CHAPTER 5

ROLE OF INDIAN JUDICIARY IN PROTECTING THE CIVIL AND ECONOMIC RIGHTS OF THE PERSONS WITH DISABILITIES.

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PROLOGUE:

It is a fundamental right of everyone to realize himself, however imperfectly and contribute to the common good, however little. --Helen Keller

The differently abled have fought for social justice from time immemorial and the battle persists to this day. Despite the fact that, the sensitivity in the 21st Century has changed from "charity to rights", the acknowledgment of these rights has not been very easy. Persons with disabilities have been blocked out of our everyday reality, touching only those who are caregivers. The Centre's delayed recognition of the rights of person with disabilities is disappointing. [1]

The pursuit for access to justice by persons with disabilities has motivated the enactment of a special legislation which came into force in 1996. In the previous Chapter it has been brought to the fore that issues concerning persons with disabilities were covered by the general laws preceding the enactment of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*. It is the sole legislation relating exclusively to the Persons with Disabilities which provides for education,

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1. Deepanjali Bhas, " National Policy for the Disabled: No clear roadmap for action", *Info Change News & Features* (August 2006), viewed at *http://infochangeindia.org/20060828251/Disabilities/Features/National-Policy-for-the-Disabled-No-clear-roadmap-for-action.html accessed* on 23.6.2008.

employment, creation of a barrier-free environment, social security etc. It has been witnessed that in the thirteen years of its enactment, this too has met with very little success even in matters as basic as ensuring a barrier-free environment and generating employment. Unfortunately, the provisions of the *Persons with Disabilities Act, 1995* have not been fully implemented till date. Time and again the Court's intervention has been sought in this area. It is known that other general legislations also consist of provisions that deal with persons with disabilities within the ambit of that law. Nonetheless, these provisions are not basically receptive. 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. There have been instances of people with disabilities and/or their care- and service-providers approaching various grievance redressal forums (primarily the Courts) to realize these provisions. But the numbers are few. It is believed that one of the reasons is the inaccessibility of the information.[2] Even though the Supreme Court through judicial activism has given bigger profundity and dimension to the rights of the citizens of this country and enlarged the horizon of fundamental rights guaranteed under the Constitution; but access to justice in the legal system for segments of population in our country has not been forthcoming.[3] In a democratic set-up, the "rule of law" is the heart of democracy. If justice is not easily accessible to every citizen, there can hardly be "rule of law". The traditionally inherited legal system is very expensive, time-consuming and more complex. Consequently, it is said that the poor and vulnerable class has started to look upon such a system as a foe, instead of a friend. In a nation like India, free and proficient legal aid to the deprived and

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2. For details visit *http://www.disabilityindia.org/disabilitylawandrights.cfm*. Accessed on 23.5.2008

3. Susan Bhujel, "Including the Excluded?" viewed at *http://www.combatlaw.org/information.php?article_id=1072&issue_id=38* , accessed on 22.6.2008

indigent in general and the disabled in particular is indispensable and an obligation of the state.[4]

So far as the conventional functional separation between the various organs of the legal system is concerned, the judiciary's role comes to the fore only on the enactment of the statute. In the process of interpretation of various statutes, the judiciary promotes or obstructs the objective of a law—a process which is of special significance in the background of social change. [5] Law in short is what the judge asserts by his legal interpretation in a judgment. Even when a particular area is covered by a statute, it is the judge who construes the legal provisions. In this process the judge tries to uncover the intent of the legislature and in this milieu it is his ultimate word as to what the legislature deliberated and hence, what the law is. On the whole, legal practice is broadly speaking 'interpretation'. It is for that reason now widely accepted that in this entire process, the judge or the judiciary makes the law as well. In reality, like the interest in Rules during the 1960s and in Legal Principles during the 1970s, much of the legal theorizing in the 1980s had been built around the concept of 'interpretation'. Interpretation has at present happened to be one of the chief rational paradigms of legal scholarship. *Dworkin* in the 1980s propagated interpretative theory of law. Accounting for the concept of law, he asserts that it is inescapably tied up with the considerations about what the law is there to settle. *Cardozo* acknowledges in his classic, *'The Nature of Judicial Process'*: "I take judge-made law as one of the existing realities of life", and that ".....no system of *jus scriptum* has been able to escape the need of it", and he elaborate further: "It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are

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4. Justice Jitendra N. Bhatt, Handicapism—Disabling Images or Images Disabling? *Supreme Court Cases (Journal)*, vol.8, (2003) at p. 2

5. Amita Dhanda, "According Reality to Disability Rights: Role of the Judiciary", S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002) pp. 90-102,at p. 90.

hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however, obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is indeed, that but, at times, it is often something more. The ascertainment of intention may be at least of a judge's troubles in ascribing meaning to a statute." *Gray* in his *Lectures on the Nature and Sources of the Law* points out that, "The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have to do is, not to determine what the legislature did mean on a point not present to is mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." The judge as the interpreter of the community of its sense of law and order must apply omissions, correct uncertainties and harmonize results with justice through a method of free decision—"*libre recherché scientifique*". [6]

The count of judicial pronouncements in the field of disability is relatively less. However, the Apex Court has pronounced progressive judgments in such cases. Even before the enactment of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, the Supreme Court has mulled over issues concerning disabled people and laid precedent. At this juncture it is noteworthy to mention that cases pertaining to mentally challenged were brought to the forefront by activist Sheela Barse and academician Upendra Baxi as early as 1988. But one of the cases that is the cornerstone of disability case-law regime is that of *Daya Ram Tripathi* v. *State*

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6. A.K.Sikri, Human Rights of the Disabled: World in a Slow Motion, *Journal of Constitutional and Parliamentary Studies*: Vol. 38, Number 1-4; January- December 2004, pp. 1-49 at pp.22,23

of UP & Another.[7] It was held by the Supreme Court that if in an advertisement, issued by the U.P. Public Service Commission, one post in the Provincial Civil Service (Executive Branch) was reserved for physically handicapped persons and the appellant, namely, Daya Ram Tripathi, who was such a handicapped person, appeared in the Combined State Services Examination, held in 1982, pursuant to such advertisement and was declared qualified in that Examination, the Government could not deny him a suitable post in the PCS (Executive Branch). In this case, Justice Chinnappa Reddy said,

> "Having announced their determination...to rehabilitate physically handicapped persons, by reserving posts for them in all the services of the government, the government cannot now create needless hurdles. The State Civil Service (Executive branch) is a large enough service, which can easily accommodate physically impaired persons in suitable posts."[8]
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> (emphasis supplied)

In this Chapter the focus shall be on the role of the judiciary in the realization of disability rights in the context of the Indian Constitution, *Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* and other disability laws. The Chapter shall bring to light not only the notable findings of the judiciary but also the apathy of the law makers to imbibe these judicial pronouncements into laws. At the same time the conflict of decisions on various issues following a lack of clear-cut provision of law has also been witnessed in a number of cases under the Persons with Disability Act, 1995.

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7. (1986) Supp. SCC 497
8. Supra note 2

A. CONSTITUTIONAL GUARANTEES AND JUDICIAL REMEDIES:

In order to achieve the objectives set out in the Preamble through the mechanism of the Constitution, certain very important and relevant provision were incorporated as, for example, Articles 14,15 and 16 guaranteeing equality before law and equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The Constitution also guaranteed "Right to Life" to all its citizens which means that every person including disabled has a right to live with dignity. This also means that the "Disabled" like other citizens or people, possess all the basic human rights particularly because they are "Human Beings".[9]

As already discussed in Chapter 3 of this work that the Constitution of India does not specifically proscribe discrimination on the ground of disability, but it also does not contain non-discriminatory provisions that guarantee equality and equal opportunities for all citizens as in *Article 14* and *Article 16*. It not only guarantees right to life and personal liberty but also directs the State through Article 41 to make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age sickness and in other cases of undeserved want, in consonance with the complementary principles "non-discrimination" and "reasonable differentiation".[10] *Article 41*, thus, makes effective provision for securing the right to work to person suffering from disability. Further, in view of the provisions contained in Article 36 and 37, it is apparent that *Article 41* is a mandate both to the Legislature and the Courts. In the landmark case of

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9. Sadiq Ahamad Jilani Syed, "Legal Framework for Social Integration of Persons with Disabilities" in S. K. Verma, S.C. Srivastava (ed.), *Rights of Persons with Disabilities* (ILI Publication, New Delhi, 2002), pp. 154- 167, at p. 155

10. Justice S.B. Sinha, "Disability Law vis-à-vis Human Rights", *Supreme Court Cases*, (2005) 3 SCC, pp. 1-14 at p. 3

Kesavananda *Bharati* v. *State of Kerala*,[11] the Supreme Court of India observed that primarily the mandate in Article 37 is addressed to the legislature, but, in so far as the Courts of Justice can indulge in some judicial law making within the interstices of the Constitution on any statute before them, the Courts too are bound by this mandate.[12] Though, Article 41does not confer a justiciable right, the Supreme Court has, by its own interpretation, bearing in mind the goal of socio-economic, held that the Courts should so interpret a statute as will advance the objective underlying Article 41. [13] At the same time Article 13 of the Indian Constitution makes a State action invalid if it is in contravention of the fundamental rights—a process which has been further whetted with the initiation of public interest litigations. Actions in public interest have been filed when the ground level position of a particular individual or group is in a flouting of the fundamental rights guaranteed under the Constitution. These actions have been filed before the High Courts or Supreme Court under Articles 226 and 32 for issuance of suitable writ order or direction for remedying the deficit and upholding the right.[14] The Supreme Court and the High Courts, in India, by exercising constitutional powers and rights under Articles 32 and 226, respectively, have in their dynamic approach, widened the concept of providing free and competent legal aid to the suppressed and oppressed, the disabled and disadvantaged class of people. While not in large numbers, actions in public interest have been filed to assert the rights of persons with disability. Through innovative interpretations of Articles 19 and 21 in particular, the Apex Court and High Courts, have charted neo-juristic, dynamic and visionary mission and have contributed and added new dedicated multi-dimensional profile to achieve socio-economic goals as per the constitutional commandments and have provided neo-concept and philosophy of "right to life, liberty and freedom" for

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11. AIR 1973 SC 1461
12. *Infra* Chapter 1 note 4 at p. 47
13. See *Jacoab M. Puthuparambil* v. *Kerala Water Authority* (1999) 1 SCC 28 =ARI 990 SC 2228; Supra note 9
14. Supra note 5 at p. 92

the weaker and disabled mass.[15] But a closer look reveals the indication of the judiciary which can be termed as sympathetic but not radical. As a matter of fact before the enactment of the *Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* one gets to see a very feeble response of Indian Judiciary regarding the human rights of the persons with disabilities. However it can be seen that judiciary was influenced by the shift to a right-based perspective on disabilities. [16]

So far as the constitutional approach is concerned the judicial concern has been more with guarantee of equality and the use of reservation as a means to achieve equality amongst the unequals. The judiciary has had a number of opportunities to explore not only the legality of such a concept but also its consistency with the right to equality. *Indira Sawhney* v. *Union of India*[17] has been witnessed to be the most important judgement, where the court has held that,

> "... mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip type disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them."
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> (emphasis supplied)

Another important judgment is that of the case of *D.N.Chanchala* v. *State of Mysore*[18]. This case involved the issue of reservation of seats for various categories of persons and classification on universal basis under Articles

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15. Supra note 4 at p. 3
16. Saurabh Jain, "Effectiveness of the Indian disability Law to enforce Human Rights of Persons with Disabilities", *AIR (Journal)* Vol. 91 (April, 2004), pp. 118-127 at p. 122
17. AIR 1993 SC 477
18. AIR 1971 SC 1762 on page 1775

14 and 15(4) of the Constitution of India. But while delivering the judgement Shelat J. observed:

> "...But an equally fair and equitable principle would also be that which secures admission in just proportion to those who are handicapped and who, but for the preferential treatment given to them would not stand a chance against those who are not so handicapped and are therefore, in a superior position. The principle underlying Article 15(4) is that a preferential treatment can validly be given because the socially and educationally backward classes need it, so that in course of time they stand in equal position with the more advanced sections of the society. It would not in any way be improper if that principle were also to be applied to those who are handicapped but do not fall under Article 15(4)....."

(emphasis supplied)

The Hon'ble Supreme Court made an effort to extend the equitable principle of preferential treatment under Article 15(4) to the persons with disability in the mainstream by giving them equal opportunity in the field of education.[19] Seven years following the *Daya Ram Tripathi* ruling, the Apex court in a Public Interest Litigation filed by *National Federation of the Blind*[20] directed the government and the Union Public Service Commission to permit visually impaired eligible candidates to compete and write the civil services examination in Braille script or with the help of a scribe. The Court held, "If some of the posts in the Indian Administrative Service and other allied services, as identified by the committee can be filled from amongst the visually handicapped persons then we see no reason why they should not be permitted to sit and write the civil services examination." However, the court also emphasised that once recruited to the lowest level of the service the visually impaired person shall have no right to claim promotion to the higher posts if that particular post is not suitable for the visually handicapped person.

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19. Supra note 14 at *ibid*
20. *National Federation of the Blind* v. *Union Public Service Commission*, AIR 1993 SC 1916

Nandakumar Narayan Rao Ghodmare v. *State of Maharastra and others*[21] was another significant case where, the Supreme Court recognised colour blindness as a disability and directed the state of Maharashtra to appoint the appellant within two months from the date of the order to the state public service. The appellant in this case was a person with colour-blindness who was not appointed to the state public service on the ground that he is disabled.

Apart from employment rights of persons with disabilities, the Pre-Disability Act era also witnessed other cases. One noteworthy case is that of *Godawari Bai* v. *DDA & others.*[22] This is the first petition in which the court directed the respondent to allot a flat on an out of turn basis within three months of the deposit of the requisite amount to a disabled lady. Further, the court said that preference should be given to the petitioner in respect of the accommodation in the ground floor if possible.

The Apex Court in cases pertaining to granting compensation or disability pension has adjudicated considerably in favour of the aggrieved disabled petitioners. In *Lance Dafadar Joginder Singh* v. *Union of India and others* [23] setting aside the orders of the High Court, Kuldip Singh and B.P.Jeevan Reddy JJ. directed the government to grant disability pension to ex-army personnel from the date of discharge from the army treating him to have incurred 60 per cent disability. Further, the court also stated the if the arrears of disability pension is not paid to the appellant with the period of six months from the receipt of this order, then the appellant shall be entitled to 12 per cent interest from the date on the amount due.

