

JUDICIAL TREND TO APPRECIATE THE PROBLEM OF DIFFERENTLY ABLE: A LEGAL STUDY

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ABSTRACT

Judiciary is regarded as custodian of the Constitution Accordingly; Judiciary plays a leading role to provide justice to persons with disabilities. Judiciary played a pivotal role in sensitizing the issues and the problems related to persons with disabilities. A close perusal of numerous rulings of the Supreme Court of India reveal issues of education, employment, reservation with regard to people with disabilities, are vibrant. Thus, Supreme Court and tries to protect disabled from manifold discrimination and enhances the principal of 'Rule of Law.

Keywords: *Custodian, Justice, discrimination, vibrant*

As Quoted by Hon'ble Justice Venkata Chaliah "The task of protection and promotion of Human rights is a complex one and requires the co-operation of all section of the society.

The above mentioned statement is true in context of interpretation of different provisions of the PWD Act, 1995 and The Rights of Persons with Disabilities Act, 2016. In order to protect the Human rights of disabled, the government of India passed the PWD Act, 1995 and now 2016 Act and in order to remove ambiguities of the PWD Act and Act of 2016, Judiciary has played an active role and making the PWD Act effective.¹ Through positive interpretation of the different provisions under the PWD Act, Judiciary has provided specific relieves to persons with disabilities. The Judgments

of S.C has boldly and categorically shifted the attention of policy makers from the mere provision of charitable services to vigorously protecting their basic right to dignity and self-respect.

Judiciary is the third pillar of democracy in India. Judiciary in India plays a pivotal role to establish social Justice to persons with disabilities. The Judiciary in India under its ambit of policy for bringing about Social Justice for persons with disabilities. Indian judiciary not only exploded the myth that people with mental and physical impairments were unequal in capacity. In this regard judiciary acted as champion. Judiciary played a pivotal role in sensitizing the issues and the problems related to persons with disabilities. Judiciary has been forth coming in setting

aside discriminatory rules, even in the absence of formal recognition of disability-based discrimination. On several occasions, Supreme Court noted the appalling conditions of the mentally ill persons detained in the jails of various States and observed that admission of non-criminal mentally ill persons in jails is illegal and unconstitutional. In recent times, the Indian judiciary has emerged as the protector of rights of disabled and its responses towards violation of disabled rights have been optimistic. Now it can be said that judicial activism in the field of disabled rights is beginning to reach a new height.² A scanning of numerous rulings of the Supreme Court of India reveals the issues of education, employment, reservation with regard to people with disabilities.

CASES DECIDED BY SUPREME COURT

Cases on mental illness:

Sheela Barse v Union of India³

The Supreme Court observed that admission of non-criminal mentally ill persons to jails is illegal and unconstitutional. The court directed that the function of getting mentally ill persons examined should vest with Judicial Magistrates and who, upon the advice of mental health psychiatrists, should assign the mentally ill person to the nearest place of treatment and care. Persons with Disabilities, more specifically with mental illness, were being subjected to prohibited forms of the treatment and were consigned

to jails. Those living in Mental health institutions were no better. The Court ordered that they are human beings and they must get treatment in place of jail.

Chandan Kumar Banik v State of West Bengal⁴

The Supreme Court was shocked by the inhuman condition of the mentally ill patients in a mental hospital at Mankundu in Hooghly district. It rescued the mentally challenged inmates of the hospital who were kept in chains by the hospital authorities. The Supreme Court deprecated and discontinued the practice of tying up with the iron chain of patients who were unruly or not physically controllable and ordered drug treatment for these patients. The administration of hospital was also removed and replaced by a competent doctor with requisite administrative ability and powers. The Supreme Court gave directions to remove other deficiencies in the care to ensure that the patients now detained in the Mental Hospital would receive appropriate attention in all respects in a humane manner.

Chained Inmates Case of Tamil Nadu⁵

The Supreme Court took suo motu action on the basis of submission note of the Registrar (Judicial) to a new item published in all leading national dailies about a gruesome tragedy in which more than 25 mentally challenged patients housed in a mental asylum at Ervadi in Ramanathapuram district were charred to death. The patients could not escape the blaze as they had been chained to poles or

beds. On these facts the Court took stern view and directed the State Government to file status report in this case, the court took strong reservations towards the apathy of government in respect of their care and proper looking towards Persons with Disabilities. Hence, directions issued to State Governments and Central Government to implement the provisions of the Mental Health Act, 1987 relating to the treatment and care of the mentally ill persons.

Suchita Srivastava vs Chandigarh Administration⁶

This case was related with reproductive rights of a woman with mental retardation residing at a government run welfare institution in Chandigarh. She became victim of an alleged rape by an in-house staff. She wanted to keep the baby and carry on the pregnancy to full term. The Chandigarh Administration filed a petition in the high court seeking approval for termination of her pregnancy under the medical termination of pregnancy Act, 1971 on the ground that she in addition to being mentally retarded, hence without any guardian she was not able to carry on with the pregnancy and would not be able to look after a child. The Divisional bench of Punjab and Haryana High court permitted such termination holding the same to be in the best interest of the woman. Aggrieved from the order of the High court appellant approached the Supreme court through an amicus. One of the main issues before the Supreme court

was regarding the legal capacity of a woman with mental retardation to decide on her pregnancy.

