Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.6924 of 2021

Ravinder Kumar Dhariwal & Anr. **… Appellants**

Versus

The Union of India & Ors. **…Respondents**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1. The Division Bench of the Gauhati High Court allowed an appeal against the judgment of the Single Judge of the High Court in a petition under Article 226 of the Constitution challenging the disciplinary proceedings initiated against the appellant. The Single Judge had directed the State to consider the case of the petitioner in view of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995[1]. Allowing the appeal against the order of the Single Judge, the Division Bench set aside the enquiry report and restored the proceedings to the stage of evidence.

A Factual Background

2. The appellant joined the Central Reserve Police Force[2] in November 2001. In 2003, he was appointed as Assistant Commandant and served in the Darrang and Haflong Districts of Assam. Between the years 2005 to 2007, he served as Assistant Commandant in Chhattisgarh, and between 2007 to 2008, he served in Srinagar. Subsequently, he was transferred to Ajmer where he was serving till 2010. On 18 April 2010, while the appellant was serving in Ajmer, the Deputy Inspector General of Police[3] lodged a complaint against him in the Alwar Gate police station alleging that the appellant had stated that he was obsessed with either killing or being killed and made a threat that he could shoot. The complaint reads as follows:

> "It is to mention that in pursuance to the above referred letter, Sub Inspector Udai Singh came in the chamber of DIGP and when sitting with Sh V K Kaundal Commandant (staff) and with Sh. Sarwar Khan, Asstt. Comdt. Then only Sh. RK Dhariwal who was posted in this Group Centre threatened that he is obsessed with either to kill or being

[1] **"PwD Act"**
[2] **"CRPF"**
[3] "**DIGP**"

> killed and he can even shoot. Thus it is evident that the mental state of this officer is not sound and he can take life of anybody and can commit suicide and likewise."

3. An enquiry was initiated against the appellant. A memorandum was issued on 8 July 2010 whereby the President proposed to hold an enquiry against the appellant under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules 1965. Six charges were framed against him which were that he remained absent from morning marker, used unparliamentary language, appeared in television channels and other print media without the prior approval of the Department, did not give parade report, tried to intentionally cause an accident, and assaulted a Deputy Commandant. The appellant was placed under suspension with effect from 8 October 2010 with the declared headquarter. The departmental enquiry was completed, and the enquiry officer submitted the enquiry report dated 3 October 2013. Pursuant to the enquiry report, notice was issued to the appellant on 7 August 2015.

4. A second enquiry was initiated against the appellant through a memorandum dated 6 April 2011 on the charge that the petitioner without depositing the pistol and ammunition proceeded to Mukhed. The enquiry has been completed and the punishment of withholding two increments was awarded.

5. A third enquiry was initiated against the appellant. The memorandum was issued on 17 February 2015 on the charges that when the appellant was placed under suspension with the declared headquarter pursuant to the initiation of the first enquiry report, he remained absent without obtaining permission.

6. It is also necessary that we advert to the medical history of the appellant to understand the full purport of the issues before us. The appellant started facing obsessive compulsive disorder[4] and secondary major depression in 2009. He visited a private psychologist at Kota, Rajasthan in 2009 and 2010. He also attended Kochhar psychiatric Centre, Delhi in 2011 and 2012. In 2012-2013, he received treatment in PGIMS, Rohtak. He was also treated at the Government Multi-Specialty Hospital at Chandigarh in 2013. In 2015, he visited Gauhati Medical College for psychiatric treatment. He also visited the Composite Hospital, Gauhati in 2015 and was referred to the Composite Hospital in Delhi, where he was admitted for treatment between 4 August 2015 to 7 August 2015. He was subsequently referred to Dr Ram Manohar Lohia Hospital, Delhi where he was categorized as permanently disabled, having 40 to 70 percent disability. The Composite Hospital by a report dated 18 July 2016, declared the appellant unfit for duty and placed him under the S5(P) category due to his partial and limited response to all modalities of treatment since 2009.

7. The Ministry of Social Justice and Empowerment, in exercise of powers under Section 47 of the PwD Act issued a notification on 10 September 2002,[5] exempting all categories of 'combatant personnel' of the CRPF from the provisions of the Section. The notification reads as follows:

> " NOTIFICATION
> New Delhi, the 10th September, 2002
> S.O.995(1)- In exercise of the powers conferred by proviso to Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights, and Full Participation) Act 1995 (I of 1996) the Central Government having regard to the type of work carried on

[4] "**OCD**"
[5] **"2002 notification"**

> hereby exempt all categories of posts of 'combatant personnel' only of the Central Para Military Forces (CPMFs) namely Central Reserve Police Force (CRPF), Border Security Force (BSF), Indo Tibetan Border Police (ITBP), Central Industrial Security Force (CISF) and Assam Rifles from the provisions of the said Section."

8. The PwD Act was repealed by the Rights of Persons with Disabilities Act 2016[6]. The Ministry of Social Justice and Empowerment, in exercise of powers conferred by the proviso to Section 20 of the RPwD Act issued a notification dated 18 August 2021, similar to the 2002 notification:

> "NOTIFICATION
> New Delhi, the 18th August, 2021
> S.O. 3367(E).—In exercise of the powers conferred by the proviso to sub-section (1) of section 20 and the second proviso to sub-section (1) of section 34 of the Rights of Persons with Disabilities Act, 2016 (49 of 2016), the Central Government, in consultation with the Chief Commissioner for Persons with Disabilities, having regard to the nature and type of work, hereby exempts all categories of posts of combatant personnel of Central Armed Police Forces, namely, Border Security Force, Central Reserve Police Force, Central Industrial Security Force, Indo-Tibetan Border Police, Sashastra Seema Bal and Assam Rifles from the provisions of the said sections."

9. A standing order on the rehabilitation of force personnel was issued by the Directorate General, CRPF on 27 July 2011. According to the order, a rehabilitation Board would be constituted which will subject the concerned person to critical examination to determine their physical and mental capacity, aptitude and job requirement among others. Pursuant to the examination, it would be determined by the Board if the person can be rehabilitated within the force or whether he should be declared unfit. The order provided a list of jobs that can be given to persons required to be rehabilitated which included duties

[6] **"RPwD Act"**

such as light duty, line men, and hospital attendants. As for persons who hold the rank of an ASI or above, they are to be posted in comparatively less operational activities. The above standing order was amended on 14 August 2012 altering the list of rehabilitative jobs.

10. The appellant challenged the inquiry report and the notice dated 7 August 2015 issued in the first enquiry in a writ proceeding. The Single Judge of the High Court by an order dated 7 August 2015 issued notice and passed an interim order directing that no further decision shall be taken in the disciplinary proceedings initiated in the first enquiry. The contentions raised by the appellant were:

(i) He has a disability within the meaning of Section 2(i) (vii) of the PwD Act. He is suffering from a mental illness with a disability of more than 40 percent; and

(ii) He is protected under Section 47 of the PwD Act which provides that a person shall not be demoted or denied promotion on the grounds of disability. In view of Section 47, the disciplinary proceedings cannot proceed any further.

The CRPF submitted that the Court should not interfere with the disciplinary proceedings in view of the seriousness of the charges, and the enquiry must be allowed to be completed.

11. The Single Judge of the Gauhati High Court by a judgment dated 19 August 2016 allowed the writ petition and directed the respondent to consider

the case of the petitioner in terms of the provisions of Section 47 of the PwD Act. The reasons which guided the Single Judge are as follows:

(i) Section 47 of the PwD Act states that no establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service. The provision also vests a positive obligation on the employer to reasonably accommodate an employee, who owing to his disability is no more suitable for the post that he is holding. The provision states that he could be shifted to another post in the same pay-scale, and in case it is not possible to shift him to another post, he is to be kept on a supernumerary post until a suitable post is available;

(ii) There is no dispute that the petitioner had acquired disability during his service. The mental disability certificate from Dr. Ram Mohan Lohia Hospital, New Delhi is sufficient to establish that the appellant has a mental disability of over forty percent;

(iii) The Supreme Court in **Kunal Singh** v. **Union of India**[7] held that Section 47 of the PwD Act is mandatory; and

(iv) In view of the above, the respondent should revisit the issue as to whether any action based on the enquiry report would serve any purpose in view of the mandatory directive under Section 47.

12. The respondents filed an intra-court appeal against the judgment of the Single Judge. The respondents contended that the appellant raised the contention of mental disability for the first time in the writ petition. It was argued

[7] (2003) 4 SCC 524.

that this contention had neither been raised in the reply to the charge sheet nor in the reply to the enquiry report. The appellant argued that his wife had tried to bring the mental health issues faced by him to the notice of the enquiry committee. However, the committee did not permit her to place the submissions. The appeal was partly allowed by the Division Bench by a judgment dated 15 November 2018, by which the enquiry proceedings were restored to the stage of recording evidence to enable the appellant to prove his mental disability by submission of material documents. The reasons which guided the Division Bench were as follows:

(i) The issue of whether the appellant is suffering from mental disability cannot be decided in a writ proceeding since it would require the evaluation of evidence, which cannot be undertaken by the High Court in an Article 226 proceedings. In these circumstances, the application of the provisions of the PwD Act is faulty;

(ii) Even if the PwD Act is held applicable to the disciplinary proceedings, an argument has been made that the 2002 notification had been issued exempting the CRPF from the application of Section 47 of the PwD Act. However, the applicability of the provisions of the PwD Act is dependent on an affirmative finding on the mental disability of the appellant; and

(iii) On a *prima facie* perusal of the material, it appears that the appellant has a mental disability. The medical reports submitted by the appellant from the respondent's hospital indicate that he had OCD and depression for a long

time. However, this is a defence that must be put forth by the appellant during the enquiry.

B Submissions of Counsel

13. Mr Rajiv Raheja, learned counsel appearing on behalf of the appellant, has made the following submissions:

(i) The appellant was continuously posted in areas where anti-insurgency operations were being conducted from 2003 to 2010. As a consequence, he developed mental health issues in 2008;

(ii) The appellant is diagnosed with OCD, secondary major depression, and bipolar affective disorder, which he developed during service. Dr Ram Manohar Lohia Hospital categorized the appellant as having a permanent disability in the range of 40-70 percent;

(iii) The appellant started taking treatment from a psychiatrist in 2009-2010. He has taken treatments from Apollo Hospital Delhi, Rohtak Medical College, Government Hospital Chandigarh, Dr Ram Manohar Lohia Hospital Delhi, and Gauhati Medical College;

(iv) The events which led to the initiation of departmental enquiries took place between April 2010 and July 2012. An FIR was registered against the appellant at the behest of the DIGP under whom the appellant was serving in Ajmer. It was alleged in the complaint that the appellant's mental state is not sound, and he threatened to kill people and commit suicide. Instead of sending the appellant for medical treatment, the DIGP

initiated criminal action against him. Thereafter, three enquiries were instituted against the appellant;

(v) The departmental enquiries were initiated against the appellant for acts committed by him after developing severe mental illnesses;

(vi) The first and third enquiries against the appellant are pending. The first enquiry has been restored to the stage of evidence by the High Court in the impugned judgment. The second enquiry is completed and the punishment of withholding two increments has been awarded to the appellant;

(vii) Section 18 (5) (b) and (d) of the Mental Healthcare Act 2017 mandates that persons with mental illness should be posted in their native places and where good treatment facilities are available. The appellant was being treated in Delhi in 2010 but was posted to Mudkhed in Maharashtra making it impossible for him to avail of medical care every fortnight or even every month. In October 2014, the appellant was first posted in Gauhati and thereafter in Silchar. These locations are far from his hometown and treatment centers;

(viii) The Composite Hospital, CRPF, Delhi admitted that the appellant has OCD and secondary major depression. Further, it acknowledged that the appellant has taken various treatments and was subjected to anti-anxiety agents, anti-depressants, anti-psychotics, sedatives, hypnotics, psychotherapy, behavior therapy, and electroconvulsive therapy;

(ix) The appellant showed only partial response to the treatment and is still symptomatic. He was categorized as S-3 but was eventually classified as S-5 (permanent disability from the psychiatric side, 100 percent unfit) by the Medical Directorate of CRPF;

(x) On 14 April 2019, even the Court of Enquiry noted that the appellant has been diagnosed with OCD and secondary major depression. The appellant was directed to appear for review before medical officers;

(xi) The behavior report issued by DIG, GC, CRPF, Gauhati dated 9 January 2019 stated that no duty was assigned to the officer due to "mental disorder" and that the "officer caught mental disorder on duty". In another behavior report dated 27 January 2018, it was noted that the "officer has not been performing any duties since he is psychiatric patient". DIG, GC, CRPF, Silchar in the behavior report dated 5 January 2019 observed that the "officer lacks proper reasoning and in making proper conclusive opinion [*sic*]". Thus, while the CRPF concluded that the appellant has a severe mental illness, it still chose to proceed with departmental enquiries;

(xii) The appellant made several requests for being transferred to the place where he was undergoing treatment. The last such request was made on 16 March 2020;

(xiii) The principles of natural justice were not followed in the departmental enquiries. Further, it is unreasonable to expect a person undergoing severe mental health issues to lead evidence and defend himself;

(xiv) The appellant is entitled to the protection granted under Section 20 of the RPwD Act, which is *pari materia* to Section 47 of the PwD Act;

(xv) The exemption granted to CRPF from the application of provisions of Section 47 under the PwD Act in terms of the notification dated 10 September 2002 does not have any effect once the RPwD Act 2016 came into force; and

(xvi) The order of the Department of Personnel and Training dated 25 February 2015 nullifies the exemption granted to the CRPF by the 2002 notification.