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21. JT 1995 (8) S.C. 156
22. (1990) supp. SCC 124
23. 1995 Supp(3) SCC 232. Civil appeal No. 4257 of 1993

In *Ramchandra Tandi and 30 others* v. *State of Orissa and others*[24] the State of Orissa refused to accord recognition and financial assistance to a school for the deaf and dumb in order to avoid unnecessary financial burden. Pasayat J. along with S.K. Mohanty J. while directing the State to grant recognition and financial assistance to the school within of its order said,

> "We are perplexed, pained that the State has taken absolutely untenable stand of its financial instability and need for financial austerity. If austerity measures are to be taken, they are to be taken at elsewhere. It is common knowledge that large sums are spent in festivals, for celebrations... If we cannot provide assistance to 62 helpless deaf and dumb children, these are unnecessary financial extravagances. After half a century of independence, it does not befit the State to take plea of unsound financial condition to deny meager amounts needed for a few deaf and dumb children....Merely making welfare schemes would not be sufficient. Merely observing World Disabled Day or the like would serve no purpose, unless there is real concern for the handicapped, otherwise it would be same as discussing problems of famine ravished in star hotels, or discussing prohibition in a bar with drunkards sizzled with drinks..."
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> (emphasis supplied)

Apart from the above, a number of public interest litigations have also been filed where the court have asked for investigation of the ground level situation. In some cases guidelines on the living and treatment conditions, education, training and rehabilitation facilities. Particularly in cases of administration and proper direction of the mental asylums of Agra, Ranchi, Gwalior and Shahadra,[25] separate petitions were filed and the Court merely gave recommendations which were more or similar in each of the cases. In such cases the Court should have *suo moto* taken suitable actions and issued proper

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24. AIR 1994 Ori 228, O.J.C. No. 5442 of 1993
25. *Rakesh Chandra Narayan* v. *State of Bihar* (AIR 1989 SC 348), *S.R. Kapoor and Others* v. *Union of India and Others* (AIR 1990 SC 752), *Supreme Court Legal Aid Committee* v. *State of M.P. and others* (AIR 1995 SC 204), *Aman Hingorani* v. *Union of India* (AIR 1995 SC 215)

directions to each of the mental hospitals within the country to abide by the court's guidelines and also instruct the respective governments to take necessary steps to initiate changes.

Thus it can be observed that the courts have made some very invaluable comments with respect to the rights of the persons with disabilities, particularly in the *case of Ramchandra Tandi*. But unfortunately all actions of the judiciary in this sphere can be termed as 'fire-fighting' in nature. They in most of the cases provided relief in individual cases but in majority cases did not bring about any revolutionary change. Again this attitude of the judiciary is mainly out of sympathy by doing good deeds instead of vindicating the rights of the persons with disability.[26]

B. JUDICIARY AND THE RIGHTS OF PERSONS WITH DISABILTIES:

With a view to confer rights on the persons with disabilities with the greatest effect, the need is to *firstly*, equip disabled people with educational opportunities; *secondly*, ensure employment of the disabled people; *thirdly*, ensure easy and convenient access to all public places; and, *fourthly*, increase public awareness on disability issues.[27] In the post Persons with Disabilities Act period the Apex court has deliberated mostly on the provisions relating to employment and reservation under the Act. The cases have come up before them for non-compliance with the provision of the Disabilities Act. Here the attempt is to shed some light on the role of the courts, both the Supreme Court as well as the various High Courts, in shaping the rights conferred upon the persons with disabilities as well as the judiciary's contribution in transform and augmenting the concept of human rights of the persons with disabilities. The

26. Supra note 5 at p. 93
27. Supra note 6 at p. 22

emphasis shall be on the access, education, employment, social security and mandatory notification of schemes amongst others.

(a) Access for persons with disabilities:

Easy and convenient access to all public places is a very important right which is to be given to people with disabilities. It needs no mention that in order to even avail of various rights guaranteed under the constitution and the statutory provisions of the various enactments pertaining to disability rights, the conditions have to be created to enable the persons with disabilities to avail of those rights.[28] Broadly, the term 'barrier free environment' would mean removing obstacles and providing access to all. Access not only to justice in courts of law, but also to various other facilities such as public buildings, housing, medical and health care, educational institutions, sports facilities etc. In *PGA Tour, Inc.* v. *Casey Martin*[29], the United States Supreme Court held that a golf player suffering from degenerative circulatory disorder in one leg was entitled to relaxation in the rules of the game that required walking as long as there was no "fundamental alteration" in the character of the competition. The issue of access hence encompasses ascertaining means to overcome "environmental barriers", "institutional barriers" and "attitudinal barriers". The concept of a barrier-free environment is in fact premised on Article 7 of ICESCR that mandates "providing and modifying devices, services, or facilities, other changing practices or procedures in order to afford participation on equal terms", including thorough installation of wheelchair ramps, elevators for people of mobility impairments, introduction of part-time work schedules for workers with severe conditions, availability of

28. *Ibid* at p. 45
29. 149 L Ed 2d 904

readers for visual impairments, and sign transition for people with hearing impairments.[30]

The strategy adopted in the persons with Disabilities Act, 1995 for the realization of positive rights is to mandate the government to prepare schemes through which it can be done. 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. Hence under Section 30 of the Act, appropriate governments have been directed to prepare a comprehensive education scheme which may provide, amongst others, for transport facilities, supply of books, uniforms, grants of scholarships etc. Under Section 38, duty has been cast on appropriate government and local authorities to formulate schemes for ensuring employment and under section 42 schemes have to be made to provide aids and appliances to persons with disabilities. So far as the realization of these vital rights can occur if the proposed schemes are formulated, the absence of a scheme would need to be seen by courts as a ground for intervention. If Courts leave the choice of making schemes at the discretion of appropriate government and local authorities then one of the most potent rights guaranteed by the statute would be rendered nugatory.[31]

A celebrated judicial pronouncement after the enactment of the Disability Act was adjudicated in *Javed Abidi* v *Union of India*.[32] The petitioner filed a writ petition seeking directions to the Union of India to implement the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 alleging, inter alia, that though the Act is intended to grant opportunities to the people with disabilities for their full participation but no effective steps have been taken by the government to implement the provisions. The petitioner prayed that the Indian Airlines be

30. Supra note 10 at p. 5
31. Supra note 6 at p. 45
32. (1999) 1 SCC 467, Writ Petition (C) No. 326 of 1997

directed to immediately provide for aisle chairs in every aircraft and ambulifts on all the airports. The main grievance of the petitioner before the court was that the Indian Airlines was not providing any concession to other categories of disabilities for their movement by air even though such concessions are being given to blind persons, who are also considered disabled persons under the Act. Appointment of the Chief Commissioner, State Disability Commissioners, constitution of co-ordination committees as well as executive committees was some of the other prayers in the petition. When a statement that the Act itself postulates for providing facilities to the disabled persons within the limits of economic capacity of the government was voiced by the then Attorney General, the court held that the economic capacity is a germane consideration while deciding the question as to whether all persons suffering from disability as defined under sec 2(i) of the Act should be granted concession like blind persons for travelling by air. At the same time the court said they cannot ignore the true spirit and objective with which the Act was enacted, thereby, providing concession to locomotor disability to the extent of 80 per cent and above for travelling by air within the country. Consequent to this case, the Indian Airlines announced that ambulifts and aisle chairs would be made available to people with disabilities at the major airports to start with and extend in a phased manner to other airports.

The order given in *Disabled Rights Group* v. *Chief Election Commission and others*[33] is one case of historic importance where a non-governmental organization filed a public interest litigation seeking the intervention of the Supreme Court to correct the wrong of the Election Commission of India in not providing adequate facilities for Persons with Disabilities to vote. The matter involved the rights of 45 million citizens of the country who were unable to vote effectively in various general and local elections with their dignity and sense of confidentiality in their vote intact, due

33. WP (C) No. 187 of 2004

to the non-availability of ramps, PWD-friendly voting machine (EVMs), PWD friendly security arrangements in the polling booths and identification of their PWD status in the electoral rolls. In this case, the petitioner approached the Chief Justice of India after several failed attempts of securing accessibility for disabled voters from the Chief Election Commissioner. Accordingly, the Chief Secretaries of the respective states were directed to coordinate with the chief election officers to ensure that wooden ramps are provided at the polling stations to enable the disabled persons to easily reach the polling stations to cast their votes at least in the cities and urban areas.

In spite of such judgements the concept of barrier free environment or right to access still remains a distant dream for the disabled. It is even more painful to see that although such directives have been spelt out by the Apex Court very little has been done to provide for aisle chairs or ambulifts in air travel. There have been many newspaper reports carrying the plight of children as well as elderly being ill-treated by the airlines staff and being manhandled at times. The problem again lies in the societal attitude or attitudinal barriers which is the basis of environmental barriers. Hence the need is to sensitise people, and courts here have a very vital role to play by not giving out judgements but along with giving directives for holding workshops regularly so that this concept of barrier free environment does not remain on paper but be a reality. The saddest part is perhaps the apathy of the NGOs working in this field. Most of them are biased and prefer to keep only those PWDs who do not have locomotor disability and hence would not require building ramps, specially designed handles, wider lifts, and specially designed toilets amongst others. The Courts must act *suo moto* and appoint special officers to impartially visit the NGOs and see that access is free for every person with disability. Accordingly the legislature must also make a specific law particularly on this aspect and assure a barrier free accessibility at all public places for the disabled lot.

But with all these hopes and suggestions, a recent judgement meted out by the Delhi High Court in *Javed Abidi* v. *Union of India and others* [34] is also worth mentioning. As a matter of fact this judgement has been a dampener in the movement for barrier free environment. The Court has resorted to the clichéd statement of economic capacity and development of the State to implement the provisions of Section 46 of the Act. The petitioner's grievance was that despite the provisions of Section 46, neither the appropriate Government nor the local authorities had taken any meaningful steps towards providing ramps in public buildings, adaptation of toilets for wheel chair users, braille symbols and auditory signals in elevators or lifts, ramps in hospitals, primary health centres and other medical care and rehabilitation institutions for the benefit of the physically challenged individuals visiting public buildings, hospitals, family health centres, medical care and rehabilitation institutions and other public places. Section 46 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 inter alia enjoins upon the appropriate Government and local authorities to provide for ramps in public buildings, adaptation of toilets for wheel chair users, braille symbols and auditory signals in elevators or lifts, ramps in hospitals, primary health centres and other medical care and rehabilitation institutions. The Court while deciding the writ said that:

> "A bare perusal of the above would show that while there is an obligation on the part of the appropriate Government and local authorities to provide for what is stipulated in clauses (a) to (d) above, the obligation is limited to the economic capacity of the Government and the local authorities.....*we allow this petition but only in part and to the extent that the respondents shall in keeping with the Section 46*

34. WP(C) Nos. 812/2001, Date of order: 20.1.2008. On Request of Petitioners the Present Order in Writ Petition No. 812/2001 was also extended mutatis mutandis to Writ Petition Nos. 13781/2004 *Disabled Rights Group* v. *UOI and Ors.* and WP(C) No. 24125/2005 *Javed Abidi* v. *Govt of NCT of Delhi & Ors.* also by the same bench of Delhi High Court on 20.01.2008.

> *of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 take adequate steps within the limits of their economic capacity and development* to provide for ramps in public buildings, adaptation of toilets for wheel chair users, braille symbols and auditory signals in elevators or lifts, ramps in hospitals, primary health centres and other medical care and rehabilitation institutions...."
> (emphasis supplied)

The final order seems to have got diluted given the fact that the Court has accentuated its stress on "within the economic capacity of the state" ,as well as the Court did not find this judgement to be important /necessary enough to be reported to media or for inclusion in Digest. With the earlier decisions on disability accessibility this case had raised the hopes of being a progressive one. But the Ld. Court has failed to live up to the expectations.

It is even more interesting to note that in the 1999 ruling in *Javed Abidi's case*, the Supreme Court though did not interpret the import of the phrase "within the limits of their economic capacity and development", but did seem to accept the defence at least partially. Hypothesising on this partial acceptance, it can be said that the governments shall not be allowed to use financial constraint as a complete justification.[35] Almost a decade later it can be logically expected that the court shall be more responsive but the decision is not up to scratch. At a stage where we are looking at the judiciary to remedy the defects of the Act, the judiciary's resort to the much criticized provision is neither acceptable nor welcome. The court's decision has definitely proved to be setback for setting aside the economic capacity and development criterion. Thus the Courts must be more perceptive and instead of highlighting a flawed provision it should take steps to put forward a more remedial approach.

35. Supra note 5 at p. 98.

(b) Educational opportunities:

Education is a social right that is intimately connected to the exercise of many other human rights. For example, education is important for the enjoyment of the right to work, right to political participation, and for the exercise of right to culture. Education supports greater autonomy and freedom of participation in all aspects of society. Failure to access education and training prevents the achievement of economic and social independence and increases vulnerability to poverty leading to what can become a self-perpetuating, inter-generational cycle.[36] The Constitution of India guarantees right to education to all children till the age of 14 years (Article 21 A). Earlier, 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 (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.

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36. The right of every child to education is proclaimed in the Universal Declaration of Human Rights and has been forcefully reaffirmed by the World Declaration on Education for All. This right is also recognised in Article 13(1) of the ICESCR, which says, 'The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.' The CEDAW Convention also addresses the gender-based discrimination in relation to education and enjoins State Parties to ensure that the women and girls receive education on the basis of equality with men. Article 10 of the Convention says: 'States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education...' The CRC addresses education in two articles: Article 28, which focuses on access to education and Article 29 about the aims and content of education. In the context of children with disabilities, Article 23 places a clear obligation on the States Parties 'to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.' The Committee on the Rights of the Child in General Comment No. 1, outlines the functions of Article 29(1), in which it 'emphasizes the indispensable interconnected nature of the Convention's provisions.' It establishes that 'Article 29 (1) is much more than an inventory or listing of different objectives which education should seek to achieve.' It makes an encompassing analysis of the right to education, which takes within its sweep the provisions listed in Article 23 for children with disabilities. For details visit *http://nhrc.nic.in*.