Supreme court deeply scrutinized the various provisions of MTP Act, which provided that where pregnancy is a result of rape and termination of the same is contemplated the consent of the pregnant woman is mandatory. The court also taken into consideration the exception to this provision which provided that in case of a pregnant woman who is 'Mentally ill', pregnancy can be terminated with the approval of the woman's guardian. The Supreme Court while opining against termination of pregnancy on the basis of various reasons including doctrine of "parens patriae" held that: In the facts before us, the state could claim that it is the guardian of the pregnant victim since she is an orphan and has been placed in government run welfare institution. However, the state's claim to guardianship cannot be mechanically expanded in order to make decisions about the termination of her pregnancy. An ossification test has revealed that the physical age of the victim is around 19-20 years. This conclusively shows that she is not a minor. Furthermore, her condition has been described as that of mild mental retardation which is clearly different from the condition of a 'mentally ill person' as contemplated by section 3(4) (a) of the Medical Termination of pregnancy Act. 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 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 Nation 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 of a 'mentally ill person' as per section 3(4) (a) of the medical Termination of pregnancy Act, the same cannot be done on behalf of a person who is in a condition of 'mental retardation. On these reasoning the court concluded that state must respect the personal autonomy of a mentally retarded women with regard to decisions about terminating a pregnancy. The court further held that for continuance of pregnancy, no express consent is required while for termination of the same her consent is a pre condition under the provision of Medical termination of pregnancy Act. The court refrained from diluting this requirement as it would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim women.

Reena Banerjee VS Government of NCT⁷

In this case pitiable and pathetic condition of Asha Kiran Home was highlighted. Asha Kiran Home comprises of six institutions

within a complex of four buildings for mentally retarded children and adults. The appellants highlighted the issues such as inadequate medical treatment, medical services and access to doctors, skewed ratio of staff to look after the inmates, overcrowding, poor distribution and consumption of dietary, clothing, bedding and also about the abuses of various kinds to the mentally challenged persons residing in the Home. The High Court, therefore, directed the parties to convene a joint meeting and submit a proposal about the reforms in Asha Kiran. The Government of Delhi, accordingly, submitted a report about the action already taken and proposed as per the report, to be taken. The existing Administrator has been terminated and Dr. V. N. Agarwal, former Medical Superintendent of Dr. Ambedkar Hospital, appointed as administrator. The Government has approved formation of a strong Governing council comprising of eminent citizens and experts. The Governing council will be fully empowered to take decisions for improvement of the Asha Kiran Home in every manner and can take all action for the welfare and upkeep of residents; their protection against any forms of assault.

The proposal had been made for the appointment of 94 house aunts. After the appointment, Proper training will be imparted by the panel of experts. On the basis of above mentioned proposals High Court disposed of the matter by expressing a hope that the Authorities concerned will implement the proposed action. But

Authorities have never fulfilled their Commitments made before the High Court Accordingly, the appellants filed an appeal in Supreme Court under article 136. There was an imminent need to drastically improve the condition of Asha Kiran. The State Government have filled affidavit in the Supreme Court on 19th April 2014, disclosing the factual information about the action taken. Then State Government filed additional affidavit in August 2015, giving information about the action taken for improving the condition. Meantime, the court issued notice to all the state and union Territories and directed them to file their response about the ground reality of the Homes run by the State Governments and Union territories. In response to the notice given by the Supreme Court, 18 affidavits have been filed by different states/Union territories giving details about the position .

The Supreme Court ordered that the Union of India and other competent state and union authorities be identified and then respond to allegations that they were failing to meet their obligation under the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Secretary of the Union of India of Health and Social Welfare shall be personally responsible for monitoring and overseeing the progress made by the central authority for Mental Health Service and compliance of the directions. The Government disclosed that the House Aunties and staff of Asha Kiran will get sensitized to every aspect of care to be

provided to the residents. The neighbouring Government hospitals are being attached to Asha Kiran for providing ongoing medical care. The team of psychiatrists, paediatricians, gynecologists and general physicians from these hospitals will visit regularly for the care of the residents. Inspection Committee constituted under section 35 of J.J.Act. For proper care and prevention of any untoward incident,CCTV system is being installed at important places. Ms.Sreerupa Mitra Chaudhary was appointed as the chairperson. The State Government disclosed that Asha Kiran has become the first Government institution in the welfare sector in Delhi, to be awarded ISO 9001:2008 for quality management in September 2014.

All the affidavits filed in this proceeding be made available to the Central Authority for Mental Health Services. The affidavit of the concerned State be additionally forwarded to the respective State Authority for Mental Health Services. The Central Authority for Mental Health Services shall inspect and evaluate the conditions of the psychiatric hospital and psychiatric nursing home and the State shall look after their own.