14. Ms Madhavi Divan, the learned Additional Solicitor General appearing on behalf of the respondents, has urged that:

(i) The appellant was involved in various acts of misconduct during 2010 and 2011, for which three different departmental enquiries were initiated against him;

(ii) Both the pending departmental enquiries have been put on hold till the appellant's mental condition improves;

(iii) The appellant was transferred from time to time following the transfer policy. The good work done by the appellant in the past has no relevance to the specific charges of misconduct against him;

(iv) Exposure to insurgency does not result in the development of mental health issues. Innumerable officers are posted in such areas and are performing their duties;

(v) The acts of misconduct were committed by the appellant when he was posted at a peaceful station in Ajmer. He was residing near his hometown and was availing of static/home posting. Rajasthan is his home state. If he had any grievance against a senior officer, he should have followed proper procedure for registering such a grievance;

(vi) The DIG, Ajmer CRPF was constrained to register an FIR against the appellant because there was an apprehension that the appellant will commit an untoward act;

(vii) The appellant did not produce himself before the medical officer of the force for treatment. There is no indication from the reports of medical officers that he has any mental ailment;

(viii) According to AMR reports dated 20 October 2008, 28 October 2009 and 26 June 2014, the appellant was placed in the medical category S-1 and was declared fit for duty. These reports do not indicate that the appellant has any mental illness;

(ix) The appellant actively participated in the first and second departmental enquiries which were conducted from 2010 to 2014. He cross-examined witnesses and submitted a defence. He never claimed that he had a mental health disorder. When the first departmental enquiry was completed by the Investigating Officer and the Union Public Service Commission advised that he be removed from service, the appellant claimed that he had mental illnesses to avoid the penalty;

(x) The Mental Healthcare Act was enacted in 2017, while the acts of misconduct relate to 2010 and 2011 when he was posted in Ajmer;

(xi) The appellant has been deployed in peaceful stations since 2014. He was posted in Gauhati from 2014 to 2018 and in Silchar from 2018 onwards. Adequate medical facilities are available in these areas. Family accommodation is also available;

(xii) The appellant was sent for Review Medical Examination in Composite Hospital, CRPF, Delhi where he was placed in the S-5 category on 31 August 2016. He was declared unfit for duty on account of being diagnosed with OCD and secondary depression. It was recommended that his service be invalidated. To avoid such invalidation, the appellant produced two medical certificates issued by Gauhati Medical College and Hospital, which declared him fit for any activity stating that he had no symptoms of a mental illness;

(xiii) The appellant has taken contradictory stands. In the first enquiry, he claimed that he had a mental illness to avoid a penalty but when he was declared unfit for duty, he claimed to be medically fit. It is clear that the ploy of mental illness is being used to mislead the department and the Court;

(xiv) On the order of the High Court dated 15 November 2018, a Review Medical Examination was conducted which placed the appellant in the medical category of S-3 because of OCD and secondary depression. At the time, the appellant was asymptomatic and was not on any medication.

However, because he had a record of mental illness, he was placed under observation in medical category S-3 for 24 weeks. Thereafter, Review Medical Examinations were conducted from 23 December 2019 to 30 December 2019 in Composite Hospital, CRPF. The appellant was placed in medical category S-3 on 31 December 2019;

(xv) The appellant has been evading Review Medical Examinations because he is aware that if he is upgraded to the S-1 category, then the pending departmental enquiries will recommence and if he is downgraded to S-5 category, he will be boarded out of service;

(xvi) The Review Medical Examinations conducted from 20 January 2021 to 29 January 2021 place him in medical category S-2;

(xvii) The contention of the appellant that the exemption granted to the CRPF from the application of Section 47 of the PwD Act was overruled by order of Department of Personnel and Training dated 25 February 2015 is incorrect;

(xviii) After the enactment of the RPwD Act, a proposal was submitted to the Central Government to exempt the CRPF from the provisions of Section 20 of the RPwD Act. A notification to this effect was issued in 2021; and

(xix) According to the department standing orders, when CRPF personnel with mental illness are placed in medical category S-3 for a maximum of 48 weeks and are not upgraded to S-2 within 48 weeks, they are downgraded to S-5 and declared permanently unfit for service. Under the rehabilitation policy relating to disabled force personnel, persons having a mental illness

are immediately invalidated from service irrespective of their fitness at the time of recruitment. They cannot be retained or rehabilitated within the force since the job profile of the CRPF personnel involves handling firearms.

C Analysis

15. The PwD Act was repealed and the RPwD Act was enacted in 2016 during the pendency of the writ proceedings. Therefore, we first determine the law applicable to the validity of the disciplinary proceedings. We would then discuss the legal frameworks on mental health. The final section discusses whether the initiation of disciplinary proceedings against the appellant was discriminatory.

C.1 Changing legal Regimes and the continuing quest for Justice

16. When the writ petition seeking to quash the disciplinary proceedings was instituted before High Court, the PwD Act and the 2002 notification were in force. However, the intra-court appeal against the judgment of the Single Judge was filed in 2017, after the RPwD Act came into force. An exemption corresponding to the 2002 notification was issued under the RPwD Act in August 2021 when the Special Leave Petition was pending before this Court. Therefore, the primary issue is to decide the law that would apply to the proceedings before this Court.

17. The disciplinary proceedings were initiated by issuing a memorandum of charges in 2010. The enquiry report was submitted in 2013, and the notice was issued in 2015. Thus, when the disciplinary proceedings were initiated, the PwD Act was in force. The 2002 notification was issued by the respondent under the

proviso to Section 47, exempting the CRPF from the application of the provision. The RPwD Act came into force on 27 December 2016. If any right has been accrued to either the appellant or the respondent under Section 47 or any other provisions of the PwD Act, then the repeal of the Act would not affect the legal proceedings unless a different intention appears from a reading of the RPwD Act, by virtue of Section 6 of the General Clauses Act 1897[8]. Section 6 of the GCA reads as follows:

> "6. Effect of repeal – Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not –
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

Section 6 provides that where a central enactment repeals another enactment, the repeal shall not affect any legal proceeding or investigation with respect to an accrued right, unless a different intention appears from the repealing statute. The general rule of interpretation is that a newly enacted statute has prospective application. Section 6 of the GCA provides an exception to this rule, where a pending legal proceeding or investigation would be guided by the old enactment,

[8] **"GCA"**

if any 'right, privilege, obligation or liability' has accrued to the parties under the repealed law. The issue which needs to be considered is whether any right, privilege, obligation or liability has accrued to the respondent in view of the 2002 notification which exempts the CRPF from its duty to not discriminate against disabled employees under Section 47 of the PwD Act.

C.1.1 Section 6 of GCA: Accrual of Privilege

18. Section 47 of the PwD Act reads as follows:

> "47. Non-discrimination in Government employments.—
> (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:
> Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:
> Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier;
> (2) 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."

Section 47 states that no employee working in a Government establishment, who acquires a disability during the course of service shall be (i) terminated from employment; (ii) reduced in rank; or (iii) denied promotion. Section 47 protects disabled employees from punitive actions on the ground of disability. Since the 2002 notification exempts the CRPF from the application of Section 47, we will have to examine if any right or privilege has accrued to the CRPF under the 2002 notification. This requires us to consider whether an exemption from a protective

provision such as Section 47 results in the accrual of a right or privilege in favour of the CRPF to continue pending proceedings under the PwD Act in terms of Section 6 of the GCA.

19. In **Ambalal Sarabhai Enterprises Ltd.** v. **Amrit Lal & Co.**[9], the issue before a two judge Bench of this Court was whether the court of Rent Controller constituted under the Delhi Rent Control Act 1958, or the ordinary civil court would have the jurisdiction to decide the eviction proceedings instituted by the landlord against the tenant. Section 3 was amended to exclude tenancies whose monthly income exceeded Rs. 3500 from the application of the Delhi Rent Control Act. In that case, the monthly rent was Rs. 8625. The eviction petition was filed by the landlord in 1985 before the amendment of Section 3. While the petition was pending, Section 3 was amended, which excluded such tenancies from the purview of the Act. The High Court had held that in view of the amendment, only the ordinary civil court and not the Rent Controller would have jurisdiction over the eviction proceedings. The tenant contended that since the tenant did not possess any vested right under the Act before the amendment came into force, the Rent Controller would not have jurisdiction. The landlord contended that even if the tenant did not possess any vested right, the landlord possessed a vested right, and that in view of Section 6 of GCA, the pending proceedings should continue under the pre-amended Rent Control Act. This Court held that the tenant did not have any vested right under the Act. Furthermore, the Court also held that the landlord does not have an accrued 'right' under Section 14 of the Delhi Rent Control Act. Section 14 of the Delhi

[9] (2001) 8 SCC 397.

Rent Control Act provides a general protective right to the tenant against eviction. The proviso to Section 14 lists specific grounds on which the tenant could be evicted. The Court held that since Section 14 is a protective right conferred upon the tenant, it cannot be construed to provide a right to the landlord. In this context, it was observed:

> "The right which is sought to be referred as vested right is only under its proviso. Proviso cannot enlarge the main section. When main section is only a protective right of a tenant, various subclauses of its proviso cannot be construed as it gives vested right to a landlord. The right if at all could be said of the landlord. It flows only under the protective tenant's umbrella which cannot be enlarged into a vested right of a landlord."

However, it was observed that Section 14 provides a 'privilege' to the landlord, and if the privilege has been accrued or acquired as required under Section 6 of GCA, then the Rent Controller would retain the jurisdiction to decide the proceedings. It was held that on the filing of the eviction petition, the privilege accrued to the landlord in view of Section 6(c) of the GCA, and the pending proceeding was saved.

20. For Section 6 of the GCA to be applicable, two conditions need to be fulfilled. *Firstly,* the respondent must possess a 'right, privilege, obligation, or liability'; and *secondly,* the 'right, privilege, obligation, or liability' must have <u>accrued</u> before the repeal of the old enactment or provision. According to WN Hohfeld, one of the greatest hindrances in the clear understanding of legal problems is the readiness to terms all legal relations as 'rights'. According to him, a right signifies an affirmative claim against another, and the correlative of right is duty. On the other hand, privilege indicates freedom from the right or claim of

another; it denotes an absence of duty.[10] Hohfeld states that the correlative of privilege is 'no right'. Section 47 of the PwD Act is a protective provision available to employees who are disabled in the course of their employment. The provision places an obligation on the employer to not impose punitive punishments such as termination of employment, reduction in rank, and denial of promotion. Therefore, the employee has a right to not be punitively punished for their disability (and a right to be reasonably accommodated), while the employer has a duty not to impose such punitive punishments (and a duty to reasonably accommodate). However, when the 2002 notification was notified exempting the CRPF from the application of the provision, the employee lost the right to claim that they should not be punitively punished. By corollary, it would mean that the CRPF has been exempted from its duty under Section 47, and thus holds a privilege to impose punitive punishments against persons with disabilities.

21. For the application of Section 6 of the GCA, the privilege should have accrued to the respondent under the 2002 notification before the repeal of the PwD Act. It is settled law that Section 6 of the GCA only protects accrual of rights and privileges and not the mere hope or the expectation of accrual. In **Hamilton Gell** v. **White**[11], a landlord had given a notice to quit to the tenant under the Agriculture Holdings Act 1908. Under the Act, on receipt of the notice to quit, the tenant is entitled to compensation in such cases. Section 11 of the Act stipulates the following two conditions to claim the right to compensation: (i) notice must be given to the landlord to claim compensation; and (ii) the

[10] W.N Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning and other legal essays,* (W.W. Cook ed., Yale University Press, 1919).
[11] (1922) 2 KB 422.

compensation must be claimed within three months of quitting the tenancy. The tenant, in this case, had fulfilled the first condition, but before he could comply with the second condition, the Agriculture Holdings Act was repealed. The Court of Appeal was tasked to decide whether the tenant's right to claim compensation accrued under Section 38 of the Interpretation Act 1889, which is *pari materia* to the provisions of Section 6 of the GCA. It was held that a right had accrued to the tenant under the Act. Three concurring opinions were given. Justice Bankes held that the tenant's right to compensation depended on the act of the landlord, that is, the landlord giving notice to the tenant to quit. Once the notice is given, the right to compensation is accrued to the tenant, subject to him complying with the conditions of the statute in so far as he could comply prior to the repeal. Scrutton LJ in his opinion states that the conditions imposed in Section 11 were conditions of *enforcement* of the right and not its *acquisition.* It was held that as soon as the tenant gave the notice to claim compensation, he was entitled to have the claim investigated by the arbitrator since Section 38 of the Interpretation Act saves investigation with respect to the accrued right. Atkin L.J differentiated between an abstract right and a specific right, and held that the tenant had acquired the right of compensation when he quit his holding. It was held that only specific rights and not abstract rights are protected under Section 38 of the interpretation Act:

> "It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute."