In a number of cases, the Supreme Court of India has considered the right to education as an important facet of right to life. In *Mohini Jain* v. *State of Karnataka*,[37] the Supreme Court held, 'the right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.' Similarly, a five-Judge Constitutional Bench of the Supreme Court in *Unnikrishnan J.P.and Others* v. *State of Andhra Pradesh and Others, Union of India* [38] held, 'the right to education which is implicit in the right to life and personal liberty guaranteed by *Article 21* must be construed in the light of the Directive Principles in Part IV of the Constitution.' In this case the Court had the occasion to also examine the extent to which claim to free education can be ascertained. The Court clarified that, '(a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.' The Court added that a number of vulnerable groups are denied this right on facetious reason. It is only if such reasons are not accepted as defences by the judiciary when 'persons with disabilities' assert their rights and the promise made under Section 26 becomes a reality.

In the previous Chapter it has been witnessed that that the provisions relating to education are contained in Chapter V of the Persons with Disabilities Act, 1995. Section 26 enjoins appropriate governments and the local authorities to ensure that every child with disability has access to free education in an appropriate environment till he attains the age of 18 years. It is also endeavour to promote the integration of students with disability in the normal schools. Along side this statutory emphasis is the social fact of normal schools denying admission to 'persons with disabilities' on the reasoning that they lack

37. AIR 1992 SC 1858
38. (1993) 1 SCC 645

the infrastructure and personnel to teach such children. These facilities would not be created in ordinary schools unless they have students with disability. Acceptance of the above reasoning is thus a negation of the statutory mandate and it is here that courts have a crucial role to play. The reality is that one of the largest groups of the total disabled population is that of mentally challenged children falling into various categories such as imbeciles (IQ from 0-25), trainable mentally challenged (IQ from 25-50), educable mentally challenged (IQ from 50-70), the dull (IQ from 75-85), dyslexic children and emotionally challenged children. Despite this fact, schools deny admission to children with disabilities on the reasoning that they lack the infrastructure and personnel to teach such children. Such avoidance of disabled students on one pretext or the other is a flagrant violation of the statutory mandate. The courts possess the power to authoritatively direct schools and government to fulfill the mandate of the Act and ensure that inclusive education happens both in form and substance.[39] Often, the provisions of the Persons with Disabilties Act are not put into operation completely which drives the parents of children and young adults with disabilities to come up to the Court for redressal. A huge number of them seek orders for reservation in higher and professional education. In sharp contrast, very few cases are filed for intervention at the primary education levels.

In the case of *National Federation of the Blind* v. *Government of NCT of Delhi and Others*, [40]the Delhi High Court has held that '...the purposes of the Act would be defeated if free education is provided only up to class 10 and not up to the age of 18 years. Since in the latter age, he/she may be able to complete the school education up to class 12.' The Court, therefore, struck down a rule laid down by National Capital Territory of Delhi.

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39. Supra note 6 at pp. 27-28
40. (CW 6456/ 2002, decided on 06.11.2003)

Appreciating that persons with disabilities must have equal access to all forms of education through a variety of models, Section 27 of the Act is modeled on human rights approach and enables persons with disabilities to all such measures that are required for the effective enjoyment of their right to education. Mainly, the Act recognizes that skilled manpower be made available for special schools and integrated schools for children with disabilities. In this respect Section 29 casts a duty on the appropriate Governments to, set up sufficient number of teachers training institutions and lend a hand the national institutes and other voluntary organisations to build up teachers' training programmes specialising in disabilities so that necessary trained manpower is available for special schools and integrated schools for children with disabilities. Sections 30 and 31 delineate the special measures to create the concept of appropriate educational environment guaranteed in Section 26. Section 30 further mandates that special provisions such as transport facilities, removal of architectural barriers in schools, supply of books, uniform and other materials to children with disabilities to encourage them to go to school and to pursue basic education be made available. Although the Act catalogues a comprehensive range of measures necessary to allow equal participation in all aspects of an educational pursuit, the disabled continue to face numerous obstacles on account of a negative mindset and poor information about the Act itself.[41]

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41. For example, one Anka Toppo aggrieved on being denied the right to take the examinations for MBBS final year on losing sight by the All India Institute of Medical Sciences (AIIMS), approached the NHRC. The Respondent was of the opinion that 'in view of the severe visual loss suffered by Shri Toppo, it would not be possible for him to work in the medical profession.' After great persuasion by the NHRC and on exposing the Respondent to numerous examples of blind people successfully pursuing medical profession, the Respondent finally agreed to take steps to examine the petitioner for the MBBS course by offering a modified methodology of examination. In the light of the experience of this case the NHRC at its sitting on 28 May 2001 expressed the view that the Medical Council of India should perform a similar exercise so that the same facility and system is available in other medical institutions of the country as well. For details see *Anka Toppo* v. *AIIMS*, No.1754/30/2000-2001.

National Association for the Blind & Others v. Central *Board of Secondary Education & Others*[42]is a landmark case in which the Delhi High Court directed to 'grant an extra hour to blind students (appearing for a written examination): meaning thereby that they shall be given 4 hours instead of 3 hours given to normal students.' Respondent No.1 was also directed to permit the school from which a blind candidate is to appear to choose amanuensis, subject to observance of the relevant rules. Due to paucity of time, the Court did not allow the prayer in respect of modification of the mathematics paper and supply of question papers in Braille. However, it directed that 'so far as the future examinations are concerned, proper curriculum and examination system shall be fixed keeping in view the objectives of the Act.' Similarly in *Dhawal S Chotai* v. *Union of India & others*[43] the petitioner was suffering from "cerebral palsy", a disability which affects the normal functioning of bones, muscles and joints and also the communication skills. Despite such handicap the Petitioner had passed B.Com Examination as also passed the Foundation Course for the Chartered Accountants course conducted by the Institute of chartered Accountants of India. He wanted to appear for the Intermediate Examination known as "Professional Education-II". At the time of taking his B.Com Examination, at his request, the University of Mumbai allowed him three extra hours to write his papers in view of his aforesaid disability. However, the Institute of Chartered Accountants of India when requested by him had agreed to give extra time of half-an-hour only for writing his papers. Aggrieved by such communication the petitioner filed the petition. The Institute of Chartered Accountants contended that in a situation like this, at the most one hour could be granted and such decisions are taken on the basis of past resolutions of the Institute. On behalf of the petitioner, the attention of the court was invited to the definition of 'cerebral palsy' as defined in section 1(2) (e) of the PWD Act,

42. CWP No 1015/2001 & CM No. 1712/2001.
43. AIR 2003 Bombay 316

1995 and to the Regulations of the HSC Board which defines spastics as those suffering from cerebral palsy. The court observed that,

> "Chapter V of the PWD Act 1995 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 children with cerebral palsy. 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... the Institute of Chartered Accountants of India is a statutory authority and would fall amongst `other authorities' under Article 12 of the Constitution of India and would be bound by Article 21 of the Constitution which provides for right to life which means right to have a decent life. The right to receive education and facilities for it will have to be read in it...."
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> (emphasis supplied)

Accordingly, it was held that the Institute of Chartered Accountants of India ought to give the petitioner similar facility to write the examination for three extra hours as was given to him for the B.Com examination. This flows from the responsibility of that Institute as an authority under Article 12 read with Article 21 of the Constitution. The Court took into account the fact that the petitioner would write with his own hands, had earlier required three hours extra and that his disability is mentioned as 50% in the disability certificate issued by All India Institute of Physical Medicine and Rehabilitation, Mumbai. The High Court further directed that the petitioner be allowed three hours extra to write his examination and all future examinations for the Chartered Accountants course and that the Examination Centre will provide all co-operation to the petitioner in continuing with the examination for three extra hours.

Section 39 of the Persons with Disabilities Act imposes yet another positive obligation on the State by mandating 'all Government educational institutions and other educational institutions receiving aid from the Government,' to 'reserve not less than three per cent seats for persons with

disabilities.' This Section of Persons with Disabilities Act remained under controversy for sometime by its placement under the Chapter on Employment, instead of Education. The decisions of the Gauhati High Court in *Binita Senapati* v. *State of Assam* [44] and the Calcutta High Court in *Deputy Secretary, Department of Health and Family Welfare* v. *Sanchita Biswas*[45] have already been discussed in Chapter 5 of this work. In both the cases, persons with disability filed petitions seeking the initiation of *Section 39* of the *Persons with Disabilities Act, 1995*. *Section 39* of the Act enjoins that there be 3% reservation of seats in government and government aided educational institutions. The Gauhati High Court turned down the petition on the ground that no mention of reservation of seats is made in the education chapter of the statute. Section 39 has been included in the employment chapter. This necessarily implies that if any reservation was being contemplated it was being done in relation to the non-teaching posts in such institutions. Further, the 3% reservation has been extended to all persons with disability. This would mean that even persons with mental retardation can demand admission in medical college. As such a consequence was evidently undesirable; the court held that the appropriate governments had not committed any illegality, unconstitutionality or arbitrariness in not providing the reservation for with disability. The Calcutta High Court, on the other hand took a different view of the matter. The High Court was required to pronounce on the reservation policy of the West Bengal government. The absence of reservations for persons with physical handicap in medical colleges, the Court found to be an infringement of both the Persons with Disabilities Act and the Constitution. This ruling of the Court, first delivered by a single judge was later upheld by a division bench. The court also provided the modalities to be adopted in selecting candidates from the PWD category.[46]

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44. AIR 2000 Gau 1
45. AIR 2000 Cal. 202
46 Supra note 5 at pp. 96, 97. The view of the Calcutta High Court also finds support in the judgement pronounced by the Andhra Pradesh High Court in the case of *National Federation of*

In Delhi High Court this question came up for hearing before a single judgein the case of *Naveen Kumar A.* v. *University of Delhi*,[47] wherein an important question relating to admission in B.E. Course on the basis of reservation due to disability under Section 39 of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*. The petitioner in this case appeared in an entrance test and secured 5016 rank out of 25 thousand. The same contention of reservation being meant for employment and not educational institutions again came up for consideration and it was held that in terms of Section 39 of the Act such a reservation had to be made and all government institutions and other institutions receiving aid from the government were directed to make such reservations. The Court observed that a physically challenged person can be admitted to a B.E. Computer Course subject to his being found medically fit to pursue the course.[48] Justice S. N. Kapoor while delivering his judgement said that:

> "In so far as the question of applicability of Section 39 of the Act is concerned Section 39 undisputed falls in Chapter VI which starts with the heading "Employment'. The learned counsel for the respondent is also right that there is another Chapter V which relates to education.....If it is seen from the point of view of a good draftsman who is to draft a legislation, the counsel for the respondent may be absolutely justified in submitting that it should have been drafted the way he suggested. But we see occasionally examples of bad drafting which simply cause some confusion. But bad

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the Blind v. *Registrar, Andhra University* (WP No. 10234 of 1999); the Madras High Court in *J.Rajkumar (Minor)* v. *Secy. Educational Deptt., Government of Tamil Nadu* (WP No. 36981, decided on 30-12-2002); The Rajasthan High Court in *Vijai Kumar Agarwal (Dr.)* v. *State of Rajasthan* (AIR 2001 Raj. 261) held that under Section 47 persons with disabilities were entitled to reservation of three per cent seats in post graduate medical courses. The Court agreed that Section 39 ought to have been placed under Chapter V but its effect could not be allowed to be nullified simply because instead of placing it under Chapter V, Parliament had placed it under Chapter VI of the Act.

47. CWP No. 4657/2000 decided on 24th November 2000

48. The Gujarat High Court in *Palak Kailashchandra Jain* v. *Union of India* (S.C.A. 7410/2000 dated 29.11.2000),held that a person with disability may be admitted in the MBBS course only after ascertaining that he/she will be in a position to undergo the medical course and will be able to discharge the functions of at least a physician.

> drafting cannot and should not debar the clear intention of the legislator and if intention appears to be clear and loud it has to be accepted irrespective of the bad drafting."
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> (emphasis supplied)

This observation of the Delhi High Court presents the true facet of poor drafting which has caused harassment to many a disabled person and questioned the efficacy of a law that had intended to be for the benefit of the persons with disabilities rather than being a litigious issue. Unfortunately after such an insightful evaluation, another single judge of the High Court in the case of *Rekha Tyagi* v. *Vice-Chancellor, University of Delhi and Others*[49] took a contrary view and referred the matter to a larger bench. The Division Bench in that case which heard the matter agreed that reservation was not permissible as Section 39 would apply only to posts and not to seats in educational institutions.

Finally, the Supreme Court in *All Kerala Parents Association* v. *State of Kerala*[50], while settling this issue said that the inclusion of the Section 39 under the chapter on employment is due to an error in drafting and affirmed that reservation of 3% of available seats in government educational institutions for students with disabilities should be applied. On the issue of inclusion of the Section 39 of the PWD Act 1995, under the chapter on employment, the Supreme Court stated,

> "We fail to understand as to how and on what principles of construction, the High Court has given a construction to the provision of Sec. 39 not only by doing violence to the language of Sec. 39 but also rewriting the provisions of Sec. 39..... section 39 unequivocally deals with the question of reservation of seats for persons with disabilities in educational institutions of the Government, as well as institutions receiving aid from the Government. The language is clear and unambiguous, which itself indicates the legislative intent. It is well settled that when the language of any statutory provisions is clear and unambiguous, it is not

49. 2001 V AD (DELHI) 746
50. (2002) 7 SCALE 198

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

Discarding the error in drafting, the court affirmed the reservation of 3 per cent of available seats in government educational institutions for students with disabilities.[51]

In *Dr. Vijay K. Agarwal* v. *State of Rajasthan & others*[52] Dr. Vijay K Agarwal, is an orthopaedically handicapped person applied for admission to Post Graduate Medical Course but was refused admission against

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51. In *Raman Khanna (Dr.)* v. *University of Delhi* [(2003) 106 DLT 97] the Delhi High Court also supported the decision of *Sanchita Biswas' Case* (AIR 2000 Cal 202)
52. AIR 2001 Rajasthan 261

the reserved category for the physically handicapped as under the University Ordinances there was no reservation provided for the physically handicapped person. Accordingly, he filed a writ petition before the Rajasthan High Court praying for a direction that he may be admitted against mandatory reservation to be provided by Section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Before the High Court, the University informed the Court that the relevant Ordinances had been amended to provide for reservation for the physically handicapped persons but since such amendment had prospective effect, no benefit could be given of the same to the petitioner. The High Court held that whether reservation of 3% seats for admission to post-graduate medical course is mandatory even if such reservations are not provided in the admission ordinances.

