21 are generally understood to be progressively realizable depending on maximum available resources, yet certain obligations are considered core and non-derogable irrespective of resource constraints. Providing access to essential medicines at affordable prices is one such core obligation.

Since a breach of a Constitutional right has taken place, the Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement provides guidance as to the appropriate relief in a particular case.

As health is a State subject, the present petition is disposed of with a direction to the Government of NCT of Delhi, to discharge its constitutional obligation and provide the petitioner with enzyme replacement therapy at AIIMS free of charge as and when he requires it.

In the context the learned Delhi High Court proposed some of the very innovative suggestions to both Central and State Governments that runs as follows

“81. This Court suggests that both the Central and State Governments should consider the following suggestions:

i. All government hospitals could have a separate CSR/ Charitable entity/account wherein donations can be received. The donations could be subject to an audit.

ii. Each hospital could have a designated officer, to whom applications for assistance can be made by patients in need. The decision to whom financial assistance could be provided, be left to the Medical Superintendent/CEO of the
Hospital along with Head of the Departments. Delhi could be adopted as the first model state.

iii. The Ministries of Corporate Affairs and Finance could consider providing extra credit (for instance increased credit) for donations in certain sectors, such as health.

iv. The Government could adopt a holistic approach to facilitate donations, so that the tax regime supports the said efforts.

v. All donations in cash and kind must be accounted for, with complete transparency to ensure no misuse or misappropriation of donations.

vi. Government hospitals could put up list on the State Department of Health website of the drugs, implants and devices they require for EWS/BPL patients. This way people would donate as per the need of each hospital. This could be revised on a monthly basis.

vii. The State Government may put up a list of drugs, implants and devices which are excluded from its budget for which donations would be welcome.

viii. Both the Central and State Governments could create a revolving fund to take care of recurring expenditure of patients suffering from chronic and rare diseases.

ix. The Government could constitute a High Powered Inter-disciplinary Committee to:

- Develop and update a list of guiding principles/best practices in the area of donations in healthcare.

- Develop a policy for tackling rare diseases and promoting the development of orphan drugs.

- Evolve new and innovative methods for attracting spending in the area of healthcare.

- This Committee could have representatives from various State and Central Government departments, private and government hospitals, non-governmental
organizations working in the area of healthcare, representatives of patients rights groups, representatives of pharmaceutical and other companies in the healthcare sector.

82. However, as the concept of CSR is still at a nascent stage and there is no mechanism in place which popularizes and facilitates donation, this Court is of the view that State must bear the burden of the treatment.

83. Before parting with the judgment, this Court would like to place on record its appreciation for the high level of debate and the assistance rendered to it by all the counsel appearing in the present case.”

Right to Safety and Security

In the case of P.V.Antony v. State of Kerala 561 Ibin Antony, a 20 year old student of the Government Vocational Higher Secondary School for Hearing Impaired, Jagathy, Thiruvananthapuram, was subjected to postmortem by the Police Surgeon and Lecturer in the Department of Forensic Medicine, Medical College, Thiruvananthapuram to conclude that the said person with disabilities of being deaf and dumb died due to extradural bleeding. He was the student of the 2nd Year Vocational Higher Secondary Course. However, it was reported that Ibin had a fall on the terrace of the hostel at about 6 p.m.; his friends carried him to his bed in a conscious state; he refused to have dinner though his friends persuaded him; the Matron was not informed of the matter at that stage; Ibin was found unconscious in the bed the next morning and the students informed the matter to the Matron; neither the Principal nor the Matron was aware of the incident till 7 a.m. on 6-7-2000 and Ibin was taken to the hospital by the Matron with the help of two other students; Ibin was declared dead at 7.55 a.m. at the Government Hospital on 6-7-2000; continued investigation revealed no foul play or negligence and therefore, on 10-11-2000, a report was submitted before the Sub Divisional Magistrate regarding the unnatural death and the matter was closed as undetected. However Ibin’s father filled a Writ petition seeking a direction to convert the occurrence report recorded by the police as a case of unnatural death to be one for an offence punishable under Section 304A IPC and to direct that the investigation be entrusted with the Crime Branch; to direct payment

of an amount of Rs. 5 lakhs by way of compensation as an interim measure without prejudice to adequate compensation being sought for in further appropriate proceedings.