The diverse and contradictory views on when the right to compensation accrued to the tenant, indicate that accrual of rights depends upon identifying when the right was accrued based on the construction placed on the statute.

22. In **Director of Public Works** v. **Ho Po Sang**[12], the interpretation of Section 10 of the Interpretation Ordinance of Hong Kong, which corresponds to Section 38 of the Interpretation Act 1889, and Section 6 of the GCA, was in issue. In this case, the Crown lessee of premises in Hong Kong applied for a renewal of his lease. Section 3 A-E of the Landlord and Tenant Ordinance provided that if the Director of Public Works gave a rebuilding certificate, then the lessee was entitled to call the tenants to quit. The lessee applied for the rebuilding certificate, and the Director notified him of his intention to give the certificate. The lessee served notice to the tenants under Section 3B(1) of the Ordinance; the tenants appealed to the Governor in Council under Section 3B(2); and the lessee cross-petitioned under Section 3B(3). When the cross-petition was pending, Section 3A-E of the Ordinance was repealed by the Landlord and Tenant (Amendment) Ordinance 1957. However, after the repeal, the Director intended to give the lessee a rebuilding certificate. In pursuance of his intention, the tenants were served with a notice to quit. The tenants challenged the issuance of notice on the ground that on the repeal of the provision, the Director did not have the legal authority to issue a rebuilding certificate. The challenge was allowed by the Judicial Committee, on appeal from the Supreme Court of Hong Kong. It was held that on the date of the repeal, the lessee did not have a right to a rebuilding certificate. The lessee only had a *hope*

[12] (1961) 2 All ER 721.

to receive the certificate, and it was thus not an accrued right. The Court also differentiated between an investigation in respect of rights and an investigation to decide whether some right should or should not be given. In this context, it was observed:

> "It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceedings is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of right and an investigation which is to decide whether some right should or should not be given."

The above observation on accrual has been referred to with approval in **M.S Shivanda** v. **KSRTC**[13] and **Bansidhar & Ors.** v. **State of Rajasthan & Ors.**[14] In **Lalji Raja Sons** v. **Firm Hansraj Nathuram**[15]**,** a Constitution Bench of this Court affirmed the observations of Atkin L.J in **Hamilton Gell** (supra) where it was held that only specific rights and not abstract rights would be saved. This Court also endorsed the observations made in **Abbot** v. **Minister for Lands**[16] where it was held that the "the mere right (assuming it to be properly so-called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed to be a 'right accrued' within the meaning of the enactment." In this context, in **Thyssen Stahlunion Gmbh** v. **Steel Authority of India Ltd.**[17] this Court affirmed the observations in **Abbott** (supra) and termed abstract rights as inchoate rights.

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[13] (1980) 1 SCC 149.
[14] (1989) 2 SCC 557.
[15] [1971] 3 SCR 815.
[16] (1895) AC 425.
[17] (1999) 9 SCC 334.

23. The principles for the application of Section 6 of the GCA are summarised below:

(i) The party must possess a right and the right ought to have accrued;

(ii) Only specific rights and not abstract or inchoate rights are saved under Section 6 of the GCA;

(iii) An abstract right becomes a specific right, only when the party does an act to avail himself of the right; and

(iv) The action necessary to avail an abstract right is dependent on the nature of the right and the text of the statute.

24. The privilege that the respondent possesses under the 2002 notification would be an abstract or inchoate privilege unless the privilege has been acted upon by the respondent. It cannot be argued that the privilege to demote or terminate the employee is accrued on the initiation of the disciplinary proceedings. As observed by Atkin L.J in **Hamilton Gell** (supra), if such an interpretation was to be provided, then all provisions of the repealing Act which are contradictory to the repealed Act would be inoperative. There are two classes of rights or privileges – conditional and non-conditional. The exercise of a conditional privilege is dependent on the fulfilment of certain conditions specified in the statute. On the other hand, a party could hold a privilege merely by being an actor in law without having to fulfil any conditions. Abstract privileges are conditionally or unconditionally available, based on the provisions of the law. The privilege that the CRPF holds under the 2002 notification is a non-conditional abstract privilege that it always possesses. In the context of Section 6 of the

GCA, these abstract privileges are accrued or acquired only when the privilege-holder does an act as required under the statute or otherwise to avail of the privilege.

C.1.1.1 The Right of Non-discrimination and the PwD Act

25. As discussed above, the privilege is only accrued when the privilege-holder does an act required under the statute to avail of the privilege. To answer whether the privilege has accrued to the appellant, the nature of the privilege granted by the 2002 notification will first have to be determined since the accrual of a privilege would depend on the nature and content of the privilege itself.

26. The marginal note to Section 47 of the PwD Act reads as 'Non-discrimination in Government Employment'. A pertinent question that arises for our consideration is whether the 2002 notification exempts the employer from its duty of non-discrimination on the ground of disability, or whether it only exempts the specific forms of discrimination expressly mentioned in Section 47 of the PwD Act. To answer this question, a reference must be made to the general structure of the PwD Act.

27. The PwD Act was enacted to give effect to the 'Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region' to which India is a signatory. In April 2002, the Economic and Social Commission for Asia and the Pacific proclaimed the decade (1993 -2002) as the Asian and Pacific Decade of Disabled Persons. The proclamation aimed to promote the human rights of disabled persons by providing an accessible environment, social security, safety nets and employment, and sustainable

livelihoods, premised on equality and non-discrimination.[18] Chapter VII of the PwD Act is titled 'Affirmative Action', and Chapter VIII is titled 'Non-Discrimination'. Sections 42 and 43 in Chapter VII stipulate that the appropriate Governments must formulate schemes to provide aids and preferential allotment of land to persons with disabilities. Sections 44 to 47 in Chapter VIII provide for special measures in transportation, roads, built environment and employment for persons with disabilities. For instance, Section 44 states that special measures must be taken to make transport vehicles such as buses and trains, and toilets in such transport vehicles accessible to persons with disability. Section 45 stipulates that the appropriate government must endeavour to, *inter alia*, make walking on the roads for disabled persons more accessible by installing auditory signals, and engraving on the zebra crossing. Section 46 provides that a built-in environment, conducive to persons with disabilities must be provided. While Sections 44 to 46 impose positive obligations on the State to reasonably accommodate persons with disabilities, Section 47 imposes both positive and negative obligations on the Government. Sub-sections (1) and (2) of Section 47 state that the government employer must not terminate, demote or deny promotion on the ground of disability. The proviso provides a positive obligation on the employer that if the post is not suitable to the employee after acquiring disability, then he could be shifted to another post with the same pay and service benefits. However, if it is not possible to adjust the employee against any post, then he may be kept on a supernumerary post until he obtains superannuation.

[18] Commission for Social Development, *Interim Report of the Secretary General: Implementation of the World Programme of Action concerning Disabled Persons* (1999), available at https://www.un.org/esa/socdev/enable/disecne5.htm#VI.

28. Article 14 of the Indian Constitution states that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". The right to equality under the Indian Constitution has two facets – formal equality and substantive equality. While formal equality means that every person, irrespective of their attributes must be treated equally and must not be discriminated against; substantive equality is aimed at producing equality of outcomes through different modes of affirmative action. The principle of reasonable accommodation is one of the means for achieving substantive equality, pursuant to which disabled individuals must be reasonably accommodated based on their individual capacities. Disability, as a social construct, precedes the medical condition of an individual. The sense of disability is introduced because of the absence of access to facilities. This Court in **Vikas Kumar** v. **Union Public Service Commission**[19], recognised the social construction of disability and the necessity to provide reasonable accommodation to such persons to comply with the full purport of the equality provisions under the Constitution. One of us (DY Chandrachud,J) writing for the three- judge Bench observed:

> "45 The principle of reasonable accommodation acknowledges that if disability as a social construct has to be remedied, conditions have to be affirmatively created for facilitating the development of the disabled. Reasonable accommodation is founded in the norm of inclusion. Exclusion results in the negation of individual dignity and worth or they can choose the route of reasonable accommodation, where each individuals' dignity and worth is respected. Under this route, the "powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship, to permit realization of these ends."

[19] (2021) 5 SCC 370.

The provisions under Chapters VII and VIII are in furtherance of the principle of reasonable accommodation which is a component of the guarantee of equality. This has been recognised by a line of precedent. This Court in multiple cases has held that the principle of reasonable differentiation, recognizing the different needs of persons with disabilities is a facet of the principle of equality.[20] In **Jeeja Ghosh** v. **Union of India**[21], Justice A K Siri observed:

> "40. In international human rights law, equality is founded upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. **Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation."**
>
> **(emphasis supplied)**

The facets of non-discrimination that guide the PwD Act are threefold: (i) right to formal equality, where no person shall be discriminated based on her disability; (ii) affirmative action in pursuance of substantive equality under Section 33; and (iii) reasonable accommodation of persons with disabilities such as provided under Section 47. There may be no specific provision in the PwD Act – unlike the RPwD Act – which provides persons with disability the right of non-discrimination. However, since the principle of substantive equality (of providing equal outcomes through affirmative action and reasonable accommodation) is premised on the

[20] Rajive Raturi v. Union of India, (2018) 2 SCC 413; Disabled Rights Group v. Union of India, (2018) 2 SCC 397.
[21] (2016) 7 SCC 761.

principle of non-discrimination, there is no reason to hold that the principle of non-discrimination, of treating every person equally irrespective of her disability does not guide the entire statute.

29. The headings of all the provisions in Chapter III of the PwD Act use the phrase 'non-discrimination'. Section 44 reads, non-discrimination in transport; Section 25 reads as 'non-discrimination on roads'; Section 46 reads as 'non-discrimination in the built environment'; and Section 46 reads as 'non-discrimination in Government employment'. As discussed above, all these provisions are premised on the principle of reasonable accommodation in public places and places of employment. The intent behind using the phrase 'non-discrimination' in the marginal note is to emphasise that reasonable accommodation is a facet of equality and non-compliance with the principle of reasonable accommodation would amount to discrimination. By no stretch of imagination, can it be said that the principle of non-discrimination is limited to Section 47 of the PwD Act. Section 47 only provides the right of non-discrimination with regard to specific forms of discrimination during the course of employment. The general right against discrimination runs through the entire statute. The limited nature of Section 47 becomes apparent when it is compared with Section 20 of the RPwD Act. Section 20 of the RPwD Act reads thus:

> "Section 20 - Non-discrimination in employment
>
> **(1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:**
>
> 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,

> exempt any establishment from the provisions of this section.
>
> (2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.
>
> (3) No promotion shall be denied to a person merely on the ground of disability.
>
> (4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service
>
> Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits:
>
> Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.
>
> (5) The appropriate Government may frame policies for posting and transfer of employees with disabilities."
>
> **(emphasis supplied)**

30. Section 47 of the PwD Act, unlike Section 20 of the RPwD Act, does not contain a provision in the nature of sub-Section (1) of Section 20 which provides that a government establishment cannot discriminate against a person with a disability in "any matter" relating to employment. While we are not interpreting the contours of "any matter" used in Section 20 of the RPwD Act in the present case, it would suffice to say that Section 20 of the RPwD Act casts a net of protection wider than Section 47 of the PwD Act.

31. Moreover, India is a signatory to and has ratified the United Nations Convention on the Rights of Persons with Disabilities[22]. Article 5 of CRPD

[22] **"CRPD";** India ratified the Convention on 1 October 2007.

incorporates the principles of non-discrimination and equality, in both its formal and substantive forms. Article 5 reads as follows:

> "5. Equality and Non-Discrimination:
> 1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
> 2. States **Parties shall prohibit all discrimination on the basis of disability** and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
> 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention."
>
> **(emphasis supplied)**

Clause 2 stipulates that the State parties must prohibit discrimination on the basis of disability, and ensure protection against discrimination to persons with disability. Clauses 3 and 4 state that to ensure de facto equality, the States shall promote equality and non-discrimination by taking appropriate steps for reasonable accommodation, and such steps taken shall not be considered as discrimination.