Nevertheless, *Dr. P.D. Benny* v. *State of Kerala & others*[53] is one of the instances where it was held that reservation not applicable to PG courses. Here the appellant who was afflicted with polio causing 60% handicap in his legs graduated in medicine from Calicut University and registered as a medical practitioner with the Medical Council of India after completing his internship in 1995. In April 2001, the State Government published a prospectus for admission to the Post Graduate Degree/Diploma Courses in Medical Sciences. While issuing this prospectus, reservations were made for various categories, like Scheduled Castes, Scheduled Tribes, Ex-servicemen and Service candidates. However, no reservation was made for the physically handicapped persons. The appellant submitted his application form. He did not claim the benefit of any reservation. However, in June, 2001, he filed a petition under Article 226 of the Constitution complaining that the State Government had failed to carry out its statutory obligation under the provisions of the 1995 Act. This action was arbitrary and violative of Article 14 of the Constitution. The single judge before whom the matter came up

53. AIR 2003 Kerala 208

dismissed the Writ Petition. On appeal, the matter was placed before the Full Bench (3 judges) and after hearing the respective contentions of the appellant and the State, the High Court did not consider it appropriate to interfere as it was a matter of policy and held that the decision has to be taken by the competent authority after examining the factual position. However, in the matter of reservations for the physically handicapped the High Court made the following observations:-

> "*The State cannot be compelled by the issue of a writ or direction to make a reservation of more than 3% seats for handicapped persons.* In all educational institutions for admission to graduate course in medical college because number of seats in each speciality at each of the colleges is ... Though the provision requires the Government to reserve not less than 3% seats in all educational institutions except those, which are not receiving any aid from it....Reservation of even one seat would exceed the prescribed percentage. It would lead to reservation of more than 3% to 100%. Still further, even if it is assumed that the pooling of seats is permissible, the reservation of 3% shall not be workable. Still further, the stipulation in S. 33 has also to be kept in view. Both the provisions of S.33 and S. 39 have to be harmonized.... The total number of seats for this subject in all the five colleges is 26. Even if it is assumed that the seats can be put together, reservation on one seat out of 26 would be in excess of the percentage prescribed under the provisions of S. 39. Since such reservation would not be in strict conformity with the provisions of the statute, no mandamus forcing the Govt. to do so can be issued.... Persons with handicaps even if imparted the training may not be in a position to fully carry out all the onerous duties expected of medical officers with postgraduate qualifications."
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> (emphasis supplied)

But this observation of the Court that "*...Persons with handicaps even if imparted the training may not be in a position to fully carry out all the onerous duties expected of medical officers with postgraduate qualifications*" is totally unacceptable. Where we believe that the disabled persons are in reality specially abled and a person who could undergo five years of rigorous study to

complete his M.B.B.S. and could also successfully complete his internship before applying for post graduation, how can that person not be able to carry out the duties of medical officers with post graduate qualifications. The explanation put forward by the Court in not allowing reservation is surely a setback to the rights of the disabled. The decision of the Rajasthan High Court in *Dr. Vijai Kumar Agarwal's case* is in the right track. But, in *P.D. Benny's Case* this attitude of looking upon the disabled persons as worthless is a definite setback in securing their rights. While the judicial decisions must be exemplary in securing the rights of the vulnerable sections of the society they must not underestimate their worth as human beings.

There has also been some uncertainty about who would constitute an 'educational institution receiving aid' from the government within the context of reserving 3% seats for persons with disabilities. In *Harsha Shivaram* v. *National Law School of India*[54]the Karnataka High Court has held that this reservation would apply only to government institutions or institutions receiving aid from the government and has no bearing on self-financed institutions such as National Law School of India. In *Social Jurist* v. *Government of National Capital Territory of Delhi & Others*,[55] the High Court of Delhi has taken a broad view while defining 'aid' and has held that the land received on concessional rate to establish a social institution would constitute aid by the Government. The Court directed the Delhi Development Authority (DDA) to take 'appropriate action' against 265 'recognized, private unaided' schools in the Delhi region, which had been allotted land by the DDA at concessional rates on condition they reserve a 25% freeships quota for disadvantaged children, for breach of that condition.

Undoubtedly, the right to education has been elaborated from a human rights perspective in the Persons with Disabilities Act. There are

54. XC III DLT 813 (2001)
55. CW No. 3156 of 2002

numerous examples of positive jurisprudence as well. One of the difficulties that could be attributed to the full realization of the right to education is the stringent criteria by which access to an entitlement is subject to a disability certificate awarded by a medical board. In that respect, the Persons with Disabilities Act is obsolete and reflects a bio-centric approach.[56]

Similar criteria also disadvantage many other members of the weaker sections. In a PIL *Social Jurist* v. *Union of India and others*[57], the petitioner pointed out that admissions were denied on irrelevant grounds like non-availability of birth certificate, non-availability of ration card, non-availability of affidavit of date of birth duly attested by the executive magistrate, non-availability of disability certificate in the case of disabled child, etc. The view taken by the Respondent, i.e. the Government and the Court only reflects the entrenched understanding based on a bio-centric model, which tends to see disability within the confines of the body of an individual. The medical criteria are used for gate keeping and as a means to check corruption.

A perusal of the above case judgements reveals that though in most cases the courts have not as yet begun to evolve a jurisprudence of disability rights. The issues raised are being decided on a case to case basis and sympathy rather than entitlement is determining the decision of the courts. Yet, if courts are to perform an activist role in the realization of disability rights particularly educational rights, the need for jurisprudence of these rights cannot be gainsaid. On a close examination of the statute, the judicial interpretation of the various provisions and formulations in the Person with Disabilities Act is of crucial importance in the realization of the various rights.[58]Further the courts must take a leap to assure the existence of the opportunities under Section 39 to educational institutions and remove every ambiguity associated with the

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56. Supra note 19
57. C.M.6736/2000 in C.W. 3956 of 2000 (Delhi H.C.).
58. Supra note 5 at p. 95

implementation of this particular provision which has caused much harassment to the disabled lot. The various High Courts in this matter seem to opine in a different manner from the other. But the correct view is that a general outlook should be adopted as the matter in issue is concerned with rights of a very vulnerable section of the society and the State's effort to give a lift to their position. It is an all accepted truth that education is the sole way to upliftment and the judiciary's confusing approach could well play havoc with the interests of the persons with disabilities.

(c) Employment Opportunities:

Promotion of equal opportunities and creating a non-discriminating environment for disabled people are the main objectives of the Persons with Disabilities Act that aims to protect the rights of persons with disability. One such important area is employment. Several cases have been filed in the Courts on the issue of employment. A large number of cases are filed by disabled people for non-implementation of the provisions of the Act. For example, one such area is non-creation of disability quota while recruiting new employees. Related issues are applicability of the Act on various bodies, distribution of the posts amongst people with different disabilities and dismissal from service on acquiring disability. Courts have also been called upon to intervene in wide array of cases such as those filed against the transport corporations, colleges, universities, banks, the Armed forces, UPSC, railways etc. [59]

Shapiro points out that, unlike other minorities, disability is one minority, anyone can join at any time a as result of sudden automobile accident, a fall from stairs of a flight, cancer or some other disease. Hence a normal person can become disabled even during the course of his or her employment. And so this head may be discussed as, firstly, rights of the PWD to secure

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59. Supra note 2

employment; and, secondly, rights of the persons acquiring disability during employment.[60]

(i) Rights of the PWD to secure employment: Employment opportunities whether be in the public or private sector is restricted due to a dearth of jobs and the volume of jobseekers enormous. In such a backdrop persons with disabilities in particular find it extremely difficult to get a suitable job even if they are competent of performing a particular kind of job. [61] In so far as the rights of this kind are concerned, Section 33 of the Persons with Disabilities Act provides for 3% reservation of vacancies for persons with a disability, where 1% each is to be reserved for persons with (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability and cerebral palsy. According to Section 36, where in any recruitment year any vacancy under Section 33 cannot be filled up due to non availability of suitable candidates with disability; such vacancy is to be carried forward to the succeeding recruitment year. The reserved seats can be filled by persons other than the persons with disabilities only when suitable candidates in this category available for that vacancy for the successive recruitment year. Under Section 41, the Act also provides incentives to public and private sector players who ensure that at least 5% of their work force is constituted of PWDs.

So far as reservation in appointment to public offices is concerned, there has been a mixed response. The judiciary has examined not only the legality of concept of the concept but also its consistency with the right of equality. It has been mentioned earlier also, in *Indra Swahney* v. *Union of India* [62] that the apex court considered the legality of a reservation in favour of disabled persons, who are not explicitly covered under Article 16 of the Constitution. The legislature as well as the Indian judiciary, has justified the

60. Supra note 6 at p. 30
61. *Ibid*
62. Supra note 17

introduction of special measures to guarantee *de facto* equality. In *Dr. Jagadish Saran & Ors.* v. *Union of India* [63] Justice Krishna Iyer held that even apart from Article 15(3) and (4), equality is not degraded or neglected where special provisions are geared to the larger goal of disabled persons overcoming their disablement consistently with the general good and individual merit. But unfortunately experience has shown that these provisions are hardly given effect to. This is due to the reason that a general misconception prevails amongst non-disabled that persons with disabilities are incapable of doing any job with precision.[64] Such kind of perception brings out discriminatory treatment in relation with persons with disabilities when selection is to be made. More often, it would be seen, the employer would conclude that even if the reservation was made, the employer could not find suitable persons under this category for a particular job. It would thus become easy for the employer not to choose anybody even if the advertisement has provided for such reservation. The attitude of the employer is creating difficulties in the implementation of the provision.[65] In *Life Insurance Corporation of India* v. *Chief Commissioner of Disabilities, Ministry of Social Justice and Empowerment and Others*[66], the view taken by LIC was that a person with 45% disability was incapable of performing his duties as a peon. The Delhi high Court in appeal from the decision of the Chief Commissioner found no substance in it and accordingly directed LIC to employ the person with disability.

People on grounds of disability have encountered rampant discrimination due to inadequate safeguards in the law. Hence it is necessary that the law must comprehend that disability is an accepted part of the human experience and it does not in any way fade away the rights of individuals to independently enjoy self-determination, make option, contribute to society,

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63. (1980) 2 SCC 768.
64. Supra note 6 at p. 8
65. Supra note 6 at p. 31
66. 101 (2002) DLT 434

trail meaningful careers and enjoy full inclusion and assimilation in economic, political, social, cultural and educational systems of Indian society. With the advancement of technology and advent of supports, as may be provided through supported employment, the notion of equating 'disability' with inability to work' is erroneous and outmoded. There should be a presumption of ability that a person can achieve employment ad other rehabilitation goals regardless of the severity of his or her disability, if appropriate services and supports are to be made available. There should also be presumption that an individual can benefit in terms of 'employment outcome' from vocational rehabilitation services—unless it is demonstrated by clear and convincing evidence that such individual is incapable of benefiting from the vocational rehabilitation services in terms of an 'employment outcome'. [67]

The medical fitness criteria for entry into and retention of government service out rightly discriminates people on grounds of disability.[68] It must also be stated in all fairness here that discrimination exists not only with respect to State entities—even private organisations fail to recognise the potential of PWDs and, hence reject them as candidates for employment. In this context it is also essential to put forward two other aspects of the problem:

(a) The definition of disability does not provide for all kinds of disability. There are some types of disabilities that may render persons with disabilities unable to undertake any job. But, there are some other kinds of disabilities that must be brought within the definition, since persons suffering from such disabilities could still perform certain kinds of jobs; and

67. Supra note 6 at pp.31-32
68. *Ibid*

(b) Under section 38 of the Act, the Government is required to identify jobs that could be performed by persons suffering from various kinds of disabilities.[69]

There have been a number of cases where questions have come up before the court as to whether a person suffering from a particular disability, would be in a position to undertake a particular job. The leading case on the point is *Govt. of NCT of Delhi* v. *Bharat Lal Meena and Anr.*[70] , the High Court of Delhi clarified that in the light of the notification dated 31 May 2001 by the Expert Committee of the Ministry of Social Justice and Empowerment, the post of physical education teachers had not been found unsuitable and hence, was not exempted. In short, this Notification provided that any post that is not suitable for reservation for disabled persons had to be explicitly exempted from reservation under Section 32 and that the identified posts, under whichever nomenclature, will be considered as identified. In short it was held that persons with disabilities can be appointed as Physical Education Teachers once they have passed the qualifying examination and undergone the requisite training and the Government cannot by a subsequent clarification take away that right which has already accrued to them. Similarly, the Andhra Pradesh High Court in *Perambaduru Murali Krishna* v. *State of A.P.*[71] has ruled that visually challenged persons who were selected for the post of Secondary Grade Teacher/School Assistant but were later deprived of their legitimate right owing to their disability, were entitled to a supernumerary post as Secondary Grade Teachers. [72] Another case worth mentioning is that of *Ravi Kumar Arora* v. *Union of India and Union Public Service Commission (UPSC),*[73] the petitioner, Ravi Kumar Arora, who had low vision, cleared Civil Services Examination 2001, under the general category, with a rank of 325 and received intimation for

69. *Ibid* at p. 30
70. (2002) 100 DLT 157
71. WPs Nos. 3997 and 4041 of 2002, decided on 20-12-2002.
72. Supra note 6 at p. 9
73. (2004) 111 DLT 126.

joining the foundation course. However, he was declared unfit for all Services on account of "substandard vision". The Committee appointed in terms of order dated 02.07.1999 to identify the posts had identified various posts for even visually impaired persons of Group 'A" and Group 'B', but that was not given effect to. A new Committee was set up in the year 2003. The lawyers argued that as per the rank of the petitioner, he would have been entitled to the Indian Postal Services or possibly a superior Service. The petitioner is therefore entitled to be appointed as per his merit and seniority based on the rank. The petitioner is also liable to be treated as having joined in service along with his batch-mates. The court directed to appoint the petitioner to the post in pursuance to the Examination of Civil Service 2001 with all the consequential benefits within a maximum period of one month from the date of this order. In *Krishan Kumar* v. *Secretary, Govt. of NCT of Delhi and Ors* [74]The petitioner claimed that he is a physically handicapped person and is entitled to the benefits of Section 33 of the Persons with Disabilities Act. His qualifications are MA (Physical Education) from Choudhary Charan Singh, Haryana Agriculture University Sports College, Hissar. When Delhi Subordinate Services Selection Board (for short 'DSSSB') advertised posts for inviting applications for the post of various teachers, including four posts of Physical Education Teacher (PET) for physically handicapped persons, the petitioner also applied for the said post in the aforesaid reserved category. He emerged successful in the said selection and was issued appointment letter dated 23.12.1999. The petitioner joined as PET at Government Boys Senior Secondary School, Shakarpur, Delhi on 13.1.2000. On 23.5.2000, he was transferred to GBM School, Sultanpuri, Delhi. While working in this school, the Deputy Director of Education (Admn. Branch), Govt. of NCT of Delhi issued him a show-cause notice dated 21.12.2000 stating therein that the petitioner was not eligible to be appointed to the post of PET as a handicapped person and, therefore, as to why his services should not be terminated as it was detected that he was not possessing the

