

Empowerment of the Disabled From Objects of Charity to Subjects with Rights

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In the *Jeeja Ghosh & Anr v Union of India & Ors* (2012) case, which involved a passenger with cerebral palsy who was offloaded from the SpiceJet flight, the Supreme Court has highlighted two important rights of disabled travellers—accessibility and reasonable accommodation. As every country has a statutory as well as international obligation to ensure the right of disabled people to access in transport services, these rights have to be realised prior to the realisation of all other rights.

Persons with mental and physical disabilities face a number of problems while travelling. The wheelchair users and other persons with reduced mobility have to regularly face the issues of accessibility. Accessibility has a direct link to human dignity and right to life of persons with disabilities.

In a commendable path-breaking approach, the Supreme Court has on 12 May 2016 ordered SpiceJet to pay ₹10,00,000 as damages to disabled rights activist Jeeja Ghosh. She had moved the Court for damages after she was offloaded from a Kolkata–Goa SpiceJet flight by the crew, following the captain's orders that she was unfit to take the five-hour-long flight due to her disability, that is, cerebral palsy.

Ghosh was to attend an international conference which she missed and claimed damages for the trauma and mental agony she had to undergo due to the attitude of the captain and the crew of SpiceJet flight. She had petitioned the West Bengal state consumer forum for deficiency of service, and also moved the Supreme Court under Article 32 of the Constitution. She argued that the agony, humiliation and emotional trauma which she had to undergo after being offloaded like a common criminal affected her right to live with human dignity (Article 21 of the Constitution). Citing other instances where disabled travellers had been put through discrimination and harassment while travelling by air, she wanted the Court to put a system in place where persons with disabilities do not face mental agony, trauma and humiliation while travelling.

The Court, while allowing her petition, echoed the contemporary shift in disability discourse from the charity and medical models to a rights-based paradigm. Persons with disabilities are now considered subjects with rights and the Court observed that the rights granted

to persons with disabilities under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereafter PWD Act 1995) formed human rights in themselves. The Court also took note of the fact that in spite of international law and domestic legislation being in place to protect the rights of persons with disabilities, their lives are handicapped by social, cultural and attitudinal barriers. The Court has recorded a finding that this is “the worst form of discrimination.”¹

What Do the Laws Say?

The PWD Act, 1995 has only three sections dealing with accessibility. These are found in Chapter VIII dealing with non-discrimination. Section 44 deals with non-discrimination in transport and provides for adapting rail compartments, aircrafts, buses and vessels to be disabled-friendly. It urges the design of washrooms in trains, vessels and aircrafts to be made in such a manner that wheelchair users can access them. Section 45 provides for installation of auditory signals at traffic signals, kerb cuts and slopes on pavements and signage for the use of persons with disabilities on the road. Section 46 provides for the installation of ramps at public buildings and hospitals, auditory signals in lifts and adaptation of toilets for wheelchair users. Despite the presence of these provisions in the statute book, courts had to point out time and again that these provisions are seldom followed and implemented.

The state or establishments in the transport sector are bound to make these provisions for accessibility “within the limits of their economic capacity.” The Supreme Court has in the case of *Dalco Engineering Pvt Ltd v Satish Prabhakar Padhye & Ors* (2010) held that the use of this expression in Section 44 made the provision directory and not mandatory. Till the decision in the Ghosh case, the question whether private entities in the transport sector were bound by Section 44 was left open and unresolved. The imposition of ₹10,00,000 as damages on the private carrier settles the issue. The Court observed that the civil aviation regulations for passengers with reduced mobility were framed keeping human dignity

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in mind and that SpiceJet had violated these regulations by offloading Ghosh.

India is a signatory to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Articles 5 and 9 therein contain detailed provisions for reasonable accommodation and accessibility in transport and public spaces, respectively. The Convention came into force in May 2008 and does not impose a rider as to limits of economic capacity. It should also be noted that the obligation to provide accessibility was not a time-bound one and India was not obliged to provide access to its disabled population right from the time that the Convention was ratified by India. Article 9 read with Article 5 on reasonable accommodation, makes it clear that reasonable accommodation and accessibility go hand in hand to ensure that rights of persons with disabilities are fulfilled in the true sense of the term.

The UNCRPD is an instrument, a charter of rights for persons with disabilities, which affirms some rights, reformulates certain others, extends several entitlements to the disabled and is an innovative instrument rather than being a Convention that follows the proclamation model (Megret 2008). Against this backdrop, reasonable accommodation, as defined by the Convention as the

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms²

has been linked for the first time to “all human rights and fundamental freedoms” and is firmly embedded within the non-discrimination mandate of the convention (Lord and Brown 2011).