32. It is settled law that if two interpretations are possible, then the interpretation which is in consonance with international law or gives effect to international law must be used.[23] Since Article 5 places the States under an obligation to provide both formal and substantive equality, an interpretation of the PwD Act that furthers the principles mentioned in Article 5 must be undertaken.

[23] Apparel Export Promotion Council v. A.K. Chopra, (1999) 1 SCC 759; Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228; Justice Khanna in ADM Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521.

Therefore, even though the PwD Act does not have an express provision laying down the general principle of non-discrimination against disabled persons, it must still have to be read in the statute.

33. Therefore, Section 47 only provides persons with disability with the right against specific forms of discrimination and not the general right of non-discrimination which runs through the entire statute but which cannot be located in a specific provision. Accordingly, the 2002 notification will also only exempt the CRPF from the duty against those specific forms of discrimination mentioned in Section 47. Correspondingly, the 2002 notification only grants the employer the privilege of discriminatory conduct in employment with respect to those acts specified under Section 47 of the PwD Act.

34. Thus, under the 2002 notification, the CRPF has the privilege to terminate, demote, or deny promotion to employees with disabilities. It also has the privilege to not abide by the principle of reasonable accommodation in re-assigning the post of an employee with a disability. However, it does not have the privilege to discriminate against a disabled employee in any other matter relating to employment. The privilege under the 2002 notification will accrue only when the disciplinary proceedings reach the stage of punishment and the respondent imposes one of the punishments mentioned in Section 47. The privilege can only accrue on the happening of one or more events that are necessary for the accrual. The accrual of the privilege cannot be based on an assumption, hope or expectation of exercising the privilege. Rule 11 of the Central Civil Services (Classification, Control and Appeal) Rules 1965 under which the disciplinary proceedings were initiated provides that the government may either impose major

penalties such as compulsory retirement, reduction to lower pay scale, or minor penalties such as censure, or withholding increments. When the disciplinary proceedings reach the punishment stage, the appellant could have still been imposed other punishments prescribed under Rule 11 which are not included within the purview of Section 47 of the PwD Act. Therefore, no privilege is accrued to the respondent under Section 47 of the PwD Act.

C.1.2 Section 102 of the RPwD Act: The Savings Clause

35. Section 102(2) of the RPwD Act states that anything done, or any action taken under the PwD Act shall be deemed to have been done or taken under the 'corresponding provisions' of the RPwD Act. The 2002 notification was issued under Section 47 of the PwD Act. The 2002 notification will be saved under Section 102 (2) only if there is a provision in the RPwD Act that is 'corresponding' to Section 47 of PwD Act.

36. A Constitution Bench of this Court in **Pankajakshi (dead) through LRs'** v. **Chandrika**,[24] had to decide a preliminary issue of whether Section 23 of the Tranvancore-Cochin High Court Act is 'corresponding' to Section 9 of the Kerala High Court Act 1958. Section 20(1) of the 1951 amendment to the Code of Civil Procedure stated, "If immediately before the date on which the said Code comes into force in any Part B State, there is in force in that State any law corresponding to the said Code, that law shall on that date stand repealed". It was held that the test that needs to be applied to identify if two statutes are 'corresponding' is whether *firstly,* the subject- matter of the two statutes is essentially the same; and

[24] (2016) 6 SCC 157.

secondly, the main object and purpose are substantially similar. It was held that both the Acts are not substantially similar since the object of the Travancore Act is to lay down the jurisdiction and powers of the High Court, while the object of the Civil Procedure Code was to lay down the procedure in civil matters alone.

37. In **Kalpana Kothari** v. **Sudha Yadhav**[25], one of the issues before the two-Judge Bench of this Court was whether Section 8 of the Arbitration and Conciliation Act 1996[26] corresponds to Section 34 of the Arbitration Act 1940. Section 34 provided for staying legal proceedings instituted when there is an arbitration proceeding. However, Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is an arbitration agreement. Therefore, it was held that both the provisions do not correspond to each other.

38. The test laid down in **Pankajakshi** (supra) is to identify corresponding statutes. That test cannot be applied to identify corresponding provisions, since a much more specific analysis will have to be undertaken. A provision is corresponding to another not merely if the provision deals with the same subject matter. Rather, the test must be whether both the provisions are essentially similar. If Section 47 of the PwD Act corresponds to Section 20 of the RPwD Act, then the 2002 notification will be deemed to have been issued under Section 20, and would hold the force of law. A comparison of Section 47 of the PwD Act and Section 20 of the RPwD Act is given below:

Section 47 of PwD Act	**Section 20 of RPwD Act**
47. Non-discrimination in Government employments.— (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a	**20. Non-discrimination in employment**.— (1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:

[25] (2002) 1 SCC 203.
[26] **"1996 Act"**

disability during his service: Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits: Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. (2) 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.	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, exempt any establishment from the provisions of this section. (2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability. (3) No promotion shall be denied to a person merely on the ground of disability. (4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service: Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits: Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. (5) The appropriate Government may frame policies for posting and transfer of employees with disabilities.

Section 20 of the RPwD Act covers a wider ambit when compared to Section 47 of the PwD Act. Section 20(1) provides for non-discrimination based on disability, which is a provision in pursuance of the equality mandate in Article 5 of CRPD. Section 20(2) states that reasonable accommodation and a conducive environment free from barriers must be provided to persons with disabilities. However, the provisions of Section 47 of the PwD Act only provide a right to the employee to not be demoted, terminated, or denied promotion because of disability, and reasonable accommodation by adjusting posts. The principle of reasonable accommodation provided under Section 20(2) is not restricted to the accommodations mentioned in Section 47. For example, under Section 20(2), the employer has a duty – in view of the principle of reasonable accommodation – to

post a person suffering from disability at a place closer to home. This form of reasonable accommodation is not provided under Section 47, though it may flow through the PwD Act. Therefore, Section 20 of the RPwD Act is not corresponding to Section 47 of the PwD Act. If any other interpretation is placed, then the 2002 notification would be deemed to exempt other rights that are available to disabled persons under Section 20 of the RPwD Act, which were not otherwise exempted under the PwD Act. Since there is no corresponding provision, the exemption notification issued under Section 47 of the PwD Act will lose the force of law. Therefore, in view of the discussion on both Section 6 of the GCA and Section 102 of the RPwD Act, the provisions of the PwD Act and the 2002 notification are not applicable to the proceedings before us.

39. Since, the writ petition was filed before the Single Judge of the High Court in 2015, before the enactment of the RPwD Act, the validity of the disciplinary proceedings could have only been decided on the anvil of the provisions of the PwD Act. However, the Single Judge ought not to have entered into the issue of the applicability of Section 47 of the PwD Act when the disciplinary proceedings were challenged at the initial stage since as observed above, Section 47 applies only at the punishment stage. The only question before the High Court was whether it was justified for CRPF to have initiated disciplinary proceedings against the appellant for the alleged misconduct which was connected to his mental disability and whether the initiation of such proceedings was discriminatory.

40. At the relevant point of time, when the intra-court appeal was filed against the judgement of the Single Judge, the RPwD Act had come into force. However,

since no privilege had accrued to the respondent under the PwD Act, and the 2002 notification was not saved under Section 102 of the RPwD Act, the Division Bench should have decided the intra-court appeal on the provisions of the RPwD Act. This would entail that the appellant became entitled to the rights under Section 20 of the RPwD Act at the time when the intra-court appeal was being heard. When the appellant was before the Division Bench of the High Court, he was already diagnosed with a permanent disability of 40 to 70 percent by Dr Ram Manohar Lohia Hospital, which is a government hospital. Further, the Composite Hospital by a report dated 18 July 2016, declared the appellant unfit for duty and placed him under the S5(P) category due to his partial and limited response to all modalities of treatment since 2009. The Division Bench also noted that the documents issued by the CRPF's hospital indicate that the appellant has had a mental disability for a long time. In such circumstances, it was not appropriate for the High Court to restore the disciplinary proceeding on the ground that a factual determination of the disability of the appellant is to be established through such a proceedings.

C.1.3 A New Dawn: Appellant's Rights under the RPwD Act

41. Section 3 of the RPwD Act states that persons with disabilities must not be discriminated against on the ground of disability, and the appropriate government shall ensure that persons with disability enjoy the right to live with dignity. Section 2(h) of the RPwD Act defines discrimination as follows:

> "(h) "discrimination" in relation to disability, means any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the

> recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation;"

Section 20 of the RPwD Act states that no government establishment shall discriminate against any person with a disability in matters relating to employment. The disabled employee also has a right to reasonable accommodation and to access a workplace without barriers. It further provides that no disabled employee shall be terminated, reduced in rank, or denied promotion because of the disability. Before proceeding to the merits of the case on the validity of the disciplinary proceedings vis-a-vis the provisions of the RPwD Act, the applicability of the 2021 notification to the facts of the present case will have to be determined. As explained above, on the repeal of the PwD Act by the RPwD Act, the 2002 Notification also lost its force of law. Between 27 December 2016, when the RPwD Act had come into force and 18 August 2021, when the 2021 notification was issued, there was no exemption notification in force. The Special Leave Petition was instituted on 5 October 2020. In **Ambalal** (supra), it was held that when a lis commences, all rights and obligations of the parties get crystallised on that date. Therefore, the rights of the parties would freeze as on the date of filing the Special Leave Petition. In the Special Leave Petition filed before this Court, it was submitted that the initiation of disciplinary proceedings is discriminatory and violative of the provisions of the RPwD Act. Therefore, the right to non-discrimination in matters of employment provided under Section 20, accrued to the appellant on the filing of the Special Leave Petition since the 2021 notification had not been notified at the relevant time. Thus, the 2021 notification would have no application to the facts of this case.

C. 2 Mental Disability and Discrimination

Before proceeding to analyse the validity of the disciplinary proceedings under the provisions of the RPwD Act, we find it imperative to refer to the national and international legal framework governing the rights of persons with mental disabilities.

C.2.1 The Indian Legal Framework

42. The National Mental Health Survey of India 2015-16 (Prevalence, Pattern and Outcomes), was a study undertaken by the Ministry of Health and Family Welfare, Government of India in collaboration with the National Institute of Mental Health and Neuro Sciences, Bengaluru. The survey estimated that nearly 150 million individuals in India suffer from one or more mental illnesses.[27] The Indian Lunacy Act 1912 was enacted to provide treatment and care for lunatic persons. Section 3(5) defined a 'lunatic' as an idiot or a person of unsound mind. The Act dealt with the treatment of lunatics in asylums, and the procedure for the 'treatment' of such persons. The Act proceeded on the premise that 'lunatics' are dangerous for the well-being of society and the fellow humans who inhabit the planet. Section 13 of the Act provided wide powers to the police officers to arrest persons whom they have reason to believe to be 'lunatics'.

43. The Mental Health Act 1987[28] was enacted, as the Preamble states, 'to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs". This

[27] G Gururaj, M Varghese et. al., *National Mental Health Survey of India, 2015-16: Prevalence, patterns and outcomes*, (2016) NIMHANS Publication No 129, available at http://indianmhs.nimhans.ac.in/Docs/Report2.pdf.
[28] **"1987 Act"**

Act replaced the Indian Lunacy Act. The 1987 Act was a huge transformative leap from the Lunacy Act which did not confer any right to live a life of dignity to mentally ill persons. However, even the 1987 Act did not confer any agency or personhood to mentally ill persons. The Act did not provide a rights-based framework for mental disability but was rather restricted to only establishing psychiatric hospitals and psychiatric nursing homes, and administrative exigencies of such establishments. Under the Act, the 'mentally ill person' was defined as a person 'who is in need of treatment by reason of any mental disorder other than mental retardation'.

44. The Mental Healthcare Act 2017[29] was enacted by Parliament in pursuance of India's obligations under CRPD, repealing the 1987 Act. Section 2 (s) of the 2017 Act defines 'mental illness' as follows:

> "(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;"

Section 2(o) of the Act defines 'mental healthcare' to include both the diagnosis of the mental health condition of persons and rehabilitation for such persons with mental illness:

> "(o) "Mental healthcare" includes analysis and diagnosis of a person's mental condition and treatment as well as care and rehabilitation of such person for his mental illness or suspected mental illness;"

[29] **"2017 Act"**

Section 18(1) provides that every person shall have a right to access mental healthcare and treatment in Government-run or funded hospitals. Sub-Section (2) of Section 18 states that the right to access mental health care shall be available to everybody equally, without any discrimination based on gender, sex, caste, political belief or such. It further states that the treatment shall be provided in the manner that is acceptable by the persons having mental illness and their caregivers. Sub-Section (1) of Section 19 states that every person with mental illness shall have a right to live in, be part of and not be segregated from society. Section 20 of the Act states that every person with mental illness shall have a right to live with dignity, and shall have a right to be protected from inhuman treatment in mental healthcare establishments. Section 30 stipulates that the appropriate government shall take measures to ensure that the provisions of the Act are given wide publicity through various forms of media. Clause (b) of Section 30 states that programmes to reduce the stigma associated with mental illness must be planned and implemented. Section 30(c) states that 'appropriate government officers including police officers and other officers must be provided appropriate awareness and sensitization on mental health'. Section 115 of the 2017 Act states that notwithstanding anything in Section 309 of the Indian Penal Code, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the Penal Code.