74. WP (C) No. 4576 of 2005 Pronounced on : December 20, 2007

educational qualifications required for the post. Subsequently, the respondent vide orders dated 26.4.2004 terminated his services on the ground that the petitioner did not possess the essential qualification prescribed for the post in question and the qualification possessed by him, i.e. Bachelors of Sports Humanities, cannot be equated with the qualifications prescribed for the post as per the recruitment rules. The respondents were also of the opinion that the petitioner was disabled to the extent of 65%. thus, rendering him incapacitated to impart training to the students The Court held that termination of services of the petitioner is clearly unjust, illegal and arbitrary and also ordered for his reinstatement The decision in *Bharat Lal Meena's Case* was reiterated and the petitioner herein was duly selected against the post. Almost more than 11 months after he joined the services as PET he was issued show-cause notice the matter kept on lingering and the termination order was issued after four years from the first show cause notice. The Court opined:

> "The termination of services of a handicapped person, like the petitioner, after his due selection on the aforesaid grounds amounts to adding insult to his injuries. It is not a case where the petitioner had suppressed either his qualifications or the extent of his disablement. With open eyes these aspects were examined by the respondents before consideration of the petitioner's candidature. Not only he was treated to have been eligible for the post with requisite qualifications, but after the selection process he was also considered fit for the said post. Taking a somersault thereafter and grounding him on the premise that he is himself a physically challenged person and, therefore, cannot give physical education to the students is inadmissible. It was too late in the day to deny his eligibility when at the time of considering his candidature the respondents allowed him to participate in the selection treating that he is having requisite qualifications for the post as per the recruitment rules."
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> (emphasis supplied)

Thus it can be seen that the *case of Bharat Lal Meena* has proved to be landmark judgement in securing the employment rights of the disabled persons particularly where they could have been deprived of their particular employment rights as a result of their disabilities. In fact while the court appears to be little confused regarding reservations and allowing disabled candidates to pursue higher education, its stand on the right to employment is very firm.

As discussed earlier, the Constitution of India views affirmative action measures as a means to achieve equality and non-discrimination, particularly in the matter of work. This view has determined the policy towards persons with disabilities as well. The Government of India by way of an Executive Order, issued as early as in1977, had introduced 3% reservation in Group C and D posts for persons with disabilities. The Persons with Disabilities Act has also included affirmative action as a strategy in the area of employment. Section 33 provides for a 3% reservation in favour of persons with disabilities, except persons suffering from mental illness and intellectual disability, in all establishments belonging to the Central and State Governments and Local Authorities. The reservation provided under this section is to be distributed equally to the extent of 1% each among three groups of disabled comprising respectively of the blind or having low-vision, the hearing impaired, and those with loco-motor impairments and cerebral palsy. This is a very important legal provision in the area of ensuring equality of opportunity in public employment.[75] It is interesting to note here that even before the Disability Act came into force, the government and other state functionaries had provided for such a reservation by issuing necessary administrative instructions. The Disability Act has now given legislative mandate to such administrative instructions. But in spite of such administrative instructions coming into

75. Chapter 8, International and National Law on Selected Economic Rights, in *National Human Rights Commission Disability Manual*, (National Human Rights Commission, New Delhi, 2005), pp.124-155 at p.131.

existence much prior to the passing of the Disability Act in 1996, question marks still arose as to the translation of the provisions of the statute book into reality. [76]

Two meaningful decisions of the Delhi High Court are worth mentioning here where the court had to step in to enforce the provisions of the Act. . One is *Pushkar Singh & Ors.* v. *University of Delhi*,[77] and the other is *Smt. Shruti Kalra* v. *University of Delhi & Ors.*[78] In the first case, the Executive Council of the University of Delhi had decided that there would be, without relaxation in required qualifications, 3% reservation for blind and orthopaedically handicapped candidates in teaching posts in the University and Colleges. The petitioners contended before the Delhi High Court that in spite of Resolution of the Executive Council of the Delhi University, there was no reservation made for teaching posts, inasmuch as, no appointment of the physically handicapped had been made except in Dr. Ambedkar College. The

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76. Supra note 6 at p. 33. Also see *Dr. Raman Khanna* v. *University of Delhi and Ors.* (106 (2003) DLT 97)

77. 2001 (II) Apex Decisions (Delhi) 749

78. 2001 (II) Apex Decision (Delhi) 582. See *Jaswant Singh* v. *State of Haryana and Anr.*(Civil Writ Petition No. 15196 of 2001,decided On: 06.05.2002) where implementation of Section 33 by the Punjab Government was questioned. According to the petitioner, in the year 1997-98 applications were invited for direct recruitment against the 18 posts of Quality Inspectors, out of which one post was reserved for physically handicapped person. He applied for the post of Quality Inspector under the physically handicapped quota and appeared in the written test conducted and was also short listed for interview. But prior to the interview the respondent authorities issued a notice in the newspapers scraping all the interviews on the pretext that a ban has been imposed on all the recruitments. The Court opined that it is the mandate of Section 33 of the Act that 3% posts have to be kept reserved for the handicapped such as blind persons or the persons with low vision; the persons who are handicapped on account of hearing impairment and for locomotor disability or cerebral palsy. The statutory compliance is supposed to be done by every department of the Government and the Corporations/Boards. It is no excuse to say that since a ban has been imposed therefore, it is not in a position to fill the posts of backlog vacancies. If there is ban, that will only apply prospectively to those vacancies which are already lying vacant with the respondents. The entire approach on behalf of the respondents to the matter is erroneous. In these circumstances, the writ petition was allowed and directions given to the respondents to start the process of filling up the vacancies of the posts of Quality Inspector falling under 3% quota of the persons with disabilities, reserved as per Section 33 of the Act.

petitioners individually and collectively with other similarly situated candidates made repeated representations even to the Vice-Chancellor. The Vice – Chancellor also gave appropriate directions to adhere to the said resolution. However the colleges continued with their apathy. The petitioners knocked the doors of justice as a last resort by filing the petition on 12 July 1995 in the Delhi High Court. The way the petition progressed in the court clearly demonstrated the lack of will and lackadaisical approach of the Executive council which was provided legislative mandate by the Disability Act as well. This was clearly visible as most of the advertisements issued by the colleges for filling up the teaching posts produced along with the writ petition filed by the petitioners did not even mention about such reservation. In some of the advertisements although it was mentioned that 3% seats are reserved for visually and orthopaedically handicapped candidates, the conduct of the respondent colleges showed it was more to complete the formality with no intention to follow the same. They came up with a host of excuses from time to time in not implementing the Resolution. The High Court while allowing the Writ petition directed the respondents to comply with the Resolution of the Executive Council of the Delhi University with effect from the date of Resolution so that the number of posts which have to be reserved for visually and orthopaedically handicapped persons are calculated subject wise and after ascertaining the number of posts, steps should be taken to fill up those posts from amongst the handicapped persons by adopting the regular selection procedure. It was further provided that if such posts have already been filled up by candidates other than the physically handicapped persons, the University would create superannuary posts so as to give effect to the reservation made in favour of blind and orthopaedically handicapped candidates. The court observed that, to give effect to the theme of Asian and Pacific Decade of Disabled Persons 1993-2002 the Indian Parliament enacted Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Therefore, respondents were bound to give 3% reservations to persons with disabilities in view of their

own resolution as well as the provisions of the Disability Act. The outlook of the respondents forced the court to make the following observation:

> "The narration of the aforesaid events shows how callous approach is shown by the respondents and nothing concrete has happened even when the university took the decision for reserving posts for visually and orthopaedically handicapped persons more than six years ago and the Parliament passed law to this effect more than four years ago. When it comes to showing sympathies with disabled persons, we come out with all kinds of slogans and catchwords. We admit that social discrimination is the most significant problem experienced by people with disabilities and we should eradicate it.....We realize the necessity of creating a more accessible and a more caring society for people with disabilities. But when it comes to real action, we forget that people with disabilities have the right to be both equal and different. In fact, this case amply proves that physical and attitudinal barriers are more limiting than limbs that are paralysed and that other people's attitudes and not one's own disability, whether it came from birth or later, are the biggest barriers."
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> (emphasis supplied)

The case of Shruti Kalra was a case of discrimination meted out to a disabled person by non-disabled. Shruti Karla, even without any vision/proper vision since birth, not only pursued her studies but also passed her Senior Secondary Examination with distinction in Accountancy as well as in Economics. She joined B.A.(Hons.) Degree Course in Instrumental Music and topped the Daulat Ram College of the Delhi University in all the three years. She was also awarded All India Post Graduate Scholarship for Instrumental Music by the University of Delhi. She topped in M.A. (Instrumental Music) and was awarded Lala Jugal Kishore Jagdish Prasad Memroial Prize. She also completed here M.Phil from Delhi University in first division. In 1995, two posts of Lecturer (Instrumental Music) in Shyama Prasad Mukherjee College (for women) of the Delhi University were advertised. Shruti Kalra applied for one of the posts and was interviewed by the Selection Committee but was not

selected. She approached the Delhi High Court with the Writ petition which was allowed on the ground that the selection procedure was not proper as the mandate for reservation policy was ignored. It was further directed that the Shruti Kalra would be considered for the post of Lecturer in Instrumental Music keeping in view the mandate of the Disability Act, 1995 and Delhi University Resolution dated 16th July, 1994 which provided that at least one disabled person would be appointed in each college in the academic year 1994-1995.

Amongst the recent cases, reference ought to be made of *Ms. Anubha Bhargava* v. *Union of India and Others*[79] . The petitioner herein is one of those 130 employees, working in different offices of the respondent-Airport Authority of India all over India, whose services were terminated, inter alia, on the ground that all these persons were appointed on ad hoc basis without any advertisement or calling candidates from Employment Exchange or following recruitment rules, which are required for any public appointment. There were approximately 200 vacancies and as 50% of these vacancies were reserved for those terminated employees, the Court expressed that it was sufficient to reassure those petitioners to have a fair chance. Advertisements were subsequently inserted for the purpose of appointment which would require the candidates to appear for a written test. The petitioner was a receptionist working with the respondents who was visually impaired and had been appointed on an ad hoc basis and had served the respondents for two years prior to the termination. The respondents, in the advertisement, had not reserved any post for visually handicapped persons. What was pointed out in the said advertisement was that only two posts were reserved for physically handicapped persons, one for Orthopaedically handicapped and one for those disabled suffering from hearing impairment. Therefore, she could not even apply in the quota reserved for such persons under Section 33 of the Disability Act. The respondents wanted her to compete in the general category along with other

79. WP (C) No. 21966/2005, Date of Order 4.12.2007.

persons whose services were terminated as well as outsiders, who are otherwise able persons, physically and mentally. The Petitioner sought exemption from subjecting her to any written test on the basis of the quota reserved for the visually disabled/physically challenged person under Section 33 of the Persons with Disabilities Act, 1995. The grievance raised in the application is that the respondents had violated the provisions of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. . Therefore the petitioner sought the court's direction that the respondents comply with the provisions of the Disability Act and keep a post vacant for the visually challenged persons till the final disposal of the petition. The Court awarded a very commendable judgement in exempting the petitioner from appearing in the written test due to her visual impairment as well as provided that one vacancy out of the vacancies advertised, thus, shall be earmarked for the petitioner. It would be up to the respondents to take this vacancy from the general quota prescribed and adjust it against the quota reserved for physically handicapped persons after undertaking the exercise as to how many posts under the said quota are still available. Alternatively, it would be open for the respondents to create a supernumerary post for the petitioner immediately, to be adjusted against the disability quota. The petitioner shall not be entitled to any salary for the interim period. The appointment given shall be treated as a fresh appointment without giving any benefit of the past service rendered. But it is unfortunate that such a landmark judgement has been concluded with the remark that "Since the order is passed having regard to the peculiar facts, as emerged above, it be not treated as a precedent." Such remarks of the judiciary surely mitigate the effect of the judgement which was otherwise so progressive and encouraging in the protection of the right to livelihood of the eprsons with disabilities.