POSTS NOT IDENTIFIED ADEQUATELY UNDER SECTION 32 OF THE PWD ACT

Amrita Vs Union of India⁸

In this case, the petitioner who was a visually impaired person applied for the post of a probationary officer as advertised by the Indian overseas bank . The petitioner

had the requisite qualifications . While filling up the application, the petitioner stated that she was visually impaired so that the Board could make adequate arrangement of a scribe for her during the entrance test as is normally done . Unfortunately, her application was returned by the Bank stating that they do not recruit blind candidates for the post of probationary officer . The petitioner challenged this rejection order in the supreme court under Article 32 of the constitution.

The substance or crux of the argument was that whether rejection of candidature under general category to the visually disabled person to the post of probationary officer is violative of fundamental rights enshrined under Art 14, 16 19 (g) and 21 the constitution . The supreme court held that both Articles 14 and 16 (1) of the constitution were infringed in this case . The court held that the petitioner was in the first instance denied equal opportunity as given to other applicants from appearing in the entrance examination on the ground of disability, which was not mentioned as a condition in the advertisement . Second, since the petitioner was similarly situated with other general candidates and the petitioner had not asked for any advantage for being a visually impaired candidate, it cannot be understood why she was not permitted to sit and write the examination for the post of probationary officer in the Bank and, therefore, the order of the Board denying her

permission to write the examination on the ground of disability cannot be sustained .

The court, relying on Article 16 hold that it guarantees equal opportunity to all persons and that all applicants must be given an equal opportunity with other who Qualify for the same post . The selection test must not be arbitrary and technical Qualifications and standards should be prescribed where necessary .The petition was disposed by granting permission to the petitioner to appear for the examination.

SECTION 33 OF THE PWD ACT,1995

In National Federation of Blind v Union Public Service Commission and Other⁹

In Civil Services Examination conducted by Union Public Service Commission, Braille script/scribe was sought by the person with disabilities (Visually handicapped persons) examinee . Article 21, of the Constitution of India, 1950 was taken recourse by the petitioner . It was sought that writ of Mandamus be issued directing the Union of Indian and the Union Public Service Commission to permit them to compete for the Indian Administrative Service and the Allied services and to provide facility of writing Civil Service Examination either in Braille-script or with the help of a scribe . Further relief was sought that group 'A' and 'B' posts examination in Braille-script or with help of scribe was permitted by the court .

In National Federation of Blind vs Union of India and others¹⁰

In a ground-breaking judgement, Delhi High Court held that 3% reservation of posts for persons with disability would not mean 3% of the identified posts, but 3% with reference to the cadre strength.

Govt. of India through Secretary vs. Ravi Prakash Gupta¹¹

In this case the petitioner **Ravi Prakash Gupta**, a totally blind person, and qualified UPSC Civil Services examination in 2006. However, he was not given the IAS cadre despite ranking 5th on the merit list for the visually disabled and there being more than five vacancies in his category. He filed petition in the Central Administrative Tribunal (CAT), which dismissed the same and subsequently he approached Delhi High Court challenging the order of the CAT and praying for the implementation of Section 33 of the Persons with Disabilities Act. The Delhi High Court directed the respondents to offer the petitioner an appointment to the said post by issuing appropriate appointment letter within six weeks; and also directed that the petitioner be given seniority along with his batch mates who took the examinations in the year 2006 and that his pay be fixed on that basis. Additionally, the Court awarded costs of Rs. 25,000 to the petitioner payable by respondent.

The Government of India being aggrieved by the order of the High Court, approached the Supreme Court through a Special Leave Petition. The Supreme Court, however, did not find any merit in the contention of the Government of India that

Section 33 of the Persons with Disabilities Act, 1995 could only be implemented after identification of posts suitable for such appointment under Section 32. Supreme Court observed that the Legislature did not intend that Section 32 be used as a tool to deny the benefits of Section 33 to persons with disabilities and that it could not allow implementation of the Act to be deferred indefinitely by bureaucratic inaction. It concluded that reservation under Section 33 was not dependant upon identification under Section 32. The Court did not find reason to interfere with the order of the Delhi High Court and directed the petitioners to implement the impugned order within eight weeks. This is a very important and landmark judgment considering the fact that non-identification of posts can no longer be any ground for non-implementation of reservation provision under the Act.

Syed Bashir-ud-din Qadri vs. Nazir Ahmed Shah¹²

The Appellant, a person with cerebral palsy, was selected for the post of Rehber-e-taleem (teaching guide) but not appointed to the post due to his disability. He challenged the action of the Government in the High Court of Jammu and Kashmir by way of writ petition. High Court ordered in his favour. Pursuant to the orders of the High Court, the Director School Education, Kashmir, constituted a committee to determine whether the Appellant could be appointed to the said post. The committee in its report stated that appellant could

read and take well and would be able to teach, but he could not write. There after it were recommended that the appellant be appointed Rehbar-e-Taleem and in accordance there with, the appellant was appointed .