45. The 2017 Act provides a rights-based framework of mental healthcare and has a truly transformative potential. In stark difference from the provisions of the 1985 Act, the provisions of the 2017 Act recognise the legal capacity of persons

suffering from mental illness to make decisions and choices on treatment, admission, and personal assistance. Section 2(o) includes within the definition of mental healthcare – diagnosis, treatment, and rehabilitation. Section 4 of the Act states that every person with mental illness shall be 'deemed' to have the capacity to make decisions regarding their mental healthcare and treatment if they are able to understand the relevant information, and the reasonably foreseeable consequence of their decision. Sub-Section (3) of Section 4 states that merely because the decision by the person is perceived inappropriate or wrong by 'others', it shall not mean that the person does not have the capacity to make decisions. The recognition of the capacity of persons living with mental illness to make informed choices is an important step towards recognizing their agency. This is in pursuance of Article 12 of CRPD which shifts from a substitute decision-making model to one based on supported decision-making.[30] Article 12 of CRPD reads as follows:

> "Article 12 – Equal recognition before the law
>
> 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> 2. States Parties shall recognise that persons with disabilities **enjoy legal capacity on an equal basis with others in all aspects of life.**
>
> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.[…]"
>
> **(emphasis supplied)**

[30] Explanation 1 to Article 12 CRPD by UN CRPD.

46. Explanation 1 to Article 12 issued by the United Nations Committee on the Rights of Persons with Disabilities discusses the 'universal legal capacity' where all persons *inherently* possess legal capacity regardless of disability or decision-making skills.[31] They may however be provided with *support* (and not *substitution)* to exercise their legal capacity. This shift from the substituted legal capacity model to the supported legal capacity model is important for two reasons. It recognises the agency held by disabled persons; and adopts a social model of disability. It has been recognised by various scholars that the 2017 Act is one of the most robust rights-based frameworks to tackle mental health concerns.[32]

47. The Indian mental healthcare discourse has undergone a substantial and progressive change. Persons living with mental illness were considered as 'lunatics' under the Indian Lunacy Act 1912 and were criminalized and subject to harassment. There was a moderate shift in the mental health discourse with the repeal of the Lunacy Act 1912 and the enactment of the 1987 Act. However, the transformation in the mental health rights framework was profound when the 2017 Act was enacted since it placed a person having mental health issues within the rights framework.

C.2.2 Mental Health in the Disability Rights Framework

48. Section 2(i) of the PwD Act defines the phrase 'disability' to mean mental retardation and mental illness among others. Section 2(q) defines mental illness

[31] ibid
[32] Richard M Duffy, Bredan D Kelly, *Concordance of the Indian Mental Healthcare Act 2017 with the World Health Organization's Checklist on Mental Health Legislation*, 11(1) International Journal of Mental Health Systems 48 (2017), available at https://ijmhs.biomedcentral.com/articles/10.1186/s13033-017-0155-1
[32] (2018) 5 SCC 1.

as a mental disorder other than mental retardation. Section 2(r) defines mental retardation as a condition of incomplete development of a person which is especially characterized by sub-normal intelligence. On the other hand, mental illness is classified as a specified disability under the RPwD Act. The schedule to the Act provides an expansive and clearer definition of mental illness, which is *pari materia* to the definition of mental illness under the 2017 Act. It is defined as follows:

> "(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;"

49. Section 2(s) of the RPwD Act defines the word 'person with disability' as 'person with a long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in the society equally with others'. Section 2 (c) defines barrier to mean 'any factor including communicational, cultural, economic, environmental, institutional, political, social, attitudinal or structural factors which hampers the full and effective participation of persons with disabilities in society.' On a combined reading of the definitions provided in Section 2(s) and 2 (c) of the Act, it is evident that the RPwD – similar to the 2017 Act – defines disability as a social construct and not solely as a medical construct. The Act does not define a mental impairment to solely constitute a disability. Rather, it defines disability based on

the interaction of the impairment with the barriers which in effect hamper the effective participation of an individual.

50. The Indian judiciary has also been cognizant of the discourse surrounding mental illness and the social construction model of mental disability. In **Common Cause** v. **Union of India**[33]**,** while deciding on the constitutional validity of passive euthanasia, the Constitution Bench made pertinent observations on Section 115 of the 2017 Act which renders Section 309 of the Indian Penal Code largely ineffective, emphasising the necessity to view the act of committing suicide as an act of circumstances (or in other words 'barriers'). It was observed:

> "366. [..]It mandates (unless the contrary is proved by the prosecution) that a person who attempts to commit suicide is suffering from severe stress. Such a person shall not be tried and punished under the Penal Code. Section 115 removes the element of culpability which attaches to an attempt to commit suicide under Section 309. It regards a person who attempts suicide as a victim of circumstances and not an offender, at least in the absence of proof to the contrary, the burden of which must lie on the prosecution. Section 115 marks a pronounced change in our law about how society must treat an attempt to commit suicide. It seeks to align Indian law with emerging knowledge on suicide, by treating a person who attempts suicide needing care, treatment and rehabilitation rather than penal sanctions."

51. In the concurring opinion authored by one of us (Dr DY Chandrachud, J) in **Navtej Singh Johar** v. **Union of India**[34], the mental health concerns of the LGBT community were highlighted. A reference was made to global psychiatric scholarship which emphasized that there is a clear correlation between the political and social environments, and the mental health of an individual.

[33] (2018) 5 SCC 1.
[34] (2019) 3 SCC 39.

Observing that laws persecuting sexual minorities and the societal stigma psychologically affect the well-being of the community, it was said:

> "95. […]The repercussions of prejudice, stigma and discrimination continue to impact the psychological well-being of individuals impacted by Section 377. Mental health professionals can take this change in the law as an opportunity to re- examine their own views of homosexuality.
> 96. Counselling practices will have to focus on providing support to homosexual clients to become comfortable with who they are and get on with their lives, rather than motivating them for change. Instead of trying to cure something that isn't even a disease or illness, the counsellors have to adopt a more progressive view that reflects the changed medical position and changing societal values. There is not only a need for special skills of counsellors but also heightened sensitivity and understanding of LGBT lives. The medical practice must share the responsibility to help individuals, families, workplaces and educational and other institutions to understand sexuality completely in order to facilitate the creation of a society free from discrimination228 where LGBT individuals like all other citizens are treated with equal standards of respect and value for human rights."

Justice Nariman in his concurring opinion, commented on Section 115 of the 2017 Act. He highlighted the affirmative duty of the Government to provide care, treatment and rehabilitation to persons having mental health issues. The judgment also observed that Section 115 of the 2017 Act has been enacted in furtherance of constitutional values:

> "76. This Parliamentary declaration under Section 115 again is in keeping with the present constitutional values, making it clear that humane measures are to be taken by the Government in respect of a person who attempts to commit suicide instead of prosecuting him for the offence of attempt to commit suicide."

52. In **Accused X** v. **State of Maharashtra**[35], a three judge Bench of this Court was deciding whether post-conviction mental illness could be a mitigating factor for commuting the punishment from death sentence to life imprisonment.

[35] (2019) 7 SCC 1.

Holding that post-conviction mental illness could be a mitigating factor, it was observed:

> "59. All human beings possess the capacities inherent in their nature even though, because of infancy, disability, or senility, they may not yet, not now, or no longer have the ability to exercise them. When such disability occurs, a person may not be in a position to understand the implications of his actions and the consequence it entails. In this situation, the execution of such a person would lower the majesty of law."

53. In **Mahendra KC** v. **The State of Karnataka**[36], a first information report was lodged against the accused person on the charge of abetment to suicide under Section 306 of the Indian Penal Code 1860. A petition to quash the proceedings was filed under Section 482 CrPC. The Single Judge of the High Court, while quashing the proceedings against the accused made observations diminishing the importance of mental health. The High Court had observed as follows:

> "37. It is not the case of the deceased that the accused had deprived him of his wealth or have committed acts that have shattered his hopes in life or separated him from his family and friends.
>
> […]
>
> 41. [..] It is not the case of the prosecution that the deceased was running away from or escaping the petitioner or his henchmen, but as is his habit, to visit his parents and to spend time with his friends. If the deceased had really felt threatened, he would have definitely approached the police. It is not that he was naive or not worldly-wise. If his employment with the petitioner was true, then the Police Commissionerate was only a stone's throw away. It is not that the deceased was a weakling. The deceased by profession, is a driver. A profession where, accidents causing loss of life and limb are a daily occurrence and every driver is aware that he could be involved in an accident at any time.
> 43. His act of attending a relatives marriage in a different town and his interacting with friends and relatives are all actions of a normal person and not of a person under

[36] 2021 SCC OnLine SC 1021.

> severe duress. The contention that this criminal case would jeopardize his career progression also cannot be brushed aside. It is also not forthcoming as to how he sourced the poison."

A two judge Bench of this Court, of which one of us was a part (DY Chandrachud, J), observed that these remarks of the Single Judge gravely undermined the mental health discourse in India. It was observed:

> "The Single Judge has termed a person who decided to commit suicide a 'weakling' and has also made observations on how the behavior of the deceased before he committed suicide was not suitable of a person who is depressed and suffering from mental health issues. Behavioural scientists have initiated the discourse on the heterogeneity of every individual and have challenged the traditional notion of 'all humans behave alike'. Individual personality differences manifest as a variation in the behavior of people. Therefore, how an individual copes up with a threat- both physical and emotional, expressing (or refraining to express) love, loss, sorrow and happiness, vary greatly in view of the multi-faceted human mind and emotions. Thus, observations describing the manner in which a depressed person ought to have behaved deeply diminishes the gravity of mental health issues."

Since disability is a social construct dependent on the interplay between mental impairment with barriers such as social, economic and historical among other factors, the one – size fits all approach can never be used to identify the disability of a person. Disability is not universal but is an individualistic conception based on the impairment that a person has along with the barriers that they face. Since the barriers that every person faces are personal to their surroundings – inter-personal and structural, general observations on 'how a person ought to have behaved' cannot be made.

54. The legislative framework and decisions of this Court on the impact of 'barriers' or circumstances on the mental health of an individual have been

discussed above. When the interaction with the barriers causes a person to feel 'disabled', it is extremely important to not stigmatize or discriminate against persons having mental health issues or any other form of disability. Such discrimination would only further entrench the feeling of being 'disabled'.

C.2.3 A Global Outlook on Employment and Mental Health

55. International conventions like the CRPD recognise mental health disorders as psychosocial disabilities.[37] Psychosocial disability is sometimes characterised as an "invisible disability" because it is not always obvious, unlike other disabilities that are observable. Employees often do not disclose their mental health disorders, which leads to the invisibilization of psychosocial disabilities.[38] The World Health Organisation and the World Psychiatric Association identify stigma as a major cause of discrimination against persons with mental health disorders. Many people with mental health disorders are willing and able to work. However, socio-structural barriers impede their participation in the workforce. People diagnosed with mental health disorders are less likely to be employed or are relegated to low-paying jobs that are not commensurate with their qualifications and interests. Exclusion from the workforce not only creates conditions of material deprivation, but it also impacts self-confidence, and results in isolation and marginalization which exacerbates mental distress. To escape stigma and discrimination, persons with mental health issues painstakingly attempt to hide their illnesses from co-workers and managers. Disclosure of

[37] Committee on Rights of Persons with Disabilities, General Comment 1, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement

[38] H Kranz, *Calling in Depressed: A Look at the Limitations of Mental Illness in the Workplace*, SayNoToStigma (2012), available at http://saynotostigma.com/2012/06/calling-in-depressed-a-look-at-the-limitations-of-mental-illness-in-the-workplace.

mental health status carries with it the possibility of being demoted, laid off, or being harassed by co-workers. Resultantly, persons with mental health disorders deprive themselves of workplace assistance and effective treatments that can improve their mental health.[39]

56. The stigmatization of mental health disorders is rooted in the characterization of individuals with mental illness as "violent and dangerous, dependent and incompetent, and irresponsible."[40] Such characterization not only influences how persons with mental health disorders are perceived by others but also influences their self-worth. Mental health disorders are often attributed to an internal cause, for which the person is held responsible. This aggravates the stigma and prejudice. Even if a person with a mental health disorder learns to cope with it or goes into remission, past episodes and possibilities of future episodes put them at a disadvantage in securing and sustaining employment.[41]

57. Thus, while the stigma and discrimination against persons with mental health disorders are rampant in society, as the highest constitutional court of the country, it falls upon us to ensure that societal discrimination does not translate into legal discrimination. International conventions provide a framework through which States can shape their laws and policies upholding the rights of persons with mental disabilities in tandem with internationally recognised standards.