The above case is a clear example of Mismanaged Government Vocational Training Institute. The learned Court came very heavily on the Principal and Matron of the Institute and observed

5. The Principal is provided with a Govt. Quarters in the school compound. She is not staying there. Had she stayed there, she could have understood the difficulties and problems of the inmates in time. The Warden and the Matron were not present in the hostel when the accident took place. They could not get any information regarding the accident till next day morning. This clearly shows the way of functioning of the institution. There is lack of responsibility on the part of the Principal and other staff members. The disabled children are not looked after properly.

This means that the male students of the school, including adolescents, who are physically challenged, were left to care for themselves, at least, for 12 hours a day. Due care and caution was not only just absent, but a clear case of administrative negligence neglect is abundantly established. Ibin is stated to have suffered the injuries at about 6 p.m. by a fall in the terrace, going by the statement filed on behalf of the Commissioner of Police. The Matron knows about the incident only at 7 a.m. on the next day. Who supervises whether the boarders have had a proper supper? Who supervises their presence in the boarding during the night time? Who ensures their safety while asleep? What was the arrangement to take care of any emergency in the school where physically challenged students reside? Are the unfortunate deaf and dumb (I may call them so with a bit of pain and anguish) expected to take care of themselves in the event of any contingency in the hostel where their parents have left them in the protective cover of a Government institution? Is it to be presumed that the Principal, the Matron and others having higher supervisory control could slumber deep, assured that no miscreants; no anti-social elements; no animals; no reptiles; would enter the school hostel and that the Principal, Matron and other staff have no duty of care and protection to discharge, after the sun sets? The unfortunate incident was in 2000. Recollecting

330
different reported incidents of sexual and otherwise invasion on the person of adolescents and children, as also the statistics of lurking house trespass, theft, burglary etc., I shudder to even dream that any progeny of independent India is a boarder in such a school.

13. In the aforesaid context, even a handful of salt would not aid me to swallow the stand of the Government that "neither the school authorities nor the departmental authorities are in any way responsible for the death of the petitioner's son and the question of granting any compensation to the petitioner does not arise", even if I were to receive with all fervent hope the further statement of the first respondent that "the Government have taken all precautions to avert all such untoward incidents in future".

In a school of such nature, the role of a Principal and the Matron is much more important than in other schools. The content of trusteeship inbuilt in the office of a principal and a matron is comparably higher in such an institution than of those schools where the blessed others study. Ibin's case is manifest expression of the failure of the State machinery. If I may call that boy a challenged person; one with disabilities; he was disabled more, and challenged by the very establishment which is entrusted with his care by the Republic Nation of which he was a citizen. The Government have failed to discharge their constitutional obligation in ensuring that Ibin's guaranteed fundamental right to life is not breached. It has been ruthlessly deprived, by not ensuring proper care and caution by those holding the mantle of guidance and by those who are expected to act as trustees to attain the goal envisaged by the Act, the Proclamation and the Constitution.

15. The State Government and the officials of the Education Department, including the Principal, the Matron are involved in the matter of running the school. The said institution falls within the sweep of the different constitutional provisions on which Ibin could cling on to the guarantees extended to him by his mother land. He was entitled to the social cover of protection which ought to have trickled to him as a public duty from the authorities.

16. All that Ibin did not have till the fateful day was the physical power to speak and hear, but he had his loving parents, friends and the society to rely on. His
parents have lost him who, in spite of his physical challenges, was undergoing a vocational course, had reached his youth, was otherwise able bodied and would have contributed to the family by his earnings. The parents brought him up holding within them the sorrow of not being able to hear him speak. Nor could he hear them. But they have been deprived of their priced possession, the child, which to every parent, is dearer than oneself. The parents have been deprived of his love. Ibin, from the evening of 5-7-2007, after his fall, would have had his share of pain and sufferings, overnight. The situation calls for an order of compensation in exercise of jurisdiction under Article 226 of the Constitution, the case being one of gross violation of fundamental rights guaranteed under Article 21 of the Constitution.