Subsequently thereto, another candidate for said post challenged the said action of the Director of school Education, Kashmir, appointing the appellant as Rehbar-e-Taleem. The appellant was examined by the doctors of Neurology department of Sher-e-Kashmir Institute of Medical Science Srinagar whose report found that the appellant had cerebral palsy with significant speech and writing difficulties , which would make it difficult for him to perform his duties as a teacher . Based on this report, once again a committee was constituted to examine the working capacity of the appellant in the school. The said committee found that the appellant was well versed with subject he taught and did justice with his teaching prowess . However the High Court disposed of the writ petition by quashing the appellant's appointment and directed the Director of school Education, Kashmir to identify another suitable job for the appellant.

The appellant thereafter approached the Supreme Court challenging the order of the Jammu and Kashmir High Court on the grounds that the order was in violation of sec 22 of Jammu and Kashmir persons with Disabilities Act, 1998 which required the government to reserve 3%

posts in every establishment for person with disabilities among which locomotor or cerebral palsy was also identified. Supreme Court said that the disengagement of the appellant as Rehbar-e-Taleem, goes against the grain of the 1998 Act. The High Court dealt with the matter mechanically, without mentioning the spirit of the 1998 Act. Therefore, his tenure as a Rehbar-e-Taleem ought to have been continued without being pitch forked into a controversy which was uncalled for. The impugned order of the High Court and that of the Chief Education officer, disengaging the appellant from functioning as Rehbar-e-Taleem, are hereby set aside.

National Federation of the Blind vs. Union of India¹³

National Federation of the Blind is an apex organization and a society registered under the Societies Registration Act, 1860, working for the protection of the rights of the visually challenged. In the year 2006, National federation of the Blind, filed a writ petition before the High Court, seeking implementation of section 33 of the Act. Delhi High Court directed the Union Government to setup a special Committee to workout the backlog of vacancies for the disabled in all departments, Public sector undertakings and Government companies from the date that the Act came into force. Being aggrieved of the order, Government of India filed a SLP in Supreme Court. Supreme Court after hearing the arguments of learned counsel , upheld the order of

Delhi High court and SLP dismissed with costs.

Rajeev Kumar Gupta Vs Union of India¹⁴

In this case, Rajeev Kumar Gupta and seven other disabled persons serving as engineers in Prasar Bharti made the grievance that the higher level group A and B posts in the engineering cadre were filled only by promotion. Although these posts were identified as suitable for disabled, the Government was denying them, which is defeating the intent and purpose of reservation provided to the persons with disabilities. The petitioners challenged the Office Memorandum dated 29.12.2005 of Government of India, which prohibited reservation in promotion for disabled persons in Group A and B posts. In the Supreme Court, the Government of India reiterated its stand that reservation in promotion for disabled persons was impermissible quoting the Indra Sawhney judgment of 1992. But the Supreme Court rejected the reasoning of Central Government and opined that the object of the 1995 Act was to ensure social integration of persons with disabilities through 3% reservation in employment. The Court held the Government Memorandum as an illegal and said 3% reservation must be provided irrespective of whether recruitment is direct or by promotion.

CASES BASED ON SECTION 39 OF THE PWD ACT

All Kerala Parents Association Vs State of Kerala¹⁵

In this case, the Division Bench of Kerala High court ordered that section 39 of persons with disabilities (Equal opportunities, protection of Rights and full participation) Act, 1995 occurs in chapter VI dealing with the employment, the expression 'seats' in section 39 would really mean post and the question of reservation of seats for appointment in educational institutions would not arise under 39 . The matter was taken in appeal against the decisions of the Kerala high court in Romy chaco VS Ramesh Babu and other. The supreme court came down very strongly against the Kerala High court's interpretation of section 39 and justice Ruma pal and justice pattnaik held that; section 39 unequivocally deals with the question of reservation of seats for persons with disabilities in education institutions of the government as well as institutions receiving aid from the government . The language is clear and unambiguous , which itself indicates the legislative intent . It is well settled that when the language of any statutory provisions is clear, it is not necessary to look for any extrinsic aid to find out the meaning of the statute in as much as the language used by the legislature is the indication of the legislative intent. We fail to understand as to how and on what principles of construction the high court has given a construction to the provisions of sec. 39 not only by doing violence to the language of 5.39, but also rewriting the provisions of sec. 39 . If sec. 39 as has been construed by the high court ,would be interpreted to

mean the government it relates to employment merely because the provision occurs in chapter VI dealing with employment, then the 'educational institutions' would have to be interpreted to mean the government post and the question of receiving aid from the government would not arise at all. Natural and ordinary meaning of words should not be departed from unless it can be shown that legal context in which the words are used requires a different meaning. We have, therefore, no hesitation to come to the conclusion that the high court was wholly in error in construing sec. 39 of the Act to mean it relates to reservation in government employment and not in relation to admission of students with disabilities in the government institutions as well as educational institutions receiving aid from the government. Further, reservation in government employment is provided under sec. 3 of the Act. We therefore, set aside the impugned judgment of the Kerala High court and hold that sec. 39 deals with the reservation of seats for persons with disabilities in government educational institutions as well as educational institutions receiving aid from the government.