A very sensitive case involving the Constitutional provision concerning special benefits for the backward classes as well as Section 33 of the

Persons with Disabilities Act, 1995 was decided by the Apex Court in *Mahesh Gupta and Others* v. *Yashwant Kumar Ahirwar and Others* [80]. In this case question arose as to the interpretation of an advertisement in the light of a circular of the State of Madhya Pradesh as regards recruitment of handicapped persons to some posts The State took recourse to a special drive for filling up the vacant posts in the reserved category candidates, viz., Scheduled Castes, Scheduled Tribes and Backward Classes. In a circular letter issued on 29.03.1993, it was stated: "SUBJECT: SPECIAL DRIVE FOR FILLING UP RESERVED POSTS FOR HANDICAPPED PERSONS." The State Government had reserved 3% posts (1% for blinds and 2% for other physically handicapped persons) for disabled persons. The State Government had also extended certain exemptions to persons with disabilities through various notifications. It was brought to the knowledge of the State Government that this quota for the handicapped persons is not being fulfilled due to absence of knowledge about reservation and procedural complications. Yashwant Kumar Ahirwar, the petitioner was not only a handicapped person but also belonged to the reserved category but was not selected. He approached the Administrative Tribunal. The Administrative Tribunal by a judgment and order dated 27.11.1999 opined that he had no right of appointment on the post of Assistant Teacher (Science) having not been selected by the Selection Committee On perusal of the advertisement published in the Rojgar Nirman dt. 26th May, 1994 (Ann. P.8), it appears that the respondent had advertised 8 posts for the reserved category for scheduled castes and 8 posts for the handicapped persons. The respondents showed the reserved category separately in the body of the advertisement, though the heading of such advertisement is misleading that applications are also invited from the candidates belonging to the category of S.C. & S.T. but the body of the advertisement leaves no room for doubt that 8 posts were got reserved for the candidates belonging to the Scheduled Castes

80. Appeal (Civil) 3984 of 2007, date of judgement 30.8.2007. Civil Appeal No 3984 OF 2007 [Arising out of SLP (Civil) No. 16291 of 2004] With Civil Appeal Nos. 3985 and 3986 OF 2007 [Arising out of SLP (Civil) Nos. 19391 and 20321 of 2004].

and 3 posts for handicapped persons without having any caste wise reservation. The Court not only set aside the judgment of the High Court but also direct that the persons whose services have been terminated Furthermore the court also directed that they should be paid back wages as also other service benefits. It also directed that If all the vacancies meant for Scheduled Castes, Scheduled Tribe had not been filled up, the State may consider appointing the petitioner. If he has already been appointed, the State may consider the desirability of creating a supernumerary post and continue his service therein. The Court observed:

> "Disability has drawn the attention of the worldwide community. India is a signatory to various International Treaties and Conventions. The State, therefore, took a policy decision to have horizontal reservation with a view to fulfil its constitutional object as also its commitment to the international community. A disabled is a disabled... They constitute a special class... The advertisement, however, failed to mention in regard to the reservation for handicapped persons at the outset, but, as noticed hereinbefore, the vacant posts were required to be filled up for two categories of candidates; one for Scheduled Castes and Scheduled Tribe candidates and other for handicapped candidates. Handicapped candidates have not been further classified as belonging to Scheduled Castes, Scheduled Tribes and general category candidates. It is a travesty of justice that despite the State clarified its own position in its order dated 1.01.2004 and stated that the posts were vacant under the handicapped quota but it completely turned turtle and took a diagonally opposite stand when a contempt petition was filed. ..... The State completely lost sight of its commitment both under its own policy decision as also the statutory provision." (emphasis supplied)

Thus the judgment will go a long way in securing reservations for persons with disabilities. But it is disheartening that use of a term like "handicapped" has been repeatedly used in the judgment. While the trend is not to use derogatory words which lowers the dignity of a persons with disability. When we are

repeatedly emphasising the positive and exemplary role of the judiciary, it is expected that the judiciary must put forward a clear mandate to address the persons with disabilities respectfully.

Hence, to secure the rights of the disabled to secure employment, the role of the judiciary has been at some points very encouraging while at some it failed to live up to its expectations. In fact in cases of reservations under Section 33 the court has in almost every case upheld the rights of the disabled persons. The courts have believed that the persons with disabilities constitute a special class whose interest must be protected at every cost. But at the same time the decision of the court to leave some of the judgements unreported surely dilutes the effect of its efforts towards vindicating their rights. Similarly long and ever going litigations regarding employment matters, as witnessed in *Pushkar Singh's Case* is also not desirable. The Court must also be very careful with the language it uses to address the persons with disabilities. Since the disabled persons have always been looked down upon and made a subject of ridicule, the court must take all care to see that their self esteem is never hampered. Hence the judiciary must play an even more pro-active and progressive role to protect the rights of the persons with disabilities as well as leave no stone unturned to see that their judgements are communicated to the masses in every feasible manner.

(ii) Rights of the persons acquiring disability during the employment: The right to have just and favourable conditions of work also embraces the right to continue in employment unless terminated or retrenched by due process of law. It has been mentioned earlier also that disability may strike a person at any time. An analysis of the different causes of disability includes accidents, diseases, crimes, wars etc. as some of the factors leading to disability of a person at a later stage in life. So far as the employment prospects of a person who acquires any disability during the employment, Section 47 has been enacted to take care

of such situation. Section 47 mandates in clear terms that no establishment shall dispense with or reduce in rank the employee, who acquires the disability during his service. Even if he is not suitable for the post he was holding, as a result of the disability, he is to be shifted to some other post with the same pay scale and service benefits.[81] The intention of Section 47 is clear and unambiguous namely, not to dispense with the service of the person who acquires disability during his service. The objective of the enactment is to provide proper and adequate opportunities to the disabled in the field of education, employment etc. it is obvious that those who are already in employment should not be uprooted when they incur disability during the course of employment. Therefore, their employment is protected even if the destiny inflicts cruel blow to them affecting their limbs. Even if he is unable to discharge the same duties and there is no other work suitable for him, he is to be retained on the same pay scale and service benefits so that he keeps on earning his livelihood and is not rendered jobless. But notwithstanding this provision, experience shows that proper respect has not been given to this provision particularly due to lacuna in the definition of disability. If an employee becomes incapacitated to perform his job because of the disability, which may be acquired by him, but is not covered by Section 2(i) then provisions of Section 47 may not be strictly applicable in his case. This definitely goes against the spirit of the Act. This is yet another reason for amending the definition of disability.[82] The role of the judiciary may be assessed through a string of cases. There have been various decisions of the English Courts which have highlighted these rights. In *Collins* v. *Royal National Theatre Board Ltd.*[83] where the court of appeal stated that Sections 4, 5 and 6 which of the English Disability Discrimination Act, 1995 prohibited an employer to discriminate against a PWD by, among other things, dismissing him. The semi-skilled carpenter who had become disabled in the course of

81. Supra note 10 at p. 9
82. Supra note 6 at p. 41, 43
83. (2004) 2 All ER 851. Also see *McAuley Catholic High School* v. *C* (2004) 2 all ER 436; Cited in *Ibid*

employment in this case was therefore entitled to relief in that the employer was duty-bound to find him a suitable alternate employment within the establishment. In another case, that of *Archibald* v. *Fife Council*[84], a street sweeper who became disabled and was consequently sought to be demoted, but because of unavailability of posts at a lower grade, was dismissed, approached the courts for justice. It was held that the Employment Tribunal, that had earlier upheld her dismissal, was to reconsider the case on the ground that the employer was mandated by the English Disability Discrimination Act, 1995 to prevent dismissal by even transferring her "upwards". [85]

One of the earliest cases on the issue is that of *Anand Bihari & others* v. *Rajasthan State Road Transport Corporation*[86]. This case reveals how the Supreme Court presented a scheme for relief to drivers disabled during the course of employment by striking down their termination and directing provision of alternative jobs, retirement benefits and additional compensation even though such disability was not covered by *Workmen's Compensation Act, 1923* nor were the drivers entitled to retrenchment compensation under the *Industrial Disputes Act, 1948*. In fact, this case was decided much before the PWD Act, 1995 came into force.

The next important case of the pre Act era is that of *Narendra Kumar Chandla* v. *State of Haryana and others*[87]. In this case a petition was filed under Article 32 in the Supreme Court of India. Chandla was aggrieved on account of being reduced in rank on acquiring disability during service. The Supreme Court, however, at that stage refuse to entertain the petition under Article 32. The petitioner therefore approached the Punjab and Haryana High Court, who dismissed his petition. Chandla again filed a leave petition in the Supreme Court. Though the Supreme Court, by its order, appointed him as

84. 2004 UKHL 32
85. Supra note 80
86. 1991 (1) SCC 731: 1991 (1) SLR 575
87. (1994) (4) SCC 460

L.D.C. (clerk), which was lower in rank but protected his salary in the pay scale of Rs. 1400-2300. However, he was deprived of his right to promotion to the next higher grade forever. No doubt to a great degree the Supreme Court removed the injustice and protected his livelihood but it did not lay down the law prohibiting discrimination in the matter of career enhancement on acquiring disability during service. [88]

In the post Act period a number of cases have come up where the Court has directed that when a person is injured during the course of employment and as a result is struck by some disability, the prime concern should be on the welfare of that person and a suitable employment opportunity must always be given.[89] But notwithstanding the judicial dictum as well as the mandate of Section 47 of the Persons with Disabilities Act, in *Baljeet Singh* v. *DTC*[90] serving regular employees of the Delhi Transport Corporation who had acquired disability during service were discharged from service by way of premature retirement. They challenged the action of the employer on the ground of protection available to them under Section 47 of the PWD Act, 1995. Though separate Writ Petitions were filed, a common judgement was delivered by the High Court. The petitioners challenged the act of the employer by alleging that in some cases the kind of disability suffered did not entitle the employer to impose premature retirement and in cases where the disability incurred incapacitated the employees from doing the same job that they were performing, alternative jobs could be given to them. The nature of disability from which the several petitioners suffered ranged from falling sick and developing chest infection, injury sustained in right eye while repairing bus, injury sustained on right ankle as steering wheel came out while driving heavy vehicle, injury sustained on spinal chord due to fall from roof of house, injury sustained by

88. Supra note 6 at p. 41
89. See *Phool Chand* v. *DTC* (CWP No. 4100/1995 decided on 28th April 1998, *Rampal* v. *DTC* (2001 VII AD (DELHI)461, *Inder Das* v. *DTC* (CWP no. 3700/1997 decided on 31st July 1998
90. 2000 (1) AD (DELHI) 88

conductor while pushing bus alongwith other passengers, multiple fractures sustained on right leg due to impact from opposite vehicle, and injury (fracture) sustained in right leg after bus rammed into a tree. In all of these cases the Medical Officer of the Corporation declared the employees as medically unfit for service and premature retirement orders were issued which was challenged in the Writ Petitions. Allowing the petitions the Court quashed the orders of premature retirement and directed payment of wages to all employees from the time such payment had been stopped. The petitioners were also to be treated as in continuous service and wherever necessary alternative jobs are to be provided. The High Court of Delhi held:

> 'when the objective of enactment is to provide proper and adequate opportunities to the disabled in the field of education, employment etc. it is obvious that those who are already in employment should not be uprooted when they incur disability during the course of employment.'
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> (emphasis supplied)

Likewise, in *Virender Kumar Gupta* v. *Delhi Transport Corporation*[91] where a conductor of DTC, after he met with an accident which rendered him unfit to perform the duties of a conductor, was prematurely retired. However, after his treatment he was certified to resume duties and fit for the desk job holding that mandate of Section 47 was clear and unambiguous and his services could not be dispensed with even upon acquiring disability. The writ petition was allowed and it was directed that he be taken back to service.[92]

An additional issue to the access to employment is protection of wages of the persons with disabilities in employment. In *Satyabir Singh* v. *Delhi*

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91. 2002 IV AD (DELHI) 876. Also see *Vijender Singh* v. *DTC* [(2003) 105 DLT 261], where the Delhi High Court ordered reinstatement in a suitable alternate post for an employee whose services were terminated only on the ground that he became physically challenged while in service.
92. Supra note 6 p. 44

Transport Corporation[93] the court opined that on acquiring disability, such a person is to be retained in the same or equivalent job and in any case be paid salary in the same pay scale as Section 47 of the Act prohibited reduction in rank of such an employee. Such a claim was sustained, in any case, even when compensation was paid to the petitioner under any other Act or scheme. Similarly, Delhi High Court in *Delhi Admn.* v. *Presiding Officer*[94] while dismissing the contention that minimum wages were not to be paid to disabled workers in a workshop established for their welfare opined

> "if the wages of an employee who incurs disability during employment are protected under Section 47 without taking into account his output, then I see no reason whatsoever why the disabled whose quality and quantity of work are not questioned should be denied dignity of labour by paying them less than the minimum wages merely on ground of their being disabled".
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> (Emphasis supplied)

Kunal Singh v. *Union of India*[95] is a shining example of the Indian jurisprudence where the Supreme Court granted both the benefit of invalidity pension and continuation of the service under Section 47 of the Persons with Disability Act. Applying the doctrine of *generalia specialibus non-derogant*, the court in this case held that a social beneficial enactment dealing with disabled person intended to give them equal opportunities, protection of rights and full participation. In this case, the Appellant joined as a constable in the Special Service Bureau (SSB) and later lost his leg and was discharged from his duties with an invalidity pension under Rule 38 of the Centre Civil Services (CCS) (Pension Rules), 1972. He challenged his discharge, which was upheld by the High Court on the ground that he had been permanently invalidated on the basis of medical opinion and as such there were

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93. 2002 IIIAD (DELHI) 1028
94. (2003) 108 DLT 119
95. AIR 2003 SC 1623.

no posts in the SSB open to him. An appeal was made before the Supreme Court where the appellant took a fresh ground under Section 47 of the Persons with Disability Act, which protects persons who acquire disability while in employment from termination. The language of Section 47 was found to be self-explanatory in as much as it cast a statutory duty on the employer to accommodate its employees who acquire a disability while in their employment in alternate posts or to create a supernumerary posts till a suitable post is available. The Supreme Court held that the Rule 38 of CCS (Pension Rules), 1972 does not override Section 47 of the Persons with Disabilities Act, as the doctrine of *generalia specialibus non derogant* would apply. This doctrine can also be found in the Act itself in Section 72. Consequently, it does not take away the right of the appellant to claim continuation of his services under the Persons with Disabilities Act, while at same time availing the parallel benefit of the 'invalidity pension' under the Pension Rules. Further the court emphasised that Section 47 contained a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires disability during the service. The Apex Court came down heavily on the Union of India by affirming,

> "It must be remembered that a 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 would also suffer."
>
> (emphasis supplied)

It must be elucidated here that Section 47 does not absolutely suggest to an injury sustained during the course of employment. The employee may acquire disability in natural course or by disease or accident, but in all these cases the benefit of Section 47 will be available to him or her. In *Ranbir*

Singh v. *DTC* [96] it was held that benefits of the enactment, and entitlements under Section 47, available irrespective of where the employee contracted the disability.

In yet another case of *Union of India* v. *Sanjay Kumar Jain* [97], where the respondent while working in Group-C post of the Railways applied for promotion to Group-B post. He qualified in the written test and was directed to undergo medical examination as per the rules of the Indian Railway Establishment Manual (in short the 'Establishment Manual'). Passing of the medical test is a requirement before the candidate is called for viva voce test. He was considered unfit as he may become visually handicapped in future. The respondent was therefore not called for viva voce test. He challenged before the CAT the order whereby it was indicated that he was not to be called for viva voce test as he had been declared medically unfit. It was held that while considering the case of the respondent sub-sections (1) and (2) of section 47 were not kept in view. Attracting the interpretation of Section 47 of the Act, the Apex Court held,

> "Section 47 only permits the appropriate government to specify by notification any establishment, which may be exempted from the provision of Section 47. It does not give unbridled power to exclude any establishment from the purview of Section 47; the exclusion can be only done under certain specified circumstances. They are (a) Issuance of a notification and (b) Prescription of requisite conditions in the notification."
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> (emphasis supplied)

In *Shri Dilbagh Singh* v. *Delhi Transport Corporation*[98], the order of the respondent DTC, prematurely retiring the petitioner from its

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96. 2002 (97) DLT 19
97.(2005) 1 PDD (CC) 405, Civil appeal no. 5173 of 2004 arising out of SLP © No. 16541/2003
98. WP(C) No 6182/2003 Date of Decision : August 1st , 2005

services, was quashed. The DTC was directed to re-instate the petitioner in its services within a period of six weeks from today, to a suitable post, of equivalent rank, and grant continuity of service, in regard to matters such as pay revisions, allowances, increments, seniority, etc. with arrears for the period.

