



## Sketching the Judicial Approach on Disability Rights in India

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### ABSTRACT

Persons with disabilities are susceptible to multifarious vulnerabilities, abuse and exploitation. To address the concerns and rights of disabled people, India has enacted laws. When faced with violation of their rights, people with disabilities have taken recourse to the Judiciary for intervention, protection and enforcement of rights enshrined in the Constitution of India (COI) and the specific legislations on disabilities. The legal arena covered by the Courts in India in addressing the matters relating disabled persons is expansive. Hence, the crux of the present article focuses on the approach taken by the judiciary in India while dealing with the rights of persons with disabilities and the authors have attempted to discuss the same through analysis of selective case-laws.

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### INTRODUCTION

Every individual including persons with disabilities have the human right to dignity and respect by being born as a human being.<sup>i</sup> There are varied interpretations on the concept of disability as understood by intellectuals, social workers, and jurists, all the while keeping in mind the philosophical foundations of the term in its literal sense. Disability is viewed as a concept where the concerned person is lacking or having some defect which may physical, sensory or mental.<sup>ii</sup>

Persons with disabilities (PWDs) and their families encounter numerous difficulties in materialising their basic human rights to life, health, equal opportunities to education, employment, social security etc. They face many barriers in their life, because of the lack of sensitivity in the social environment. In India, the Rights of Person with Disabilities (RPWD) Act, 2016 aims at ensuring rights and protection to disabled persons. Violation of rights have led PWDs to approach the judiciary in India to enforce their protection against injustice and discrimination. Judicial activism in the sphere of human rights has emerged as a new source of hope for vulnerable groups including disabled people. In the present paper, authors have endeavoured to discuss the role of judiciary in dealing with PWDs through analysis of certain case-laws.

## **ANALYSIS OF JUDICIAL DECISIONS IN INDIA**

### ***Children with disabilities***

Children suffering from retardation (physical and mental) including children who have been abandoned were protected by the Hon'ble Supreme Court of India (SCI) through issuance of orders which stipulated that such children should be kept in observation homes. Where crimes are alleged to be committed by children, the Court had held that in each district juvenile courts were to be established for expeditious investigation and trial and magistrates who were trained need to deal with such cases.<sup>iii</sup>

### ***Competitive examinations***

Blind people's right to compete in All India test for securing post in administrative services was affirmed by the SCI which ordered the Public Service Commission to permit the petitioners to write the said examination through assistance of a scribe or use Braille scripts, thus ensuring access to the opportunity to compete in All India examinations.<sup>iv</sup>

### ***Humane treatment***

Hoogly district hospital had shackled their mentally challenged inmates and justified that same was done to control their unruly and aggressive behaviour. Supreme Court of India intervened and provided reprieve by restraining the hospital from resorting to such treatment of inmates.<sup>v</sup>

### ***Reservation of Seats for admission***

A public interest litigation<sup>vi</sup> was filed where the petitioners had challenged an educational notification issued by the State of Assam. This notification which was as per guidelines of Medical Council of India (MCI) provided that in admission to paramedical courses in three medical colleges of Assam, 3% seats will be reserved for persons with physical disability which would constitute persons having 50% to 70% locomotor disability of lower limbs. The Court held that denying the benefit of admissions to persons with visual and hearing impairment to medical colleges in the country was illegal and that the legal provision<sup>vii</sup> was categorically extending benefit of reservation to all the seven categories of disabilities. There was legal justification on the part of MCI in denying such benefit and the impugned notification was declared by Court to be unsustainable. Furthermore, the Court viewed that the prescription of 50% to 70% disability specified in the notification was void as the same is not in consonance with the language of the law in force.

### ***Equal Opportunity***

Aryan Raj, an intellectually challenged person, petitioned that the Government College of Art, Chandigarh, had not considered his request to waive off the qualifying marks which was required for his admission to the course on Diploma in Fine Art for Divyang. Two different qualifying criteria were set according to which PWDs had to obtain 40% in aptitude test and for students belonging Schedule Caste and Schedule Tribes a concession of 35% was granted. In view of this plea, the High Court of Punjab and Haryana held that for intellectually or mentally challenged students, the minimum marks should be 35% in aptitude test as they are equally deprived as a SC/ST student. The Court acknowledged that intellectually challenged persons have certain limitations which are not present in those who are physically challenged and that courses should be opened to cater to the specific needs of persons who are challenged mentally or intellectually.<sup>viii</sup>