This means and implies that reasonable accommodation has to be arranged to ensure equality and the Convention has further fortified the no-compromise stance insofar as reasonable accommodation goes by providing in Article 5(3) as follows: “In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”³ The denial of reasonable

accommodation is considered a form of discrimination on the ground of disability in terms of the provisions of Article 2 of the Convention.

One must note that no special or extra time was given to countries that signed and ratified the Convention to ensure steps for reasonable accommodation were put in place. It was an immediate obligation (Lord and Stein 2009), but only the failure to implement the reasonable accommodation duty, and not the failure to undertake positive measures, is actionable as a violation of the right to non-discrimination. Further, that the failure to accord reasonable accommodation measures “should be understood as one manifestation of discriminatory conduct, akin to direct discrimination or indirect discrimination” (Lawson 2008).

Accessibility in Air Transport

Section 44 makes it clear that aircraft and washrooms therein must be accessible to persons with disabilities, it calls for “special measures” to be taken “within the economic capacity” of establishments in the transport sector. The judgment in the Ghosh case has brought private players within the ambit of establishments in the transport sector. The Court while deciding the case went into details as to the Civil Aviation Requirements (CAR), 2008 and the CAR 2014 regarding the transportation of passengers with disabilities or limited mobility. The CAR 2008 was revised following the recommendations of the Ashok Kumar Committee and the CAR 2014 is in place. The Court observed that all the recommendations of the committee had not been taken into consideration. The Directorate General of Civil Aviation (DGCA) has been asked to work in tandem with the Department of Disability Affairs (DDA) to streamline the CAR 2014. The committee had recommended the inclusion of autism which was accepted by the DGCA.

The committee had also suggested the procurement of standardised assistive devices, the establishment of a help desk and curb-side assistance kiosks. These suggestions were considered, but not fully accepted by the DGCA. There was a controversy regarding wheelchair usage

and the transportation of automated wheelchairs which use batteries. The Court has asked the DGCA to work with the DDA and resolve these pending issues and bring the CAR 2014 in line with the committee report.

Much before the regulations for the travel of wheelchair users and persons with disabilities were put in place, another disabled rights activist, Javed Abidi had filed a public interest litigation (PIL) before the Supreme Court in 1997 (*Javed Abidi v Union of India* 1999). In his petition, Abidi inter alia argued that it was the social responsibility of the Indian Airlines to provide aisle chairs and ambulifts to persons with locomotor disability. He also pointed out that the 50% concession in fares given to persons who were visually impaired and denial of the same to other persons with disabilities like locomotor disabilities was unfair.

Soli Sorabjee, in his arguments in favour of the Indian Airlines, pointed out that the facilities and concessions can be provided only “within the economic capacity” of the airline. The Court noted that this was a germane consideration, but went ahead to rule that in keeping with the objects of the PWD Act, that is, the creation of a barrier-free environment and integration of persons with disabilities into the mainstream, concessions for persons with locomotor disabilities of 80% or more, was called for. The Court also ordered that aisle chairs and ambulifts be provided for persons with locomotor disabilities at every airport.

The main and marked point of departure from Abidi’s petition which argued for reliefs as a social responsibility of the airline and the approach of the Court in Ghosh’s case is the marked change in attitude. The Court has in the latter case, clearly declared that the disabled are subjects with rights and preferred a rights-based approach rather than relying on the medical or social models of disability.

Accessibility and the Railways

The Indian Railways, which transports about 8,224 million passengers a day,⁴ has a wide range of concessions for persons with disabilities. Trains are, thus, a popular mode of transport for persons with disabilities. According to a

study conducted by a non-governmental organisation, Voice of the Specially Aabled People, nearly 5% of passenger traffic consists of persons with disabilities and senior citizens.⁵ However, facilities for persons with disabilities in trains and in stations are far from satisfactory. The carriage for persons with disabilities is still shared with the luggage van and persons who are wheelchair users face difficulties even now in accessing the same because of the difference of height between the railway platform and the coach. A PIL was filed in the Gujarat High Court against the Western Railways for the increase of the height of railway platforms (Raturi and Iyer 2011: 490; *Jan Sangarsh Manch v Union of India* 2006). Disabled-friendly toilets are conspicuous by their absence. However, the Railways Minister Suresh Prabhakar Prabhu in his Railway Budget for 2015–16 announced that all stations under redevelopment would be accessible to persons with disabilities and wheelchair users. Disabled-friendly toilets and drinking water taps have also been promised in all stations.