Disabled Rights Group vs Union of India¹⁶

In this case, three important issues are raised for the benefit of persons suffering from 'disability' as given in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act) 1995. The first issue related to the non-

implementation of 3% reservation of seats in educational institutions as provided in section 39 of the Disabilities Act, 1995 and section 32 of the Disabilities Act, 2016. Second issue raised in this petition, is to provide proper access to orthopaedic disabled persons. Third issue related with adequate provisions and facilities of teaching for disabled persons.

Regarding 3% reservation in Education institution, the language of section 39 of the Disabilities Act, 1995 and section 32 of the Rights of Persons with Disabilities Act, 2016, is crystal clear. "Section 39 provides that All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent seat for persons with disabilities." As per this provision, all Government educational institutions as well as other educational institutions which are receiving aid from the Government are supposed to reserve seats for the benefit of persons with disabilities. Disabilities Act, 2016 makes more exhaustive provisions insofar as providing of educational facilities to the persons with disabilities is concerned. Regarding accessibility section 40 mandates the Central Government to frame Rules and laying down the standards of accessibility for physical environment, transportation system, information & communication system and other facilities & services to be provided to the public in urban and rural areas.

Therefore, it is not only essential to provide necessary education but to see that such education is imparted to them in a conducive manner. This is only possible if there is proper accessibility to the building where the educational institution is housed. The court said that not making adequate provisions to facilitate proper education to persons with disabilities amounts to discrimination.

CASES BASED ON SECTION 43 OF THE PWD ACT –SCHEMES FOR PREFERENTIAL ALLOTMENT OF LAND FOR CERTAIN PURPOSES.

Salil Chaturvedi & Prajwala vs. Union of India¹⁷

It came to the notice of the Supreme Court that while some states had partially implemented the provision under Section 43 but no State came forward with the specific plea that schemes had been formulated and reservation had already been made in favour of disabled persons. The Court, accordingly, directed that whenever the State governments or local authorities allot land, preferential treatment shall be given to disabled persons and they shall be allotted land at a concessional rate. The Court also directed that while the percentage of reservation may be left to the discretion of the State governments/local authorities; but the total percentage of disabled persons was required to be taken into account while deciding that percentage. Additionally, the Court allowed liberties to them who felt

that the State governments/local authorities were not extending the benefits to the persons who are entitled to get such benefits under Section 43 of the Act to file complaints with the appropriate authorities as envisaged under the provisions of the Act.

CASES BASED ON SECTION 44 OF THE PWD ACT - NON- DISCRIMINATION IN TRANSPORT

Jeeja Ghosh and other vs Union of India and others¹⁸

Ms. Jeeja Ghosh is a prominent social activist involved in disability rights. She is a patient of cerebral palsy. She is a Board member of the National Trust, an organization of the Government of India. Once Ms. Ghosh was invited to an International conference, which was going to be held in Goa, from 19th to 23rd Feb. Ghosh was invited as one of 15 international individuals to review an Indo-German project. Organizer purchased plane tickets for Ms. Jeeja Ghosh in the morning of 19th February when she seated on the flight, Ms. Jeeja Ghosh fell off the plane due to her disability. She filed a PIL, in which she mentioned that shock and trauma of this event caused sleeping disorder. It also deprived the conference organizer to hear her thoughts and experiences. The unfortunate incident infringed her fundamental rights under Article 14 and 21 of the Indian Constitution. She had also submitted a complaint to the Ministry of Social Justice and Empowerment as well as

to the Commissioner for Persons with Disabilities and the Chief Commissioner for Persons with Disabilities. Both had issue show cause notices to Spice Jet. In the meantime Spice Jet had sent a letter in which apologizing for the incident. It was just as sprinkling salt on their wounds.

It is claimed that such behavior of airlines crew is outrageous and illegal. Staff of Spice Jet clearly violated Rule 133A of Aircraft Rules, 1937.

In this backdrop, the petitioners seek the following relief:

- a) Issue a writ in the nature of Mandamus to the Spice Jet, directing them to follow civil Aviation Rules.
- b) She later demanded issue of writ or order in the interest of justice.

The bench after considering the various arguments from the parties, decided that the petitioner Jeeja Ghosh was not given appropriate, fair and caring treatment while she was required with due sensitivity, and the manner in which she was de-boarded from the aircraft shows total lack of sensitivity on the part of the officials of the airlines. The bench also observed that the rights granted to the disabled persons are based on principle of human dignity, which is treated as a significant facet of right to life and liberty. The airline staff acted in callous manner and in violation of Rules, 1937 and CAR, 2008 guidelines.