### ***Reasonable accommodation and facilities***

A disabled law student, Pooja Sharma was not able to continue with her studies at the University because adequate facilities were not available and she was not provided with reasonable accommodations as per her special needs and the University had also refused the required modification for accessibility of her wheel chair to the bathroom. Bar Council of India (BCI) was asked to submit its views on this matter by the SCI.<sup>ix</sup> Pursuant to this direction, BCI in 2011 resolved that all law colleges had to offer courses to PWDs. BCI directed that three percent reservation quota for disabled candidates had to be implemented by the colleges and observed that reservation would be futile unless colleges

were ready to meet the sundry needs of PWDs. Every university and colleges had to ensure that minimum infrastructure facility is available for disabled candidates. It was asserted that to ensure the effectual participation of students with disabilities, educators and staff in their work, each Centre of law must provide for the requisite facilities both physically and academically.<sup>x</sup>

The instant PIL was pending for eleven years and on 15 December 2017, SCI directed that the obligation mandated under law<sup>xi</sup> regarding reservation of not less than five percent seats for “persons with benchmark disabilities”<sup>xii</sup> must be complied with by government educational institutions while admitting students to higher education courses which would otherwise attract penalties under section 89 of the RPWD Act, 2016. Responsibility for ensuring that obligation is fulfilled by the educational institutions was entrusted to the Chief Commissioner and/or the State Commissioner.<sup>xiii</sup> Moreover law colleges were directed to provide intimation of the same the BCI. University Grants Commission (UGC) was asked by the Apex Court to constitute an Expert Committee which would make provisions for proper accessibility of persons with disabilities in educational institutions and provide pedagogy suitable for differently-abled persons along with suggestions for implementation of modalities, funding and monitoring.

### ***Non-discrimination***

A Writ of Mandamus was filed before the Apex Court for direction of payment of similar transportation allowances to all disabled government employees including those who are blind or having hearing impairment. There was inequality in payment of stipends between the other disabled employees and those who had hearing impairment. Respondents were directed by the SCI to grant transportation benefits equally to all disabled employees serving in the government irrespective of whether they were blind, orthopaedically challenged or had impairment relating to speech or hearing. It was held that the Disability Act does not envisage any discrimination between disabled persons who are blind and those having hearing impairment and that all PWDs discharging governmental duties were to be treated equally and protected by law. Apex Court stated that there would be marginalisation of persons with hearing or speech disability if it was thought that their suffering was lesser than blind people and hence all were entitled to same benefits.<sup>xiv</sup>

### ***Access to Public facilities***

In 1998 the Apex Judiciary recognised that accessing public facilities was the fundamental right of PWDs.<sup>xv</sup> The petitioner, Mr. Javed Abidi, an orthopaedic challenged individual raised a specific issue on

the accessibility of air transportation for disabled people and generally narrated about the implementation of the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act 1995<sup>xvi</sup> (hereinafter referred to as PD Act 1995).

It was argued by the petitioner that people with orthopaedic disability were having difficulty in using air transport and that ‘ambulifts’ should be utilized by Indian Airlines so that such persons can be transported to the aeroplane along with aisle wheel chairs to enable them to reach their seats. It was stated that such people were not only suffering because of being forcefully hauled up but were embarrassed hurting their dignity. The petitioner informed the Court that Central and State level committees as required by the Act to protect the rights of disabled persons had not been established. Indian Airlines during the hearing of this case provided for ‘ambulifts’ in all major airports along with aisle chairs. Assurance was given by the Union and governments of different States that steps were being taken to set up Committees.

Airfare concessions were granted by the Court to persons with 80% orthopaedic disability. The Apex Judiciary thanked the petitioner in accelerating the implementation of the law and directed that in addition to protection of rights, the primary aim of the Act was to integrate the PWDs in the social mainstream and create an environment free from barriers.

### **Promotion in Job**

The respondent, Leesamma Joseph who had 55% permanent disability filed an appeal before the Apex Judiciary<sup>xvii</sup> against the judgment of the Kerala High Court. After the death of her brother, Leesamma was appointed as a typist/ clerk in the police department on humanitarian ground. In December 1998, she had qualified all departmental tests for promotion. In 2004, she was promoted to the post of Senior Clerk and in 2015 she was promoted to Cashier. The contention of the respondent in the instant case was that her promotions to the post of Senior Clerk was to be calculated from 2002 and as cashier from 2012. She claimed all the consequential benefits from 2002 and 2012 respectively.

Citing the law<sup>xviii</sup>, the State argued that government had the right to identify 3-4% posts wherein people with impairment could be appointed and that such a provision could not mean to accord promotions based on reservations. It was viewed that respondent was not recruited but rather appointed on grounds of compassion as her brother had expired. Thus, it was submitted that under the law the respondent had no right to reservation in respect of said promotion.

Supreme Court of India held that under Article 16(4) of the Constitution of India, PWDs have right to reservation in promotions.<sup>xix</sup> Interpreting the legal provisions, the Apex Court observed that law mandates equality in providing opportunities to progress in the career and this includes even promotions. Thus, if PWDs were denied promotion then this would be in contravention of the legal mandate. It was stated by the Court that a case of discriminatory promotion cannot be made on the ground of mode of entry in service and thus, no person who has entered service on compassionate ground cannot be denied promotion (para 27). Pursuant to this, SCI directed the Kerala government to identify post within a timeframe of three months and to ensure reservation-based promotion in such posts (para 29).