According to the Minister of State for Railways, Manoj Sinha, all A class and B class stations will have a standard ramp for barrier-free entry, two parking lots for persons with disabilities and a non-slippery walk-way from the parking lot to the building. These stations will also have signage of appropriate visibility and an assistance kiosk. Facilities for inter-platform transfer and engraving on platforms to aid the visually impaired are also planned. “A-1” category stations qualify for provision of escalators/elevators, while “A” category, “C” category and stations of tourist importance qualify for provision of escalators under desirable amenities. Two hundred and seventy seven escalators and 224 lifts have been provided at various stations so far. Wheelchair facility is provided, duly escorted by coolies on payment. Moreover, zonal railways have been authorised to introduce battery-operated vehicles at major railway stations for persons with disabilities. Disabled-friendly coaches (second class-cum-luggage and brake van with coaches for persons with disabilities) are in service. Presently, around

3,300 such coaches are in service. At least one disabled-friendly coach in mail and express trains would be provided.⁶

The railways are bound to follow the directive in Section 44 as they are a public enterprise. Facilities in trains and stations for persons with disabilities leave a lot to be desired and there is a clear imbalance between category A1 stations and other stations. Misuse of facilities like ramps meant for persons with disabilities is widely observed.

The courts have again constructively intervened when it comes to accessibility in the railways. The courts have held that the PWD Act would not be interpreted in such a manner as to reduce the standards of safety and efficiency in the railways, but to extend a helping hand for persons with disabilities to lead a self-reliant life with dignity and freedom (*Union of India v Devendra Kumar Pant* 2009). The Delhi High Court while allowing a petition by the National Association of the Deaf asking for the recruitment of sign language interpreters at major railway stations and airports observed that as far as facilities for persons with disabilities are concerned, “notwithstanding the will, direction has been lacking.”⁷ The same high court extended certain railway concessions for the deaf in a petition filed by Naqvi in 2002 (*Kaukab Naqvi v Union of India* 2002). In the *Chairman, Railway Board v Jagmohan Singh* case,⁸ the PWD Act 1995 was recognised as a beneficial legislation and a departure from the medical model.

It was another PIL petition (27/2007) filed by the India Centre for Human Rights and Law that led to a court order against the railways ordering them to make stations disabled-friendly (Raturi and Iyer 2011: 510). The sheer volume of disabled passengers on Indian Railways makes it incumbent on the public sector enterprise to improve the facilities and accessibility both in stations and on trains. A minuscule 3,300 coaches for persons with disability is simply not enough and the step-motherly treatment to category B and C stations when it comes to the provision of facilities for persons with disabilities must stop forthwith.

Accessibility on the Road and to Public Spaces

Sections 45 and 46 of the PWD Act of 1995 provide for non-discrimination on the road and inaccessibility to public spaces. Section 45 provides for auditory signals at traffic lights, kerb cuts and disabled-friendly pavements for the wheelchair users and engraving on the zebra crossings for the aid of the visually impaired. Section 46 of the act provides for the construction of ramps in public buildings and hospitals, braille symbols in lifts and toilets that are wheelchair accessible. These sections too begin with the rider of economic capacity.

It is interesting to note that the American courts have not allowed the defence of “undue burden” while ordering the installation of curb ramps. In *Kinney & Ors v Yerusalem* (1993), the Court ruled that the installation of curb ramps was an alteration and the lack of curb ramps was a “primary obstacle in the smooth integration of persons with disabilities into the commerce of daily life” (Raturi and Iyer 2011: 494). In India, PILs were filed against the Andaman and Nicobar Administration (*Bhuvanashwari Devi v Andaman and Nicobar Administration* 2008) and Jammu and Kashmir (*Javed Abidi v Union of India* 2001) for not building accessible roads as per the provisions of the PWD Act, 1995.

Although the Ministry of Road Transport and Highways is one of the ministries that is to implement the Disability Policy, 2006, the ministry has done nothing for the welfare of persons with disabilities. The urban–rural divide in the provision of facilities in road transportation is stark. Although there is a statutory mandate for the provision of facilities for the disabled persons, they have to approach courts through PILs for facilities.

It was the visit of Stephen Hawking to Delhi in 2001 and a consequent PIL filed by Javed Abidi before the Delhi High Court that led to a court order forcing the implementation of Section 46 of the PWD Act (*Javed Abidi v Union of India* 2001) (Raturi and Iyer 2011: 492). Low-floor, high capacity buses for the use of persons with disabilities was introduced in Delhi,⁹ Mumbai (*ILS Legal Aid Centre v State of Maharashtra* 2002) and Kolkata

(*Integrated Disabled Employees Association v State of West Bengal* 2013) following the filing of petitions. Accessibility to temples in Tamil Nadu for the wheelchair users and persons with disabilities was also secured through court orders (*B Meenakshi v State of Tamil Nadu* 2006) (Raturi and Iyer 2011: 490).