Javed Abidi vs. Union of India¹⁹

The moot Question was that whether facility of grant of concession in air travel to person suffering from Locomotor disability required. The Petitioner filed a petition under Article 32 of the constitution before the Supreme Court of India. In this petition, petitioner asked the Court to direct the Union Government and the State Government to implement the provisions of the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Petitioner also prayed for directions to the Indian Airlines to provide 50 % concession to all disabled persons as other wise to provide such concession only to visually impaired persons would be discriminatory.

In regard to the Question of concession of 50 % on air –tickets, the court took the view that bearing in mind the discomfort and harassment a person suffering from Locomotor disability would face while traveling by train particularly too far off places, it was necessary to direct the Indian Airlines to grant the same concession which the Airlines was giving to those suffering from blindness to those suffering from Locomotor disability to the extent of 80 % and above for traveling by air within the country. It would of course be necessary for such person with Locomotor disability to furnish requisite medical certificate from the Chief District Medical officer.

In taking this view, the Court rejected the Contention that Indian Airlines was not in feasible economic condition to

give such concession, or that the concession to blind persons was being given prior to the above persons with disabilities Act coming into force or that it would result in discrimination with other disabled persons. Such direction was given, according to the court, keeping in view the broad objectives and true spirit of the persons with Disabilities Act to create barrier free environment and make special provisions for the integration of persons with disability into the social mainstream. Supreme Court, While delivering the Judgment, Stressed on the face that the Providing Concession, aisle chair and ambulifts are the social responsibility of the Airlines.

Rajiv Raturi vs. Union of India and others²⁰

In this case , the Supreme Court passed a slew of directions to the central and the State Governments to ensure that public infrastructure and facilities are accessible to persons with disabilities. The Court directed that the governments come up with detailed reports and plans to make Public buildings, airports, railway Stations, Public transport carriers accessible with in three months. Accordingly, government filed its status report before the court in which central government said that several government buildings further, railway stations and airports had also been made accessible. The Court directed that accessibility audits of government buildings be completed by February 2018 and retrofitting of these building be completed in August 2018, December 2018, June 2019 and December 2019 respectively.

CASES BASED ON SECTION 46 OF THE PWD ACT

Disabled Rights Group vs. Chief Election Commissioner²¹

A letter written by a disabled Rights group, an NGO to Supreme Court was registered as a writ petition in Public interest . The grievances expressed in the letter related to the absence of facilities to PWD to exercise their franchise in the elections . The petitioners referred to the need for;

- a) Wooden ramps at polling Stations to enable disabled persons to have an easy access
- b) The numbers in the Electronic voting machine being written in Braille to enable Visually handicapped voters to feel the numbers and press an appropriate button to cast the vote
- c) Separate Queues and special arrangements for PWD at Polling stations; and
- d) The Polling station Personnel to be Courteous and render necessary assistance to enable persons with disability to exercise their franchise

These suggestions were reiterated by the amicus curiae . The Election commission of India has responded by these suggestion . The commission Stated that it has issued instructions to chief Electoral officers of all States and Union Territories, to provide ramps to enable physically handicapped persons to use their wheelchairs to go into

the polling stations, to have separate Queues for ph and to sensitize poll personnel about the special needs of the disabled . Regarding printing of serial numbers in Braille, the Election Commission stated that it will evolve an appropriate and satisfactory Solution in consultation with the Ministry of social Welfare and Empowerment, representatives of NGO, engaged in the nation level in the welfare of VH and technical Experts from the ECIL and BEL .Again it is pointed out that even the existing EVMs, have been designed keeping in view the needs of the visually handicapped and hearing impaired electors.

Further, the Court directed the chief secretaries of respective States in coordination with Electoral officers of those States, to make available wooden ramp facilities at polling Stations situated in cities and urban areas . It is also stated that new EVS Containing Braille numbers by the side of the ballot buttons have been introduced to assist the VH.

CASES UNDER ARTICLE 47 OF THE PWD ACT.

Narendra Kumar Chandla v State of Haryana and other²²

A special leave petition was filed under Article 136 in the Supreme Court of India . The petitioner was aggrieved on account of being reduced in rank on acquiring disability during service . However, he was deprived of his right to promoting to the next higher grade forever . No doubt to great degree the Supreme Court removed the injustice

and protected his livelihood but it did not lay down the law that prohibition against discrimination in the matter of career enhancement of those who acquired disability during service . As Section 47 of the Act says that no establishment shall dispense with or reduce in rank, on employee who acquires a disability during his service . Provided that if any employee after acquiring disability is not suitable for the post he was holding could be shifted to same other post with the same pay scale and service benefit . Moreover if it is not possible to adjust the employee against any post he may be left on supernumerary post until a suitable post is available or he attains the age of superannuation whichever is earlier . No promotion shall be denied to a person merely on ground of disability .