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[39] Heather Stuart, *Mental illness and employment discrimination,* 19(5) Current Opinion in Psychiatry 522–526 (2006).
[40] Arunima Kapoor, *Depressed People Need Not Apply: Mental Health Stigma Decreases Perceptions of Employability of Applicants with Depression*, 7 Yale Review of Undergraduate Research in Psychology 84-94 (2017), available at https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/a/1215/files/2017/06/Arunima-1amuxqj.pdf
[41] Ibid

58. CRPD is an international human rights treaty of the United Nations which is intended to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.[42] It also aims to promote respect for their inherent dignity.[43] It is a holistic treaty that combines civil and political rights provided by anti-discrimination legislation along with an array of social, cultural, and economic measures to fulfil the guarantee of equality.[44] India is a signatory to CRPD and has ratified it on 1 October 2007. Article 1 of the CRPD provides an inclusive definition of persons with disabilities. It recognises that disability is an evolving concept and that disability results from the interaction of persons with impairments with attitudinal and environmental barriers that hinders their full participation in society[45]. Article 1 states thus:

> "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

59. The Committee on the Rights of Persons with Disabilities, which monitors the implementation of CRPD in General Comment One[46] discusses the rights of persons with cognitive or psychosocial disabilities in the context of Article 12 of the CRPD. Article 12 states that persons with disabilities have the right to equal recognition before the law. The Committee notes that persons with cognitive or psychosocial disabilities are often denied legal capacity and are disproportionately subjected to substitute decision-making regimes. The

[42] Article 1, CRPD 2006.
[43] Ibid.
[44] Jayna Kothari, *The UN Convention on Rights of Persons with Disabilities: An Engine for Law Reform in India*, 45(18) Economic and Political Weekly 65-72 (2010).
[45] Preamble, CRPD 2006.
[46] Committee on Rights of Persons with Disabilities, General Comment 1, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement

Committee notes that, "[m]ental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity." While the present case does not deal with the legal capacity of persons with mental health disorders, it is imperative to note that the CRPD recognises mental health conditions as psychosocial disabilities[47]. Staying true to the social model of disability, the Committee acknowledges that assessments of mental capacity are informed by social and environmental factors. The recognition of the legal capacity of persons with psychosocial disabilities confers on them legal personhood, where they can be a bearer of rights and exercise those rights.

60. Article 2 of the CRPD defines discrimination on the basis of disability in the following terms:

> "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation"

61. While the CRPD recognises the denial of reasonable accommodation as discrimination based on disability, it also specifically imposes a positive duty on States under Article 5 (3) to take all appropriate steps to ensure the provision of reasonable accommodation.

[47] See also, Brendan D. Kelly, *Mental Capacity, Human Rights, and the UN's Convention of the Rights of Persons with Disabilities*, 49(2) Journal of the American Academy of Psychiatry and the Law Online 152-156 (2021), available at http://jaapl.org/content/jaapl/49/2/152.full.pdf

62. Article 27 of the CPRD in the context of work and employment, *inter alia*, imposes the following obligations on State Parties to:

(i) Recognise the right to work and employment of persons with disabilities;

(ii) Prohibit discrimination in matters of employment; and

(iii) Provide reasonable accommodation at the workplace.

The relevant provisions of Article 27 are extracted below:

> "(1) States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. **States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation**, to, inter alia:
>
> (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
>
> (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances...
>
> …
>
> **(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace**
>
> …
>
> **(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities**."
>
> **(emphasis added)**

63. The Committee on the Rights of Persons with Disabilities in General Comment Six[48] provides that to achieve de facto equality in the workplace and to fulfil the duty of providing reasonable accommodation under Article 5 (3), the States parties, *inter alia*, should:

(i) Promote the right to supported employment, which includes work assistance;

(ii) Recognise denial of reasonable accommodation as discrimination and also prohibit multiple and intersectional discrimination and harassment;

(iii) Allow proper transition into and out of employment in a non-discriminatory manner; and

(iv) Provide equal and effective access to benefits and entitlements, such as retirement and unemployment benefits. These entitlements must not be infringed through exclusion from employment, aggravating the situation of exclusion.

64. The International Labour Organization[49] has created the Code of Practice in Managing Disability in Workplace 2002[50] to guide employers to adopt a positive strategy in managing disability-related issues in the workplace.[51] It is a normative document and is intended to be read in the context of local conditions and applied according to national law and practice.[52] Section 1.4 of the ILO Code

[48] Committee on the Rights of Persons with Disabilities, General Comment 6, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en
[49] "**ILO**"
[50] "**ILO Code**"
[51] International Labour Organization, *Managing Disability in the Workplace: ILO Code of Practice*, available at https://www.ilo.org/global/topics/safety-and-health-at-work/normative-instruments/code-of-practice/WCMS_107777/lang--en/index.htm
[52] Ibid.

defines a 'disabled person' as a person whose prospects to secure, return to, retain, and advance in suitable employment are substantially reduced due to a duly recognised physical, sensory, intellectual or mental impairment. Section 6 of the ILO Code deals with job retention of employees with disabilities. Under this section, sub-section 6.1 provides the policy on acquired disabilities. The sub-section reads thus:

> "**6.1.1. Where existing employees acquire a disability while in employment, employers can continue to benefit from their accumulated expertise and experience by taking steps to enable them to retain their employment. In developing a strategy for managing disability in the workplace, employers should include measures for job retention including:**
>
> **(a) early intervention and referral to appropriate services;**
>
> **(b) measures for a gradual resumption of work;**
>
> **(c) opportunities for workers with disabilities to test work or obtain experience in an alternative job if they are unable to resume their previous jobs;**
>
> **(d) the use of support and technical advice to identify any opportunities and any adjustments which might be required.**
>
> 6.1.2. In seeking to facilitate job retention or return to work by a disabled employee, employers should be aware of the range of possible options. In some cases, the employee may be able to return to the same job as before, with no changes. In other cases, some adjustments may be required to the job itself, to the workstation or the working environment. In yet other cases, it may be necessary for the person to move to a different job in the workplace. The disability management strategy should include measures to promote job retention in each of these forms. These may include training or retraining for the person concerned, the provision of information to supervisors and co-workers, the use of devices and appliances, the right to access to other supports as appropriate, as well as modifications or alternative options in the procedures needed to perform the job so that any existing condition is not exacerbated.

> 6.1.3. In developing measures for the redeployment of workers with disabilities, employers should take into account the occupational preferences of those workers and consult with worker representatives, if necessary.
>
> **6.1.4. When a worker acquires a disability, the employer should ensure that accommodation measures are fully considered in order to utilize the residual potential and skills of that worker, before other steps are taken**.
>
> 6.1.5. The competent authorities should provide guidance, services and incentives to employers, groups of employers and employers' organizations, in order to maximize opportunities for people with disabilities to retain their employment, and to resume work speedily following an accident, injury, disease, changed capacity or disabling condition. **These could include measures which allow for individual counselling, individual rehabilitation plans or job retention programmes, aiming to promote opportunities for these workers in their current or another occupation in which they can make use of their talents and experience, as far as possible without loss of earnings.** Such measures should be developed in consultation with employers' organizations and workers' organizations, relevant professionals and organizations of persons with disabilities."
>
> **(emphasis supplied)**

65. The discussion above indicates there is an international consensus that persons with mental health disorders have a right against workplace discrimination and are entitled to reasonable accommodation. Both the CRPD and the ILO Code promote policies of job retention and rehabilitation for persons with mental disabilities. While CRPD has been instrumental in shaping mental health legislation in many countries, specifically in terms of access to treatment and protecting patient autonomy[53], it is imperative that the discourse on persons with mental health disorders is not limited to biomedical and health issues. The

[53] Brendan D. Kelly, Mental Health, *Mental Illness, and Human Rights in India and Elsewhere: What are we aiming for?*, 58 (Suppl 2) Indian Journal of Psychiatry S168-S174 (2016), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5282611/.

discourse needs to expand to fundamental issues of housing, education, support, and employment. The present case presents one such opportunity.

C.4. Discipline and Punish: The Validity of the Disciplinary Proceedings

66. A much more formative question that remains is whether disciplinary proceedings against the appellant constitute workplace discrimination. This question has important repercussions for persons with mental disabilities who find themselves falling foul of the standards of workplace conduct on account of their disability. In such instances, disciplinary proceedings may take the form of discrimination because a person with a mental disability may have an impaired ability to comply with workplace standards. Often the process of the disciplinary proceedings is the punishment. Since in section C.1.3 of the judgment, we have established that provisions of the RPwD Act would be applicable to the case before us, we will examine the validity of the proceedings under the RPwD Act.

67. The jurisprudence in Indian law relating to mental disability and employment discrimination has revolved around Section 47 of the PwD Act. This Court while interpreting Section 47 has held that the provision is applicable when the mental disability is acquired during service. While applying Section 47, the Court did not enter into an analysis of whether the mental disability was a factor or had a direct causal connection with the alleged misconduct that led to the dismissal.[54] Thus, a different standard applies to cases governed by Section 47. It is important to clarify that the analysis that we undertake below in examining

[54] Geetaben Ratilal Patel v. District Primary Education Officer (2013) 7 SCC 182.

whether disciplinary proceedings can constitute discrimination against persons with disabilities will not influence the jurisprudence on Section 47 of the PwD Act.

68. Here we are assessing the preliminary question of whether disciplinary proceedings can be instituted against the atypical conduct of an employee who has a mental disability. Section 47 comes into play only at the stage of impositions of sanctions, where an employee cannot be dispensed with or reduced in rank.

69. Since the jurisprudence on this issue is yet to evolve in India, we have analyzed the legal policies and practices adopted by other jurisdictions in relation to the rights of persons with mental disabilities against employment discrimination. We have also specifically examined how courts in other jurisdictions have adjudicated misconduct charges when the alleged conduct is found to be connected to the mental disability of the employee.

C.4.1 Foreign Jurisdictions

I United States

70. The Americans with Disabilities Act[55] was enacted in 1990 to lay down a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities".[56] ADA covers such individuals who have a physical or mental impairment that substantially limits one or more of the major life activities.[57] Title I of the ADA prohibits employment discrimination because of the disability of an individual in respect of job application procedures, hiring,

[55] "**ADA**"
[56] 42 U.S.C. § 12101(b)(1).
[57] 42 U.S. C. § 12102 (1).

advancement, discharge of employees, employee compensation, training, or other terms, conditions, and privileges of employment.[58] The Rehabilitation Act 1973, which applies to employers receiving federal funds was a precursor to the ADA and presently applies to federal agencies in relation to disability-related claims. The standards of ADA apply for assessing violations under the Rehabilitation Act 1973.[59]

71. ADA encapsulates denial of reasonable accommodation as discrimination unless the employer can demonstrate that the accommodation casts an undue hardship on the business operations.[60] Reasonable accommodation measures under the ADA include making existing facilities accessible and usable by persons with disabilities, restructuring jobs, modifying work schedules, and re-assignment to vacant positions.[61] An employer is not required to accommodate an employee with a disability if they pose a direct threat to the safety of others that cannot be mitigated by reasonable accommodation.[62] In **Borgialli** v. **Thunder Basin Coal Co.**[63], a coal mine blaster was diagnosed with multiple mental health disorders including depression, anxiety, and personality disorders. He was discharged because of the threats he made about injuring himself and others. The Court of Appeals, Tenth Circuit held that he posed a direct risk to the safety of others and himself, especially because he worked with high-power explosives. Further, an employer does not have the duty to eliminate essential functions or the fundamental duties of an employment position to reasonably

[58] 42 U.S. C. § 12112.
[59] Major William E. Brown & Major Michele Parchman, *The Impact of the Americans with Disability Amendments Act of 2008 on the Rehabilitation Act and Management of Department of the Army Civilian Employees*, 1 Army Lawyer 43 (2010).
[60] Ibid.
[61] 42 U.S.C. § 12111.
[62] 42 U.S.C. § 12113.
[63] 235 F.3d 1284,. 1290 (10 th Cir.2000).

accommodate an employee with a disability. However, the employer must take into consideration if such essential functions can be performed with reasonable accommodation.[64]