While accessibility comes with a Herculean effort in India, other jurisdictions, notably America, have held the entire city administration accountable for violating disability provisions in a number of cases. A case in point is *Tyler v City of Manhattan* 1994. In this case, Tyler, a wheelchair user, brought a successful class action claim against the Manhattan city administration. He successfully argued that recreational centres in the city and public offices were not accessible to wheelchair users. In another case, *Barden v City of Sacramento* 2002, the city administration was held guilty for violating the Americans with Disabilities Act provisions by not providing city sidewalks which are not accessible to wheelchair users (Raturi and Iyer 2011: 494).

In India, authorities are seldom brought to book for not providing accessibility, especially in the transport sector and for not providing access to public spaces. It is a vigilant and proactive judiciary which has from the late 1990s to 2016 (in

Ghosh) come to the rescue of the disabled traveller.

Conclusions

Approximately, 10% of persons with disabilities require wheelchairs.¹⁰ It was reported by Devi et al (2013) that 52% of wheelchair users faced problems in accessibility on a daily basis, and 77% of them considered it as a major problem. The findings of the study reflect the apathy shown towards accessibility for the disabled. The hindrance appears to be in the wording of the statute itself. An analysis of the wording of the statute gives an indication as to why provisions relating to accessibility are not fulfilled in India. The state and transport authorities are bound to take efforts to ensure accessibility only “within the limits of their economic capacity.” This rider is often erroneously cited as the reason for not providing accessibility.

Many studies have been conducted and have proved that the provision of reasonable accommodation and access from the inception of a project has economic advantages rather than not providing such accommodation (Stein 2003). While it is futile to argue for a “flat earth bill” to make everything—every bus, subway station, restaurant and theatre—accessible (Shapiro 1993: 114), it is high time to realise

that the persons with disabilities have the right to access and reasonable accommodation. This is a right granted by the PwD Act and fortified by the stringent provisions in the UNCRPD.

The Indian authorities have cited costs for escaping from their responsibility of providing access and reasonable accommodation. This verdict from the Supreme Court in the Ghosh case would perhaps serve to reverse this trend. There cannot be any justification for not providing reasonable accommodation and accessibility, the provision of which is an internationally accepted obligation when India ratified the UNCRPD.

The denial of reasonable accommodation and accessibility strikes at the root of the achievement of the rights of persons with disabilities and is fuelled by attitudinal mental blocks coupled with an unhappily worded statute in the case of India. A zero-tolerance approach to barriers in the environment for the disabled traveller and a swift change in mindset from viewing persons with disabilities as objects of charity to subjects with rights is the need of the hour.

Every citizen of India has a fundamental right to travel across the country. The disabled traveller has this right to undertake the journey with human dignity and respect, a facet of the right to life granted

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under Article 21. The disabled traveller has also the right to be treated equally with other travellers under Article 14 of the Constitution. It is about time that these rights see the light of the day. It is possible only when accessibility at all levels is provided to the traveller with disability. After all, a disability does not kill the wanderlust in an individual.

NOTES

- 1 *Jeeja Ghosh & Anr v Union of India & Ors* (2012), available at: http://supremecourtindia.nic.in/FileServer/2016-05-12_1463049304.pdf, paragraph 42.
- 2 Convention on the Rights of Persons with Disabilities, available at: <http://www.un.org/disabilities/convention/conventionfull.shtml>.
- 3 Same as Note 2.
- 4 Indian Railways: Annual Report and Accounts, 2014–15, p 17.
- 5 Pranav Desai (2016); Railway Budget 2016 – 10 Suggestions from Voice of SAP, <http://voiceof-sap.com/news/railway-budget-2016-10-suggestions-from-voice-of-sap/>, viewed on 16 May 2016.
- 6 Statement made in Rajya Sabha on 6 May 2016. <http://pib.nic.in/newsite/pmreleases.aspx?m-incode=23>, viewed on 16 May 2016.
- 7 In the High Court of Delhi (Date of Decision: 24 November 2011; WP (C) No 6250/2010; *The National Association of the Deaf v Union of India and Others* 2009), available at: <http://www.hrln.org/hrln/images/stories/pdf/National-Association-of-the-Deaf-versus-Union-of-India-241111-order.pdf>.
- 8 Indian Law Reports 2008 I Del 1039.
- 9 *Dinesh Gupta v Ministry of Transport* 1999 (Chief Commissioner of Disabilities) and Court on its own *Motion v State* 2011 (SCC Online Delhi 1108).
- 10 Fact sheet on Wheelchairs (2010: WHO).

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