Questions have also arisen as to whether a person who has become disabled during employment be ineligible for further promotion. In *Shri Suhas Vasant Karnik* v. *Union of India and Others*, [99] the Bombay High Court had the occasion to examine whether person suffering from blindness could be declared ineligible for seeking promotion. The High Court held that the respondent is not entitled to discriminate amongst the members of staff merely because some of its members are physically handicapped. It further held that the respondent is under constitutional obligation to encourage participation of the visually handicapped persons in activities of the Bank on par with other members of the staff and consider the cases of visually handicapped for promotion fairly and equitably. Having regard to the judgement of the Supreme Court in *National Federation of the Blind* v. *Union Public Service Commission and Others* [100], it allowed the petitioner and all other similarly situated persons to appear in the promotional examination and participate in the process of promotion. Similarly, in *Union of India and Ors.* v. *Suresh Kumar*[101] the respondent was denied promotion for his disability. But the Ld. Judges A.K.Sikri and Vipin Sanghi opined that no promotion shall be denied to a person merely on the ground of his disability; provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.. It is, therefore, clear that if the respondent is a disabled person

99. W.P.1368 of 1993 dated 17.8.1995
100. (1993) 2 SCC 411.
101. WP (C) No. 9443/2007

under the Disability Act, his promotion cannot be ignored merely because he has acquired the aforesaid disability.

There is a provision in the Disability Act to accord exemption to establishments from employing disabled. This is possible only after a set procedure given in Section 47(2), which states,

"Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provision of this Section."

No guidelines have been evolved nor any rules included in the implementing rules for deciding a case for exemption. In such a situation, there is a danger of arbitrary operation of this proviso jeopardising the future prospects of a disabled employee which has also been reiterated in *Suresh Kumar's Case*. The provision added by the Court shall prove to be cumbersome while treating this case as a precedent.

In *Union of India and Anr.* v. *Jagmohan Singh and Ors.*[102] the question that arose for consideration was as to whether 3% reservation under Section 33 of the Persons with Disabilities Act, 1995, in the public employment provided in favour of the physically handicapped persons would be available to them even for promotions as well. The contention of the petitioners to deny him promotion overlooking the provisions of the Act was not taken very happily by the Court. The Judges said that they fail to understand as to how when a physically handicapped person like the respondent gets promotion in the normal course would be able to discharge the function of that post satisfactorily, but would not be able to do so if he is promoted to this post under the reservation quota. Ironically, this was the argument of learned counsel for the petitioner

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102. WP (C) Nos. 11818 and 13627-28/2004 (*Union of India thru G.M. Northern Railways*, WP(C) No. 11818/2004 *Chairman, Railway Board* , WP(C) No. 13627-28/2004 v. *Jagmohan Singh*, WP(C) No. 11818/2004 *Northern Railway Physically Handicapped Employees Welfare Association and Ors.* , WP(C) No. 13627-28/2004)

before the Tribunal that in the normal course, despite being handicap, the respondent herein was eligible to be considered in the selection for. If selection by promotion to such a post under normal channel is available to a person like the respondent and his handicapped-ness, in that eventuality, does not come in way of discharging his duties, the reason for not providing reservation on this ground is contradictory in terms and cannot be sustained. Such a justification for denying reservation was totally irrational and arbitrary and depicts closed and narrow minded approach of the petitioner.

Thus so far matters of promotion are concerned the Court has not shown prejudice to deny promotion, but at the same time reliance on the proviso to Section 47(2) is not acceptable. As emphasized earlier also such decisions prove to be little difficult for the beneficiaries of the Act when it comes to treat them as precedents in future situations. Hence it is always hoped that the judiciary will play a more positive role in setting aside provisos and concentrating on the beneficial aspect of the legislation so that more and more people are benefited

In addition to the above another facet which needs to be highlighted is the application of the Act in the private sector particularly the application of Section 47. Almost all the cases discussed above have been in the public sector undertakings and The Persons with Disabilities Act as well as the Supreme Court directives are applicable in that sector. The objections to the application of the Act in the private sector are twofold. One, that the section sought to be invoked i.e. Section 47 has a title that says that this provision applies to government employment. The other is that the legislation is applicable to establishments which have been defined U/S 2 (k) to mean corporations, established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government, or a local authority or a government company as defined in Section 617 of the Companies

act, 1956 and includes Departments of Government. [103]The issue came up before the Court in *Shree Satish Prabhakar Padhye* v. *Union of India and others* [104] where a division bench of the High court decided that the Act applied both to the public and the private sector as is evident from various provisions of the Act. The decision came at a time when the petitioner, who was employed as a trained telephone operator for 23 years, filed a petition against his termination on the ground of acquiring a disability. The petitioner was not provided with a sound proof cabin and was subjected to extremely noisy surroundings in the respondent's factory. The Petitioner contended that due to constant loud manufacturing noises his sense of hearing became gradually impaired and ultimately he had to undergo medical treatment leading to termination of services. The petitioner contended that his right to employment had been violated and also contented that the term "establishment" in the Act applies to the private sector also and thus he was entitled to the provisions under Section 47 and so his services could not be terminated. Consequently the Court ruled that the Act applied to

> "....both private as well as public, Governmental as well as local, including Corporations established under an Act of the Centre or the State. It therefore, excludes only the smaller which would be, at best, sole Proprietary Concerns and partnership Firms which are not Corporations established under any Acts."[105]
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> (emphasis supplied)

Hence it can be seen that the judiciary has been upbeat about restoring the rights of the persons who have encountered disability while being in employment. However it always need to be stressed that in cases of employment, the judiciary must bring the various labour laws like the industrial Disputes Act, The Employees State insurance Act and the Workman's

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103. Dr. N. Vasanthi, *"Disability and Labour Laws in India"*, *Supreme Court Journal*, vol. 7 (2006), pp. 11 -17 at p. 14
104. MANU/MH/1077/2005
105. Supra note 102

Compensation Act into a straight line along with the Persons with Disabilities Act, so that all indistinctness are set aside and greater number of people are actually empowered and not merely compensated for their disabilities. The Court should be careful in interpreting the various legislations and concentrate more on harmonious construction so that disabled are assured of their rights of not being discriminated, as a human rights issue and not out of charity or their being medically unfit.

(d) Mandatory notification of schemes:

The approach taken on in the Act for the recognition of positive rights is to mandate the Government to organize schemes through which it can be realized. Thus, under *Section 30* of the Act, appropriate Governments have been directed to set up an inclusive education scheme which may make available, inter alia, for transport facilities, supply of books, uniforms, grant for scholarships, etc. Under *Section 38*, a function has been cast on the appropriate Government and local authorities to devise schemes for ensuring employment and creating a barrier-free environment and by virtue of *Section 42*, schemes have to be made to provide aids and appliances to persons with disabilities. The comprehension of these imperative rights can only come about if the projected schemes are formulated or alternatively, courts see the absence of a scheme as a ground for intervention. If courts leave the choice of making schemes to the discretion of appropriate government and local authorities then one of the powerful rights guaranteed by the statute would be rendered negatory. [106]Pointless to mention, due to the apathetic functioning of the State machinery, the provisions of the Act were notified with effect from November 4, 2003 only after public interest litigation in the Delhi High Court was filed. The impact that judicial interpretation can have on this formulation has come to the fore in the decision of the Allahabad High Court in *National Federation of Blinds, U.P.*

106. Supra note 5 at p. 97

Branch v. *State of U.P.*[107] where the petitioner's request for concessional tariffs in allotment of land under Section 43 of the Act was rejected on the ground that in the absence of any scheme for such allotment under the provision, no such benefit could be provided to him. To correct the folly of the administrative machinery, the Court directed the framing of a scheme in three months' time, and also noted that:

> "It was the obligation of the State Government and all local bodies including the development authorities, to frame a scheme and notify the same. If they had not done so, they cannot take advantage of their own wrong."
>
> (emphasis supplied)

The Delhi High Court in *Delhi Development Authority* v. *Chief Commr. for Disabilities*[108] while directing allotment of a flat in terms of Section 43 of the Act noted with dismay that there was no scheme to provide allotment to persons with disabilities in accordance with the mandate of Section 43. The Court therefore observed that

> "The object and intent of the legislature in enacting Section 43 of the Act cannot be defeated by non-framing of the scheme in terms of the mandate of the section".

In accordance with the ruling of the Court, the Delhi Development Authority has notified schemes for the persons with disabilities that came into effect in October 2004. [109]

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107. AIR 2000 All 258

108. CW No. 4300 of 2003 decided on 11.7.2003

109. Supra note 10 at pp. 11-12. Also see *Indian Council of Legal Aid and Advice* v. *Union of India & others* [(2000) 10 SCC 542] where the Apex Court elucidated the following words: "Article 21 and 41 of the Indian Constitution cast a duty on the state to make provisions for treating and preventing disability, within its economic capacity so that a disabled person may be able to lead normal life. The Supreme Court opined that the scheme for periodical check-ups and treatment of visually disabled persons admitted to blind schools run by Delhi administration or voluntary organisations formulated by Union of India should be adopted by all states and the

Similarly, in a recent case of *Sanjay Kumar Jha* v. *AIIMS and Another* , [110] the petitioner herein is a disabled person as he suffers from blindness. All India Institute of Medical Sciences (AIIMS) has a big campus known as Ayurvigyan Nagar Campus. Having felt the need to have a local telephone booth for the visitors and residents etc., AIIMS has constructed a shop at the said campus from where local telephone booth is operated. On 8.2.1994, AIIMS had allotted the said shop to the petitioner for running a public telephone booth in response to his application for allotment thereof. This allotment was made on licence basis and licence deed was executed. As per the conditions of the said allotment licence deed, the allotment was for a period of 11 months renewable by mutual consent. There are other usual terms contained in the licence deed. Further extensions were given from time to time. During the currency of the said licence agreement, AIIMS inserted tender notice as per which, tenders were invited to run the said STD/ISD local phone booth. The petitioner got alarmed from this tender notice as it was clear from the aforesaid move that the AIIMS wanted to go with open tender and had invited bids from the general public for allotment of the said booth. Aggrieved by this action of the AIIMS, the petitioner filed the instant petition inter alia, on the ground that being a disabled person he was conferred with various rights under the Disability Act one of which was that he was entitled to preferential allotment of land at concessional rates by the Government at all levels and therefore, the respondents could not deprive him of the possession of the said booth, which was already allotted to him and was in his possession. The petitioner has sought preferential treatment for allotment of the said telephone booth to him which is under his occupation for a long period of 14 years primarily because of his disability and the rights which flow in his favour under the Disability Act. Section 43 of the said Act, which deals with preferential allotment of land at concessional rate to such disabled persons. The respondents had claimed that no

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Union Territories in the whole country, and issued notice to the health secretaries of the entire states and Union Territories to show cause why the scheme should not be implemented."
110. WP(C) No.14332/2004. Pronounced on : 14.03.2008

scheme was prepared by the appropriate Government, namely, the Central Government under Section 43 of the Act and in the absence of such a scheme, no right had accrued to the petitioner. Even if a disabled person was to be given preferential allotment, the petitioner could not claim exclusive right, as in such eventuality as well, the booth could have been put to tender by making only disabled persons eligible to submit their bids. Judges A.K. Sikri and Vipin Sanghi, while rejecting the contentions of the respondents clearly held that there is a duty cast on the appropriate Government and local authorities to frame schemes in favour of persons with disabilities for preferential allotment. It is, thus, the bounden duty of the appropriate Governments and the local authorities to frame such schemes and take such an affirmative action so that persons with disabilities are able to reap the benefit of the provisions like Section 43 of the Act. The Court observed:

> "It is necessary to point out that the appropriate Government or the local authorities have not framed the requisite schemes in favour of persons with disabilities for preferential allotment etc., though this is the duty cast upon them by the Legislature under Section 43 of the Disability Act. This Act came into force with effect from 7.2.1996, i.e. more than 12 years ago. Therefore, it would be necessary to give direction to these authorities to make appropriate schemes under Section 43 of the Act within a period of six months."
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> (emphasis supplied)

Hence the above construal of the courts guarantees as rights all those entitlements on which schemes have to be devised by the appropriate governments. The judiciary's stand on the fact that the right is already there and the scheme is nothing but a means of its realization. Such elucidation surely strengthens the struggle for affirmative rights by persons with disabilities.[111]

111. Supra note 5 at p. 98

(e) Social Security:

Sections 66, 67 and 68 of the Persons with Disabilities Act, 1995 contain the provisions pertaining to social security. Social security for persons with disabilities largely involves the issue of rehabilitation so that they become independent. In the last few decades the ambit of rehabilitation has expanded throughout the globe. The current state of affairs of persons with disabilities in almost every nation calls not only for improvement of job prospects but also for enlarged public understanding and constructive attitudes in the community. In *National Federation of Blinds UP Branch* v. *State of Uttar Pradesh*[112], while pronouncing the judgement the Court defined rehabilitation as:

> "Rehabilitation means the restoration of the disabled to the fullest physical, mental, social, vocational and economic usefulness of which person is capable. In other words rehabilitation is a goal-oriented programme which aims at enabling an impaired person to reach an optimum mental or social functional level, which follows basically three aspects, Physical Rehabilitation, Vocational Rehabilitation and Psychological Rehabilitation of the disabled."
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> (emphasis supplied)

So far as cases relating to social security are concerned, the Supreme Court has been quite generous. In *Swatantra Kumar* v. *Qamar Ali & others*[113], the Supreme Court increased the amount of compensation after considering future economic loss due to the permanent or partial disability as well as for pain, shock and suffering undergone by the applicants. Borrowing from *Anand Bihari & others* v. *Rajasthan State Road Transport Corporation*[114], the Apex Court in *Jaswant Singh* v. *State of Punjab*[115] proposed the same social

112. AIR 2000 Allahabad 258.
113. MANU/SC/1033/1998.
114. Supra note 85.
115. Supra note 77.

security scheme outlined in an earlier case. Accordingly, the respondents were directed to provide alternative appointments for the appellants when vacancies arose or to pay compensation computed on the basis of the number of years the individual had worked. In this case, the appellants were drivers, who became blind as a result of their service.