Disability and Insurance: In the matter of Vikas Gupta v. Union of India and Anr.562 the case, as set out in the writ petition is that Postal Life Insurance Policy is issued by the respondents for the benefit of employees of Post and Telecommunication Department and other government employees; that the said Policy makes a distinction between disabled and non-disabled employees; whereas non-disabled employees can avail a maximum insurance of `5,00,000/-, the maximum sum insured for disabled employees is `1,00,000/- only; not only so, the disabled employees have to pay an extra premium also. The petitioner contends that the discrimination so meted out to the disabled employees is violative of Article 14 of the Constitution of India and the classification of the disabled and non-disabled employees in the matter of issuance of insurance policy is not based on any reasonable differentia and has no nexus with the purpose for which such insurance policies are issued. It is yet further contended that the same is violative of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 enacted in culmination of the decisions taken in the United Nations Convention on the Rights of Persons with Disabilities, to which India is a signatory.

The Court on perusal of the Post Office Life Insurance Rules, 2011 notified on 28.04.2011 indicates that Rules 14 and 15 thereof expressly exclude handicapped persons; Rule 17 thereof provides for "Scheme of PLI for Physically Handicapped

Persons"; such persons are required to undergo a special medical examination to determine the exact nature and extent of their handicap and its bearing on the life being insured. Premium in respect of such policies is to be "determined by the accepting authority". The "physically handicapped persons" are thus indeed being treated separately by the respondents and the respondents have in affidavits already admitted to charging higher premium from them justifying the same on the higher risk being insured.

On the question whether in the matter of life insurance, such classification of persons with physical disability can be said to be discriminatory the Court observed that

"18. The Disabilities Act though in the Preamble thereof proclaims to have been enacted to ensure equality the people with disabilities but in Chapter VIII thereof titled "Non-Discrimination" only deals with non-discrimination in transport, non-discrimination on the road, non-discrimination in the built environment and non-discrimination in Government employment and does not provide for non-discrimination in the matter of insurance."

20. We find that in the matter of insurance, the Apex Court in LIC of India v. Consumer Education and Research Centre (1995) 5 SCC 482 observed that authorities in the field of insurance owe a public duty to evolve their policies subject to such reasonable, just and fair terms and conditions accessible to all the segments of the society for insuring the lives of eligible persons.

22. It would thus be seen that disability per se cannot be the basis of discrimination in the matter of insurance. This Court is therefore unable to uphold the action of the respondents and/or the provisions of the Rules which create persons with disabilities class unto themselves. The same undoubtedly is a violation of the Disabilities Act even though not expressly dealing with the matter of insurance. The persons with disability cannot be grouped together for the purpose of insurance. They are to be treated similarly as others/non-disabled persons and just like in the case of non-disabled persons, the insurance risk is assessed on an individual basis, are liable to be similarly assessed; while so assessing, depending upon the risk assured and the risk assessed, premium is to be computed.
23. We therefore allow this writ petition and direct 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.

Summary:

Hence, on the basis of above discussion the researcher finds that The PWD Act has a number of ambiguities that might have had an adverse effect on the minimal entitlements and protections that the Act gives to the persons with disabilities. However, time and again, the judiciary, through creative and purposeful interpretation of the provisions, has salvaged the Act and made it operational. For instance, in one of the early cases under the PWD Act, the Supreme Court refused the argument of the State that it did not have sufficient economic means to implement the provisions of the Act, relating to accessibility. Since the current PWD Act is piece of social-welfare legislation, the role of judiciary in recent years found to be crucial in interpreting the statute in the light of its intended objectives. In the absence of a strong anti-discrimination legislation judicial interpretation played a remarkable role in protecting rights of persons with disabilities and in ensuring their full participation.