### ***Inclusion and Dignity***

Vikas Kumar, the appellant in the case *Vikas Kumar v. Union Public Service Commission*<sup>xx</sup>, was suffering from “dysgraphia”. In 2018, since he was appearing for Civil Service examinations, he requested for a scribe from the Union Public Service Commission as he had 40% “benchmark disability”. However, UPSC denied his request clarifying that as per the 2018 exam notification of Civil Service only candidates with blindness or at least 40% locomotor disability could avail the facility of a scribe and that the appellant did not fall under this required criteria.

The appellant then brought this matter before the Tribunal which ordered UPSC to provide a scribe during the preliminary examination. However, the appellant could not access a scribe as RMLH Hospital, Delhi did not issue him the disability certificate. In view of this, the Tribunal did not interfere with the said 2018 exam notification.

Thereafter Vikas Kumar filed a writ petition before the High Court wherein he challenged the lawfulness of 2018 examination rules of Civil Service. In August 2018, NIMHANS, Bangalore issued a medical certificate to the appellant and stated that he would need a scribe during the said competitive exam.

Delhi High Court on September 2018 did not intervene with the Tribunal’s order and stated that the relief sought about providing scribe was otiose [para 8], since the appellant had failed to qualify the preliminary examination.

Thereafter, Vikas Kumar, appealed before the Supreme Court of India on 16<sup>th</sup> January, 2020. The Apex Court directed that the condition of the appellant had to be studied properly by a medical board constituted by AIIMS. The board found that the appellant had six percent disability which did not meet the criteria

of “benchmark disability” set under RPWD Act 2016. It was held by the Apex Court that right to a scribe cannot be based on the pre-requisite of “benchmark disability”.

Further it was viewed by the Court that the misconception that scribe should be provided only for candidates sitting for competitive examinations who have 40% or higher degree of impairment must be discarded by the government.<sup>xxi</sup> Such a condition is arbitrary and is in contradiction to the intent and purpose of the RPWD Act, 2016.

It was held that service accorded by a scribe was as per law so that PWDs could receive assistance and thus be ensured respect for their integrity, dignity and equality. PWD could not be viewed as second-class citizens. Criteria of disability cannot be set high which would deprive disabled persons from equally accessing facilities. The Court referred to another case<sup>xxii</sup>, wherein it was stressed that preventing discrimination is not only embodied in the principle of equality but it also brings within its fold many positive rights including “reasonable accommodation”. Therefore, there is a duty on the part of the State to ensure PWDs “reasonable accommodation” such as access to a scribe to write examinations.

Apex Court viewed that though persons with disabilities are not explicitly within the protective fold of the Part III of the COI, yet the full force and vigour of the golden tringle of Articles 14, 19 and 21 are applicable to disabled persons (para 32). In tune with the RPWD Act, 2016, the Court directed that within three months, norms had to be issued for ensuring the preservation of the right of PWDs to sit for exams with the aid of scribes and this would help in realising their rights. Thus, the Supreme Court of India declared that Vikas Kumar was entitled to a scribe to appear in any competitive examinations conducted by the government (para 74).

### ***Women with disabilities***

Supreme Court of India has actively asserted the need for protection of women and girls with disabilities. Recently, a blind girl was sexually assaulted by a perpetrator who was her brother’s friend.<sup>xxiii</sup> The Apex Judiciary stated that rights under Part III and Part IV of the COI would be a distant promise so long disabled women were subjected to violence and this treat was a reality which has curbed their right to move freely and exercise their ability to live an active life. The Court observed that women with disabilities are prone to sexual violence and perceived as soft-targets. Certain guidelines were issued by the Supreme Court for making criminal justice system more disabled friendly. It was directed that, to map out the data of gender-based violence, disability should be a variable on which data

should be maintained by National Crime Records Bureau (NCRB). The Court emphasized upon the sensitization of police officers and trial and appellate judges in dealing with cases of sexual abuse survivors and sexual violence of women with disabilities. The Apex Court upheld the punishment of life sentence awarded to Patan Jamal Vali.<sup>xxiv</sup>

## CONCLUSION

To guarantee that ‘persons with disabilities’ are not denied of their right to dignity through discriminatory practices, concerted effort must be made by the authorities of the Union and government of States in India to efficaciously implement the laws meant for the protection of persons with disabilities. Unfortunately, even though laws exist, yet PWDs have been deprived of their rights to equality of opportunities and protection of their bodily integrity. However, as evidenced from the analyses of varied case laws in the present article, it has brought forth, the activism portrayed by the judiciary in India in emancipating the persons

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- <sup>xii</sup> Person with benchmark disability means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority



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