72. The Equal Employment Opportunity Commission[65], which is empowered to enforce Title I of the ADA, in its enforcement guidance relating to mental health conditions has observed that while employers do not have to hire persons who cannot perform a particular employment duty or pose a direct threat to the safety of others and self, the employer "cannot rely on myths or stereotypes" in relation to mental health conditions. There must be some objective evidence to the effect that even with reasonable accommodation a person with a mental disability cannot perform the required tasks, or they pose a safety risk. The guidance also provides examples of reasonable accommodation for persons with a mental disability that include quiet office space, changes in supervisory methods, and permission to work from home.[66] However, the employer's duty to reasonably accommodate a person is prospective, i.e., it is triggered when the employee informs the employer of the disability and requests an accommodation. For instance, the Court of Appeals for the Federal Circuit held that an employer was not obligated to accommodate a plaintiff's depression and alcoholism (considered as a disability under ADA) before it knew of it. [67] In many cases, especially relating to misconduct-related discharges, employees fail to request

[64] US Equal Employment Opportunity Commission, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_13_; Also, see Regulations To Implement The Equal Employment Provisions Of The Americans With Disabilities Act.
[65] "**EEOC**"
[66] EEOC, Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights, available at https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights
[67] Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1107 (Fed. Cir. 1996) cited in Ibid.

accommodation before engaging in the misconduct, which results in negative outcomes for their discrimination-related claims.[68] It has been argued that giving a "second chance" to the employee can be classified as a reasonable accommodation where the employee has failed to ask for reasonable accommodation prospectively and has committed misconduct. [69]

73. Commentators have noted that under the ADA, persons with mental health disorders have not fared as well as those with physical disabilities and have not been able to capitalize on the gains of the disability rights movement.[70] A crucial issue that comes up before courts is whether a person having mental disabilities can be discharged on account of misconduct. Many mental disabilities manifest themselves in conduct. In the United States, most courts have held that employees with disabilities who engage in misconduct are not protected by the ADA. In **Hamilton** v. **Southwestern Bell Telephone Co.**[71], the US Court of Appeals, Fifth Circuit held that discharge of an employee with PTSD was not discrimination based on a disability rather it was the failure of the employee to "recognise the acceptable limits of behaviour in a workplace environment." However, few courts have held that if an employee is discharged because of conduct causally connected to disability, it constitutes discrimination and violates ADA unless the person is not qualified for the job.[72] In **Teahan** v. **Metro-North**

[68] Bugg-Barber v. Randstad US, L.P., 271 F. Supp. 2d 120, 130 (D.D.C. 2003); Burmistrz v. City of Chi., 186 F. Supp. 2d 863, 875 (N.D. Ill. 2002).
[69] Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 Syracuse Law Review 931, 967, 973 (1997).
[70] Jeffrey Swanson et al, *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66(1) Maryland Law Review 94 (2007).
[71] 136 F.3d 1047, 1052 (5th Cir. 1998).
[72] Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 Florida Law Review 187, 188-89 (2005).

Commuter Railroad,[73] the plaintiff had raised a discrimination claim under the Rehabilitation Act 1973. The plaintiff had a substance abuse problem and regularly remained absent from work. His employment was terminated because of absenteeism. The Court of Appeals, Second Circuit held that there cannot be any distinction between the "handicap and its consequences". Thus, if the plaintiff can prove that his absenteeism was solely a consequence of substance abuse, his discharge would constitute discrimination based on a disability. Likewise, in **Den Hartog** v. **Wasatch Academy**,[74] the Court of Appeals, Tenth Circuit rejected the division between disability and disability-related conduct under the ADA regime. It recognised that mental health disorders present themselves as atypical behaviour. It held that, "[t]o permit employers carte blanche to terminate employees with mental disabilities on the basis of any 'abnormal' behaviour would largely nullify the ADA's protection of the mentally disabled". The court further held that the employer should first assess if the misconduct can be remedied by a reasonable accommodation measure. If that is not possible, the employer can terminate the employment only if any express defence applies such as the "direct threat" defence or if the rules that have been violated are "job-related" and are a "business necessity". Otherwise, the court observed, if the employee can perform essential functions of the job, certain atypical conduct causally connected with the disability must be tolerated or accommodated.

[73] 951 F.2d 511 (2d Cir. 1991).
[74] 129 F.3d 1076, 1086 (10th Cir. 1997).

74. In **Raytheon Co.** v. **Hernandez**[75], the US Supreme Court considered the issue of disability-related misconduct. The plaintiff having failed a drug test chose to resign in lieu of a discharge. After receiving treatment for his addictions, he applied to be rehired by Raytheon. The employer had a policy of not rehiring former employees who have been previously discharged or who resigned in lieu of discharge. Raytheon argued that the decision to not rehire the plaintiff was made without any awareness of his past record. The court held that a neutral no-hire policy can be a legitimate non-discriminatory ground for Raytheon to not rehire the plaintiff. Thus, the plaintiff could not, it was held, raise the claim of disparate treatment based on disability. However, the court remanded the issue relating to the disparate impact of the neutral no-hire rule on members of a protected group to the Court of Appeals, Ninth Circuit, which had conflated the analysis between disparate treatment and disparate impact. The court held:

> "…In so holding, the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate-treatment claims. Had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA. And thus the only remaining question would be whether respondent could produce sufficient evidence from which a jury could conclude that "petitioner's stated reason for respondent's rejection was in fact pretext."

Commentators have argued that the court implicitly rejected the **Teahan** (supra) approach where employees can prove intentional discrimination or disparate treatment merely by proving that their conduct was a consequence of a mental

[75] 540 U.S. 44 (2003).

disability, collapsing the difference between the disability and manifestation of that disability.[76] However, if a claim of disparate treatment fails, a plaintiff can still establish that a facially neutral employment policy disparately impacted those who have a disability.[77]

75. Recently on 13 September 2013, a class-action suit was filed before the US District Court of Connecticut on behalf of thousands of Air Force veterans who have claimed that Air Force awards less-than-honourable discharges to service members on account of minor infractions without recognizing the role mental health or sexual trauma plays in moulding the conduct that leads to such discharges. The suit is pending.[78]

II Canada

76. Three legislations govern the disability rights regime in Canada. The Employment Equity Act of Canada 1995[79] prohibits discrimination, *inter alia*, against persons with disabilities. Section 2 of EEAC reads thus:

> "The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences."

[76] Kelly Cahill Timmons, Accommodating Misconduct Under the Americans with Disabilities Act, 57 Florida Law Review 187, 188-89 (2005).
[77] O'Brien, Christine Neylon and Darrow, Jonathan J., *The Question Remains after Raytheon Co. v. Hernandez: Whether No Rehire Rules Disparately Impact Alcoholics and Former Drug Abusers*, 7 Journal of Business Law 157 (2004).
[78] Martin Johnson and Jane Doe on behalf of themselves and all other similarly situated v. Frank Kendall, Secretary of the Air Force, available at https://law.yale.edu/sites/default/files/area/clinic/vlsc_johnson_v_kendall_complaint_09-13-2021.pdf
[79] "**EEAC**"

Section 3 of the EEAC defines 'persons with disabilities' in the following terms:

> "persons with disabilities means persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who
> (a)consider themselves to be disadvantaged in employment by reason of that impairment, or
>
> (b) believe that a employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment,
>
> and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace; (personnes handicapées)"

77. The second important piece of federal legislation is the Canadian Charter of Rights and Freedoms[80], ratified as Part-I of the Constitution Act 1982. The CCRF seeks to balance individual and group rights and is the first national constitution in the world to recognise the right to equality of persons with disabilities.[81] Section 15 (1) of the CCRF stipulates:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, nation or ethnic origin, colour, religion, sex, or mental or physical disability."

78. The third significant legislation is the Canadian Human Rights Act 1978[82], which, *inter alia*, applies to government employees and employees of industries and businesses falling under federal jurisdiction or considered as a part of the federal government. Section 2 of the CHRA provides thus:

> "The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are

[80] "**CCRF**"
[81] Bally Thun, *Disability Rights Framework in Canada*, 12(4) Journal of Individual Employment Rights 351-371 (2007).
[82] "**CHRA**"

> able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."

79. In **British Columbia (Public Service Employee Relations Commission) v. BCGSEU**[83], the Canadian Supreme Court held that once it is established that *prima facie* discrimination exists, the burden shifts on the employer to justify the discrimination, which involves proving that it provided reasonable accommodation. The court developed a three-stage test based on proportionality to determine whether an employer may use the bona fide occupational requirement[84] defence after an employee or a job applicant has shown a *prima facie* case of discrimination. The Court laid down the three-prong test in the following terms:

> "(54.) (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer."

[83] [1999] 3 SCR 3.
[84] "**BFOR**"; available under Section 13 of the British Columbia Human Rights Code

80. Alcohol and drug addictions are considered physical and mental disabilities by most labour boards and human rights tribunals in Canada.[85] In **Entrop** v. **Imperial Oil**,[86] the Ontario Court of Appeal, following the decision in **British Columbia (Public Service Employee Relations Commission)** (supra) held that randomized drug and alcohol testing can be a bona fide operational requirement in safety-sensitive workplaces. In the context of dismissals, the court considered whether a single positive test would warrant termination from employment. The court observed:

> "112. […] dismissal in all cases is inconsistent with Imperial Oil's duty to accommodate. To maintain random alcohol testing as a BFOR, Imperial Oil is required to accommodate individual differences and capabilities to the point of undue hardship. **That accommodation should include consideration of sanctions less severe than dismissal and, where appropriate, the necessary support to permit the employee to undergo a treatment or a rehabilitation program**".
>
> **(emphasis supplied)**

81. In **Stewart** v. **Elk Valley Coal Corp.**[87], S had been working in a coal mine for over a decade. The mine operators had a zero-tolerance policy towards the use of illegal drugs. The policy created an exception where, if the employee made a prior disclosure of any dependence issues, they could take the benefit of a rehabilitation policy instead of being dismissed. On such disclosure, the employee could obtain treatment and return to work. Although S was aware of the policy, he did not disclose to the employer that he used to consume cocaine on his days off. It is important to note that the Alberta Human Rights Tribunal had found that S himself was not aware of the addiction. One day, S was

[85] Faisal Bhabha, *Stewart v. Elk Valley: The Case of Cocaine Using Coal Miner*, All Papers 323 (2018), available at https://digitalcommons.osgoode.yorku.ca/all_papers/323
[86] (2000) 50 OR (3d) 18.
[87] [2017] 1 SCR 591.

involved in an accident while operating a vehicle at work. There was minimal damage and no one was injured. But the employer directed S to undergo a drug test and he tested positive for cocaine. S admitted to the employer that he believed he was addicted to cocaine. However, since the disclosure was not made before the incident, the employer did not accommodate his possible addiction under the workplace policy. He was terminated from employment for breaching the company policy, not because of his drug addiction but on account of his drug use. The majority (six out of nine) of the Canadian Supreme Court found that there was no requirement to accommodate since there was no *prima facie* discrimination. The majority observed that addiction was not a factor in the dismissal. S was dismissed because he failed to comply with the policy. S still maintained some ability to comply with the terms of the policy despite the addiction. The majority also held that it cannot be said that the policy adversely affected a protected group i.e., persons with a disability since the policy impacted both recreational drug users and drug addicts. The minority concurring opinion given by two judges observed that there was *prima facie* discrimination because even if it was assumed that S had some control over the use of drugs, it did not eliminate drug addiction as one of the factors for dismissal. However, they held that the employer could not have accommodated S any further without encountering undue hardship. They gave significant weight to the fact that S was employed in a safety-sensitive workplace. Any other disciplinary action short of dismissal would have undermined the deterrent effect of the zero-tolerance policy causing undue hardship. They further pointed that the employer had offered S the possibility for reapplying after six months provided he underwent

rehabilitation, for which they would reimburse 50 percent of the costs in the event he is re-hired. The sole dissenting opinion argued that persons with addictions are stigmatized and often stereotyped as “the authors of their own misfortune”. The dissenting opinion observed that the case fell in the bracket of indirect discrimination where a neutral policy against drugs adversely impacted those persons who had a dependency on drugs. While the policy affected all workers equally, S because of his dependency faced a clear impairment in complying with the policy. The protected ground needs to be only one of the factors leading to termination. The minority opinion also observed that the choice threshold conceptualized by the majority effectively removes the rights holder from protection and stigmatizes them further by blaming marginalized groups for their choices. The judge highlighted that distinctions have never been made between protected grounds and conduct that is inextricably linked to such grounds. Thus, the majority erred in creating a distinction between drug addiction and taking drugs. Finally, the minority opinion observed that the duty to accommodate is an individualized assessment. The pre-incident accommodation, where the employee could have disclosed their addiction was not available to S since he was not aware of his addiction, denial is a symptom of substance dependency. The judge opined that the deterrent effect of the zero-tolerance policy could have been achieved by alternatives short of dismissal like suspension without pay.