Kunal Singh vs. Union of India and Anr.²³

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 respondents . He filed a writ petition in the high court challenging the validity and correctness of the said order on the ground that it was arbitrary and that he could have been assigned with alternative duty which he could discharge keeping in view the extent of his disability . However, the High Court dismissed his petition holding that he had been permanently invalidated on the basis of the medical opinion and as such there was no scope for him to continue any further in service of

any kind in SSB. The petitioner then went to Supreme Court making an appeal based on section 47 of the Act. The Supreme Court made the following observation .

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

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 nonderogant* 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, which reads as follows:

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

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

Union of India vs. Devendra Kumar Pant²⁴

In this case Supreme Court held that promotion to a higher post cannot be claimed automatically based on Section 47 of the Act. While examining the case of a colour blind person (which according to the Court neither amounted to blindness nor low vision as defined under the Act and was therefore not a disability under the Act), the Supreme observed that Section 47 (2) did not provide that even where the disability came in the way of performance of higher duties and functions associated with the promotional post promotion shall not be denied. The Court found that Section 47 (2) barred promotion being denied to a person on the ground of disability, only if the disability did not affect his capacity to

discharge the higher functions off a promotional post and that where the employer stipulated minimum standards for promotion keeping in view safety, security and efficiency, and if the employee were unable to meet the higher minimum standards on account of any disability or failure to posses the minimum standards, in such a case, Section 47 (2) would not be attracted.

Dalco Engineering Pvt. Ltd. vs. Shree Satish Prabhakar Padhye .²⁵

The Bombay High Court was of the view that a company incorporated under the Companies Act would be included within the scope of the Act and it accordingly issued order directing the private company under Section 47 of the Act to reinstate a terminated employee who acquired disability during the service and to shift the employee to a suitable post, with the same pay scale and service benefits as also with back-wages from the date of his termination . Being aggrieved by this order of the Bombay High Court, the employer approached the Supreme Court. Upon an examination of the provision of the Act, the Supreme Court found that the Legislature had not intended the said provisions to be made applicable to private employers and observed that despite the fact that a socio-economic legislation ought to be interpreted liberally, the interpretation could not be carried to levels unintended by the Legislature. The Supreme Court, accordingly, concluded that private sector employers were not 'establishments' within

the meaning of section 2(k) of the Act (as was interpreted by the Bombay High Court to be so) and hence it said that Section 47 would not be applicable to them .

Bhagwan Dass vs. Punjab State Electricity Board²⁶

Assumes very significance as it highlights a situation where an employee acquiring disability during service was not aware about the beneficial provision under Section 47. The employee lost his eyesight while in service and was retired from service based on his own request asking for retirement under which letter he also requested that a suitable job be given to his wife in his place. He was retired from service in 1999 despite a circular of the Board that an employee acquiring a disability during service could not be retired from service. Subsequently, the employee became aware about the provision that he entitled to protection under Section 47 of the Act and, accordingly, made repeated requests to the respondent for rejoining service; but his request was not considered. The High Court of Punjab & Haryana dismissed his petition and he later on filed a special leave petition before the Supreme Court. The Supreme Court made the following observation:

The appellant was a class IV worker and preferred to opt 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. However that instead of doing so, the

officers picked-up a line of request for retirement in his letter and took it out of context. In light there of and in view of the express provision of section 47 of the Act, *it was held that the action of the Board in terminating the appellant's service was bad and illegal.*

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

Dileep Kumar Singh vs. Union of India²⁷

On 1st Jan, 1998, the respondent was enlisted in the CRPF as Assistant commandant. On the 19th October 2001, he sustained serious injuries in his spinal cord and legs while he was on duty.

After the injury, he was provided with specialized treatment in various hospitals, but nothing worked out. At last, a medical board in its report declared him permanently incapacitated and recommended that he be relieved from service on medical grounds. On 27th October, 2004, a show cause notice was served on the respondent along with a copy of the report of the medical board with a direction to submit his representation. Instead of representing against the show cause notice, the respondent filed writ petition No, challenging the said show

cause notice. An interim order was passed on 19th January, 2005, in which appellants were directed not to pass any order pursuant to the report given by the medical board against the respondent on 1st July, 2011, the respondent was relieved from service and given invalidation pension as admissible under Rule 38 of the CCSC (pension) Rules of 1972. The respondent filled a second writ petition challenging the afore said order.

On 8th Jan, 2014, the Allahabad High Court held on that a notification dated 10th September, 2002 issued under section 47 in which H.C made it clear that the exemption provision would only apply to promotion and not to continuing the respondent in service. As a consequence, the order dated 1st July, 2011, was set aside and the Union was directed to treat the petitioner in service and to adjust him against any suitable post or against any suitable post or against a supernumerary post until a suitable post is available or until he attains the age of superannuation, whichever is earlier.