Even in *Ashwani Kumar Mishra* v. *P. Muniam Babu & others* [116]where a 23-year-old appellant met with an accident, received severe injuries and became permanently disabled, the Supreme Court granted him some compensation in lieu of future earnings on the basis of his monthly income. The Hon'ble Court stated that even though the appellant was not formally employed, the amount of compensation could be fixed on the basis of "some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused". Hence, it enhanced the amount of compensation.[117]

But amongst all these the decision given by the Supreme Court in *Indian Bank's Association, Bombay and Ors.* v. *Devkala Consultancy Service and Ors.* [118] the most remarkable. Devkala Consultancy Services had filed a petition in the Karnataka High Court challenging the authority of banks to round up the existing interest rates to 0.25 percent of such rates as were less than 0.25 percent. Such rounding off was found necessary on account of the grossing up involved in calculating the incidence of tax. As the Reserve Bank of India had given its approval to such rounding off in April, 1993, the banks collected an amount of Rs. 723.99 crores, it was alleged. The High Court held that the action of the banks was illegal and accordingly directed that this excess amount be collected by the Union of India from the banks and deposited in Government funds. The Indian Banks Association which was a respondent in the writ court

116. MANU/SC/0248/1999
117. Supra note 3
118. MANU/SC/0355/2004, JT 2004 (4) SC 587

appealed to the Supreme Court by way of Special Leave. The Supreme Court upheld the judgement of the High Court and declared that the Reserve Bank of India could not have empowered the banks to charge something more from the borrowers by the process of rounding off of interest in exercise of their contractual powers vis-à-vis the Banking Regulation Act. Considering that there were more than five crores of borrowers of the banks, any directions to refund the amount would take a long time. The Court therefore directed that the amount accrued so far should be put in a corpus for the Welfare of the physically challenged. The Court also directed the Indian Banks Association and other institutions concerned to contribute Rs. 50 lakhs each. The CAG would be the Chairman of the said Trust and the Finance Secretary and the Law Secretary of the Union of India would be the ex-officio members thereof. The corpus so created might be invested in such a manner to enable the trustees to apply the same for the purpose of giving effect to the provisions of persons with Disabilities (Equal Opportunities Protection of Rights and full Participation) Act, 1995.The Bench stated as follows:

> "Despite the progressive stance of the Court and the initiatives taken by the Government, the implementation of the Disabilities Act is far from satisfactory. The disabled are victims of discrimination in spite of the beneficial provisions of the Act...We are, therefore, of the opinion that in a larger interest, a fund for the aforementioned purpose should be created with the amount at the hands of the Union of India and the appellants and other concerned banks, which may be managed by the Comptroller and Auditor General of India.... We would request the Comptroller and Auditor General of India to effect recoveries of all the excess amount realized by the Union of India by way of Interest Tax and interest by the banks and other financial institutions and create the corpus of such fund therefrom. The appellant and other concerned banks are also hereby directed to contribute to the extent of Rs. 50 lakhs each in the said fund.... The Comptroller and Auditor General of India would be the Chairman of the said Trust and the Finance Secretary and the Law Secretary of the Union of India

> would be the ex-officio members thereof. The corpus so created may be invested in such a manner so as to enable the trustees to apply the same for the purpose of giving effect to the aforementioned provisions of the 1995 Act... The Union of India, the Reserve Bank of India, the Appellant banks, other scheduled banks and financial institutions are directed to render all cooperation and assistance to the trustees... The committee as also the committees set up by the Central Government should act in close cooperation with each other. The Committee may, if it thinks proper, invest any amount in the Trust set up by the Central Government under the 1999 Act or any other scheme framed by the Central Government, as noticed hereinbefore.... The trustees aforementioned with a view to give effect to this order may frame an appropriate scheme. In case of any difficulty, they may approach this court for any other or further order/orders or direction/directions.... The Central Government, however, with a view to implement the aforementioned provisions may be amending the 1995 Act to provide for creation of such a fund and, in such an event, the statutory authority, if any, would be entitled to take over the corpus of the fund; but so long no legislative step is taken in this behalf, this order shall remain in force."
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> (emphasis supplied)

In fact this decision of the Apex Court is so encouraging and absolutely a perfect example of judicial intervention in matters of upliftment of the persons with disabilities. The Court in addition to the fund allotted for the purpose of National Trusts Act considered it necessary that funds are very important for the fulfillment of the various provisions of the Persons with Disabilities Act. But this broad perspective of the Court to create a fund for the disadvantaged people like the disabled is totally unparallel in a case which was primarily concerned with financial matters. This *suo moto* intervention of the court surely deserves a salute. In fact the directives of the Court to make changes in the actual legislation to accommodate the correct usage of the allotted fund, but it is unfortunate that the legislators have not risen from their deep slumber even after four years of passing of such an outstanding judgement.

a mental asylum in Tamil Nadu were charred to death as they had failed to escape due to the fact that they had been chained to poles or beds, the Supreme Court of India issued notices to the State of Tamil Nadu and the Central Government. The Court appointed a `friend of the court' to make a prima facie examination and submit a report on the basis of which it issued notices to other States also. It was reported to the court that the Mental Health Act, 1987 had not been implemented by the Central/State Governments. Realizing the urgency about implementation of the said Act it was stated on behalf of the Central Government that the Act would be implemented in right earnest. After examining the provisions of the Act, the Supreme Court issued specific directions to all State Governments and Union territories to take a survey of bodies providing psychiatric mental health care, grant them licenses on fulfillment of minimum prescribed standards, a nodal agency involving the Chief Secretary or Additional Secretary be designated to coordinate implementation of the Act of 1987 as also the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as also of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. It was also directed that awareness campaign with special rural focus on the rights of the mentally challenged persons should be carried out and that chaining of mentally challenged persons is illegal and that mental patients should be sent to doctors and not to temples or darghas.[127]

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127. After hearing the Additional Solicitor General of India in the matter the Supreme Court gave further directions on 12.4.2002. See, *In Re: Death of 25 chained inmates in Asylum fire in Tamil Nadu with Saarthak Registered Society and another* v. *Union of India & Others (AIR 2002 SC 3693). Also see Chandan Kumar Banik* v. *State of West Bengal*, the Supreme Court heard of the inhuman conditions in which mentally ill persons were held in mental hospital at Mankundu in the District of Hooghli. The Court denounced this practice and ordered the cessation of the practice of tying up the patients who wee unruly or not physically controllable with iron chains and ordered medical treatment for these patients. However on August 6th 2001 the indifference of state and private authorities resulted in the tragic death of 26 patients in Erawadi as they were tied to their beds when fire engulfed the building. Following this tragedy the National Human Rights Commission of India(NHRC) advised all the Chief Ministers to submit a certificate stating no person with mental illness are kept chained in either government and private institutions.

A perusal of the above referred cases clearly reveal that until recently many mentally ill persons were confined to jails and those living in mental health institutions were no better off, as the conditions both in prisons and in mental institutions were far below the stipulated standards. The NHRC is mandated under section 12 of the protection of Human Rights Act 1993 to visit government run mental hospital to study the living conditions of inmates and make recommendation thereon. In 1997 project quality assurance in Mental Health Institutions was initiated to analyze the conditions generally prevailing in 37 government run mental hospitals and departments. The findings of this study confirm that mental hospitals in India are still being managed and administered on a custodial mode of care. Characters sized by prison like structure with high walls, watch towers, fenced wards and locked cells. Mental Hospitals are like detention centres where persons with mental illness are kept caged in order to protect society from the danger their existence poses. The above discussion has clearly pointed out that each of these cases reached the Supreme Court at different point of times through public litigation. However, in these cases, there was no mention of the rights of the inmates to minimum standards of care and treatment. However, the cases have demonstrated the need for continued judicial monitoring in order to ensure that the state acts in accordance with the statute and the Constitution.[128]

A SUM UP:

The Rights Approach to disability has led to the evolution of impressive legal framework. With sincere regard to the Supreme Court's pronouncements involving disabled people, it is felt that the judiciary has not shown the same zeal, enthusiasm and activism in disability rights cases as

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128. Manish Lakhawat, " *Human Rights Of Mentally Ill Persons*", viewed at http://www.legalserviceindia.com/articles/mentai.htm, accessed on 23.6.2008

compared to activism shown in environmental cases.[129]An appraisal of the various case laws concerning the different facets of disability human rights reveals that the courts are yet to start to evolve a jurisprudence of disability rights. The courts have resorted to individual remedies of the problems brought before them primarily based on sympathy rather than entitlements. Yet, if courts are to perform an activist role in the realization of disability rights, the need for a jurisprudence of these rights cannot be refuted. [130] Although on the whole, the case-laws show that the Supreme Court has been sensitive towards persons with disability and in most of the cases the verdict has been in favour of the disabled; and no doubt the combination of the effects of these cases will definitely give new dimension to disability law in India.

The Courts though have pronounced very remarkable judgements concerning employment and social security; but it seems to be averse towards education and barrier-free environment. In fact there are very few cases concerning barrier free environment or the right to access as it is commonly called. It is even more interesting to note that whereas in *Javed Abidi's Case* decided in 1999 the court gave some very broad guidelines, which proved to be a landmark decision on the area; but in *Javed Abidi Case* decided by the Delhi High Court in 2008 the judiciary seems to have lost trail. Moreover it is even more shocking to see that the Court is apathetic to the publication of the judgements. Even in matters of education, the confused state of mind of the various High Courts cannot be overlooked. When the Calcutta High Court had pronounced a very progresssive judgement in *Sanchita Biswas's Case* [131] regarding interpretation of Section 39, saying that Section 39 should be construed under the Chapter 'Education' and not 'Employment'. It is surely amazing that there was a flurry of cases until the matter was finally put at rest by the Kerela High Court in *All Kerala Parent's Association of the Hearing*

129. Supra note 2
130. Supra note 5 at p. 95
131. Supra note 45

impaired v. *State of Kerala*[132]. It is expected that to reduce the burden on the judiciary the Apex Court should suo moto look into such cases and pronounce a favourable decision so that the invaluable time of the judiciary is not wasted in deciding cases of similar nature.

Further, in matters of employment the court has surely proved its mettle. Most of the cases reveal an upbeat attitude of the judiciary. But again the court's apathy in not treating some unusual judgments as precedents is not acceptable, especially where the issue is concerned with the right to livelihood of persons with disability who have been repeatedly emphasized as vulnerable and neglected.

The greatest contribution of the judiciary can be seen in the cases relating to social security. The decision given in *Indian Bank's Association's case* is simply majestic. In fact such actions of the Court are exemplary in nature. But unfortunately non-application of these provisions surely mitigates their effect. The Judiciary's role must not merely be sympathetic but it should reasonably weigh the issues placed before them, so that the decision given by them has a tremendous effect on the society.

Another issue which needs to be mentioned here is that, though the Apex Court and the various High Courts have resorted to foreign judgments while expressing and explaining their judgements, but it is very unfortunate that to this day we have very few cases that could match up with the activism of the judiciary in the western world. We hardly have any case assessing upon the need of access to healthcare of the persons with disabilities. Though, similar access to healthcare for the persons with disabilities in India can be provided under Article 21—the fundamental right to life—of the Constitution. In *M.C. Mehta* v. *Union of India*[133]the Supreme Court observed that the right to life

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132. Supra note 53
133. (1999) 6 SCC 9

under Article 21 also encompassed the "right to good health". But the role of the judiciary has not moved further. Persons suffering from HIV/AIDS also suffer from a disability not included in the definition under the Act. In South Africa, the Constitutional Court in *Minister of Health* v. *Treatment Action Campaign*[134] invoking the right of access to public health care services embodied in the South African Constitution held that the State was constitutionally obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of such a right. People were therefore entitled to use of Nevirapine—a potentially life-saving drug that reduced the risk of mother to-child transmission of HIV. In *Bragdon* v. *Abbott*[135] the United States Supreme Court construed asymptomatic HIV infection as a disability if it affected the major life activity of reproduction.[136] Again, though the definition of disability has been criticised again and again for being too restrictive, but the Court in none of the cases has made any efforts to clarify the same or to make it more inclusive, or make suggestions for its amendment.

So far as the other laws are concerned it is only the Mental Health Act which has some cases to its credit. But in spite of their shortcomings the National Trust Act and Rehabilitation Council of India Act have hardly attracted any judicial intervention either suo moto or on individual prodding. Even PILs can hardly be found concerning these two areas. The point which resurfaces again is that the judiciary is not ready to show its activism in this area unless made to ponder.

To sum up it can be said that in spite of admirable constitutional and statutory authority given to the judiciary, there have been very few cases where the court has taken any drastic action to provide any exemplary relief. In most of the cases the courts have stuck to provide remedy only on case to case

134. 13 BHRC 1
135. 141 L Ed 2d 524
136. Supra note 10 at pp. 10-11

basis. *Suo moto* action is also negligible. The judiciary in spite of some landmark judgement seems to be in a dormant stage where it requires constant prodding to rise from its slumber. Further, in case of projection and protection of human rights and particularly of people of the weaker sections and the disabled, the general judicial response except constitutional courts is believed to be not very encouraging and satisfactory mainly due to docket explosion, slow motion justice system and high and heavy quantum of expenses in litigation, complexity of processual justice system, the heart of the judicial anatomy---the common litigants are frustrated. It is also felt by them that the administration of justice is woefully out of tune with the unprecedented crisis and new challenges of modern India. The need is therefore to innovate and evolve effective, efficient systematic and scientific strategies to meet the new challenges of the present century. [137] As a final point it is hoped that the judiciary will be more pro-active in taking suo moto actions in cases of violation of the rights of persons with disabilities making the most of the powers granted to them. The need is of continuous judicial pondering and most imperative of all, the disability fraternity must also step ahead and assert their rights.

137. Supra note 4 at pp. 7-8