In response of the Judgment of Allahabad High Court rejoinder affidavit filed by the appellants in S. C, in which it was clearly mentioned that central Para Military forces perform a critical role in maintaining internal security and guarding of national borders. The job requirements are "technical" in nature requiring a high level of physical fitness. CRPF is exempted from the provisions of section 47 of the Act. Further, the respondent does not come

within the purview of standing order 7/99 and has been declared 100% permanently incapacitated for further service. His case dealt with procedure laid down in section 8 of CRPF medical manual. There is difference between 'not fit for normal active duty and 100% permanent incapacitation for further service. However, it is respectfully submitted that the full bench decision of Allahabad High Court in the case of Union of India VS Mohd. Yasin Ansari has held that a person in the armed forces even with lower degree of disability cannot be retained in services. The Supreme Court ordered that plea of the disabled officers mentioned being vague, for no particulars are given as to the extent of their disability, the Union has made it clear that standing order no.7/99 will not apply and that since the job requirements demand a high level of fitness and ability. Therefore, the judgment of the Allahabad High Court set aside.

HORIZONTAL RESERVATION UNDER ARTICLE 16

Mahesh Gupta VS Yashwant Kumar Ahirwar²⁸

In this case, the posts of Assistant Teacher reserved for persons with disability were erroneously advertised as posts reserved for Schedule Caste person with disability. The Supreme Court held that there should not be any further reservation within the quota of disabled persons, on the basis of caste, creed or religion. This judgment is of great importance because it stop further

division of posts reserved for disabled into SC, ST, OBC.

CONCLUSION AND OBSERVATIONS

The persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995 (PWD Act), led to a judicial activism in disability rights. The PWD Act was the first legislation, whose objective was to provide full participation and Equality to the people with Disabilities. But PWD Act was not drafted properly. Many of the provisions made by the Act in support of persons with disabilities come with the rider "within the limits of economic capacity". In this context, judiciary played a very important role. The judiciary through positive interpretation of the various provisions of the Act, delivered landmark judgements which mostly went in favour of the persons with disability. A close perusal of the judicial case laws mentioned above, shows that judiciary opened new path and rays of hope for disabled. The Supreme Court and High Courts have enlarged the scope of the Act. There are several instances where judiciary has provided specific relieves to persons with disabilities through various landmark principles like reasonable accommodation, social security etc. At that juncture, Indian Court were influenced by the shift to a right based perspective on disabilities. In various cases Court tried to extend the equitable principle of preferential treatment to person with disability to bring them in the main stream. It is trustworthy to mention

that Supreme Court of India compelled the authorities to start the implementation of the provisions of any legislation. In several judgments, the Supreme Court have taken serious note of the callousness shown by the Central Government, State Governments and Union territories in implementing the provisions of PWD Act, 1995. The appalling conditions of the mentally ill persons deplored by the Supreme Court and the matter came in notice of Government. It can be said that the Indian Courts have considered and laid down certain guidelines with regard to the betterment in Government sector but failed to include private sector in the list of establishment. In the case of Dalco Engineering Pvt. Ltd vs Shree Satish Prabhakar Padhye²⁹ but Supreme Court missed out an opportunity to broaden the scope of the PWD Act to include private establishments as well. It means that person employed in the private sector and if acquire disability in the course of employment, will remove from the service. This is the gross violation of the rights of disabled as well as UNCRPD. But it can be said that with few exception majority of the judgements of the judiciary have gone in favour of the persons with disabilities.

It is recommended that private sector must be included in the list of establishment.

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³ AIR 1993 4 SCC 204.

⁴⁴ AIR 1995 Supp 4 SCC 505.

⁵ AIR 2002 SC 979.

⁶ AIR 2009, S.C 1110.

⁷ Civil Appeal No.11938 of 2016

⁸ AIR 2005 13 SCC 721.

⁹ AIR 1993 SCR 556.

¹⁰ W.P. No.15828/2006 (Delhi High Court.)

¹¹ Special Leave Petition No -14889 of 2009 S.C

¹² AIR (2010) 3 SCC 603

¹³ Civil Appeal No 9096 of 2013.

¹⁴ Writ Petition (Civil) No.521 of 2008

¹⁵ AIR 2003 S.C.

¹⁶ Writ Petition (civil) No. 292 of 2006, Writ Petition civil No. 997 of 2013, AIR 2017, (S.C)

¹⁷ W P (Civil) No 576 of 2004 S.C .

¹⁸ Writ Petition No.98 of 2012

¹⁹ AIR1999 S.C 532 .

²⁰ Civil Appeal No. 243 of 2005 of 2017.

²¹ WP (Civil) No. 187 of 2004 S.C .

²² AIR 1994 SCR 657.

²³ Appeal (Civil) 1789 of 2000 S.C .

²⁴ Civil Appeal No. 4668 of 2007 S.C .

²⁵ Civil Appeal No 1886 of 2007 S.C .

²⁶ Appeal (Civil) 8 of 2008 S.C .

²⁷ Civil Appeal No.2466-2467 of 2015

²⁸ Civil Appeal No.3984 of 2007

²⁹ Civil Appeal No.1886 of 2007.