III European Union

82. The European Union[88] recognises the duty to accommodate persons with disabilities in the employment context. Article 5 of the Employment Equality Directive[89] 2000 provides thus:

> "Reasonable accommodation for disabled persons
>
> In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

83. The Court of Justice of the EU has moved beyond the medical model of disability towards a social model evolving its understanding of disability in accordance with the CRPD.[90] In two joint **HK Danmark**[91] cases, the court held thus:

> "41. …if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78."

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[88] "**EU**"
[89] "**EU Directive**"
[90] Ferri, Delia, *The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination*, 16(2) European Constitutional Law Review 275–305 (2020).
[91] HK Danmark v. Dansk Almennyttigt Boligselskab DAB and HK Danmark v. Pro Display A/S in Konkurs, 11 April 2013, joined cases C-335/11 and C—337/11.

Article 2 of the EU Directive recognises both direct and indirect discrimination. Article 4 of the EU Directive provides an exception to discriminatory conduct where such conduct "constitutes a genuine and determining occupational requirement, provided that the objective is legitimate, and the requirement is proportionate." In **Tartu Vangla**[92], a prison officer was dismissed because his hearing acuity, without corrective aids, did not meet the minimum standards of sound perception under Estonian regulations. The Court of Justice held that while the regulations pursue a legitimate aim of securing the safety of persons and public order in prison, the requirement that the prison officer must meet the minimum standards of sound perception without hearing aid, or the employment would be terminated is not proportionate for attaining the objective of the regulations. The court held that the absolute nature of the regulation did not reasonably accommodate the prison officer, which amounted to disability-based discrimination. The court observed thus:

> "44 However, it must be remembered that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner [internal citations omitted].
>
> 45 It is apparent from the information contained in the order for reference that compliance with the minimum standards of sound perception prescribed by Regulation No 12 is assessed without there being, for the prison officer concerned, any possibility of using a hearing aid on that occasion, whereas, when assessing compliance with the standards laid down in that regulation as regards visual acuity, the officer may use corrective devices such as contact lenses or spectacles. However, the wearing, loss or deterioration of contact lenses or spectacles may also hinder the performance of a prison officer's duties and create risks for him or her comparable to those resulting from the use, loss or deterioration of a hearing

[92] Case C-795/19

> aid, particularly in the situations of physical confrontation which that officer may encounter.
>
> 46 As regards, next, whether that requirement is necessary in order to attain the objectives pursued by Regulation No 12, namely preserving the safety of persons and public order, it should be recalled that non-compliance with the minimum standards of sound perception prescribed by that regulation constitutes an absolute medical impediment to the exercise of the duties of a prison officer. Those standards apply to all prison officers, without the possibility of derogation, regardless of the establishment to which those officers are assigned or the position they hold. Moreover, that regulation does not allow for an individual assessment of a prison officer's ability to perform the essential functions of that occupation notwithstanding any hearing impairment on his or her part.
>
> 47 However, as is apparent from paragraphs 15 and 39 of this judgment, the tasks of those officers include the supervising of persons placed under electronic surveillance by means of a surveillance system, as well as monitoring surveillance and signalling equipment, without involving frequent contacts with the prisoners. Furthermore, it is apparent from the order for reference that Regulation No 12 does not take into account the fact that a hearing impairment may be corrected by means of hearing aids which can be miniaturised, sit inside the ear or be placed under headgear."

While the above decision deals with a physical disability, it lays down important principles regarding how the dismissal of an employee from service is a measure of last resort. Further, it is not sufficient to show that the employer's discriminatory conduct was in pursuance of a legitimate workplace objective, the employer should be able to establish that the discriminatory measure is proportionate to the objective that is sought to be achieved.

IV South Africa

84. South Africa does not have specific disability-related legislation.[93] The Employment Equity Act 1998[94] seeks to achieve equity at the workplace by prohibiting unfair discrimination including on the ground of disability. Section 6(1) of the EEA reads thus:

> "No person may unfairly discriminate, directly or indirectly against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language or birth."

Section 1 of the EEA describes persons with disabilities as "people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment." Employment Equity Act No 55 of 2018: Code of Good Practice on Employment of Persons with Disabilities 2015[95] provides guidance on how to interpret and comply with the mandate of EEA. Clause 5.1 of the Code defines discrimination on the basis of disability as:

> "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. **It includes all forms of discrimination, including denial of reasonable accommodation.**"
>
> **(emphasis supplied)**

[93] Estie Gresse, Melvin L.M Mbao, *An Analysis of the Duty to Reasonably Accommodate Disabled Employees: A Comment of Jansen v. Legal Aid South Africa*, 24(1) Law, Democracy and Development 109 (2020).
[94] "**EEA**"
[95] **"Code"**

In addition, the Technical Assistance Guidelines on the Employment of Persons with Disabilities 2017 adds further clarity to the implementation of the EEA and the Code.

85. The Labour Relations Act 1995[96] governing the right to fair labour practices protects employees from unfair dismissal.[97] Section 188 of the LRA provides that misconduct can be a ground for dismissal unless the employer fails to prove that the reason for dismissal was the employee's conduct or capacity. Schedule 8 of the LRA provides guidelines to be followed to dismiss employees for misconduct in a fair manner. Incapacity is also listed as a ground for dismissal under Section 188 (1) (a) of the LRA. Incapacity means that an employee is not able to undertake essential functions of the job due to an illness or injury.[98] Item 10 of the Code of Good Practice: Dismissal of the LRA provides that the employer should make an enquiry into all possible alternatives short of dismissal if an employee would remain absent due to the illness or injury.[99] The duty to accommodate the incapacity of the employer is higher when that incapacity develops during work and requires either modifications of the work environment or alternative employment.[100] In **Smith** v. **Kit Kat Group (Pty) Ltd.**[101], a distinction was made between disability and incapacity. An employee is termed as incapacitated only if the employer cannot accommodate them or they refuse

[96] "**LRA**"
[97] Section 185 (a) of the LRA
[98] Standard Bank of SA v. CCMA, 3 (2008) 29 ILJ 1239 (LC).
[99] Item 10 (1) of the Code
[100] Item 10 (4) of the Code
[101] (2017) 38 ILJ 483 (LC). The Court observed, "*What the respondent needed to do was to have conducted a proper incapacity investigation into what consequences this speech impediment would have on the applicant's ability to discharge his duties. The respondent needed to properly and objectively assess to what extent the applicant's ability to interact with fellow employees or suppliers was impacted upon (the applicant had little dealings with customers). Further, and if there was an impact, it needed to be explored how the applicant could possibly be accommodated. But what the respondent did was to simply assume that disability automatically equates to incapacity, which is not so*."

the reasonable accommodation. The Labour Court clarified that the employer must first engage in an incapacitating enquiry to assess to what extent the disability impacts the employment functions. If there is an impact, the employer must consider how the employee could be reasonably accommodated unless the accommodation constitutes an unjustifiable hardship for the employer. Commentators have noted that courts often use the terms disability and incapacity interchangeably because the measures that are to be adopted for accommodating an employee with a disability are effectively not different from the measures that may be undertaken to find alternatives before dismissing an employee for incapacity. Both can be considered parallel processes.[102]

86. In **Pharmaco Distribution (Pty) Ltd.** v. **EWN**[103], the senior management in the employment agency was aware that the employee had bipolar disorder, for which she was taking medications. The employment contract provided that the employee can be subjected to medical examinations, including psychological evaluations. The employer directed the employee to undergo a medical examination, which she refused. She was dismissed from service on a charge of misconduct for not complying with the employer's instruction. The Labour Court of Appeal, affirming the decision of the Labour Court, observed that the employer would not have subjected her to psychiatric assessment but for her bipolar disorder, and she would not have been consequently dismissed. Thus, the employer's conduct constituted unfair discrimination based on disability under Section 6 of the EEA and the dismissal was automatically unfair under the LRA.

[102] Bassuday K & Rycroft A, *'Incapacity or disability? The Implications for Jurisdiction Ernstzen v Reliance Group Trading (Pty) Ltd (C727/13) [2015] ZALCCT 42*, 36(4) Industrial Law Journal 2516-2521 (2015).
[103] (2017) 38 ILJ 2496 (LAC).

It is also significant that the court found that although the employee was on medication and her condition was under control, she still had a disability. [104]

87. In **New Way Motor & Diesel Engineering (Pty) Ltd** v. **Marsland**,[105] the employee suffered a nervous breakdown after his wife deserted him. He was hospitalized. When he returned to work, he was ostracized and verbally abused by the appellant and management. A disciplinary hearing was instituted against him for poor work performance amongst other charges. Thereafter, the employee terminated his contract when his work was outsourced. The Labour Court held that the employee has been constructively dismissed and the dismissal constitutes unfair discrimination against the employee on grounds of mental health. The court observed that mental health played a significant role in the dismissal. The Labour Court of Appeal also upheld the dismissal as automatically unfair in terms of the amended LRA. The Court of Appeal further observed that the conduct of the appellant had violated the human dignity of the employee. Commentators have observed that this lays down the position that dismissal of employees having depression can only be an act of last resort and alternatives should be considered before such dismissal.[106]

88. In **Legal Aid South Africa** v. **Ockert Jansen**[107], the Labour Court of Appeal of South Africa dealt with an employee who was diagnosed with depression and high anxiety during the course of service. Disciplinary

[104] Matilda Mbali Ngcobo, *Court's Treatment of Depression in the Workplace: Incapacity, Poor Performance, Misconduct and Disability*, available at https://researchspace.ukzn.ac.za/bitstream/handle/10413/18678/Ngcobo_Matilda_Mbali_2019.pdf?sequence=1&isAllowed=y.
[105] (2009) 30 ILJ 2875 (LAC).
[106] Rangata, *The "Invisible" Illness Challenge, Employment Law*, (2015), available at https://maponya.co.za/wp-content/uploads/2018/03/The-invisible-illness-challenge-Without-Prejudice.pdf
[107] (2020) 41 ILJ 2580 (LAC).

proceedings had been instituted against the employee as he had been absent from work without notice and that he was insolent and defiant to the management of the company. He was eventually dismissed from service. He challenged the proceedings in the Labour Court and received an order in his favour. However, the Labour Court of Appeal ruled against him. In doing so it held thus:

> "[40] The stresses and pressures of modern-day life being what they are, depression is common in the workplace. Employers from time to time will need to manage the impact of depression on an individual employee's performance. The approach to be followed will depend on the circumstances.
> [41] In the first instance, depression must be looked at as a form of ill health. As such, an incapacitating depression may be a legitimate reason for terminating the employment relationship, provided it is done fairly in accordance with a process akin to that envisaged in Items 10 and 11 of the Code of Good Practice: Dismissal. **If an employee is temporarily unable to work for a sustained period due to depression, the employer must investigate and consider alternatives short of dismissal before resorting to dismissal. If the depression is likely to impair performance permanently, the employer must attempt first to reasonably accommodate the employee's disability. Dismissal of a depressed employee for incapacity without due regard and application of these principles will be substantively and/or procedurally unfair.**
>
> [42] Depression may also play a role in an employee's misconduct. It is not beyond possibility that depression might, in certain circumstance negate an employee's capacity for wrongdoing. **An employee may not be liable for misconduct on account of severe depression impacting on his state of mind (cognitive ability) and his will (conative ability) to the extent that he is unable to appreciate the wrongfulness of his conduct and/or is unable to conduct himself in accordance with an appreciation of wrongfulness. Should the evidence support such a conclusion, dismissal for misconduct would be inappropriate and substantively unfair, and the employer would need to approach the difficulty from an incapacity or operational requirements perspective. Alternatively, where the evidence shows that the cognitive and conative capacities of an employee have not been negated by**

> **depression, and he is able to appreciate the wrongfulness of his conduct and act accordingly, his culpability or blameworthiness may be diminished by reason of the depression. In which case, the employee's depression must be taken into account in determining an appropriate sanction. A failure to properly take account of depression before dismissal for misconduct could possibly result in substantive unfairness**."
>
> **(emphasis supplied)**

Thus, it has been held that the employers must be cognizant of the role mental health disorders have played in the alleged misconduct and consider it as a mitigating factor even if the mental health disorder was not incapacitating.

V Analysis

89. On the basis of our discussion of the above-mentioned jurisdictions, the following conclusions emerge:

(i) Mental health disorders are recognised as a disability as long as they fulfil the defining criteria;

(ii) The duty of providing reasonable accommodation to persons with disabilities is sacrosanct. All possible alternatives must be considered before ordering dismissal from service. However, there are accepted defences to this principle. The well-recognised exception to this rule is that the duty to accommodate must not cause undue hardship or impose a disproportionate burden on the employer – the interpretation of these concepts may vary in each jurisdiction. In the US, the duty to accommodate is also to be balanced with ensuring the safety of the workplace (the direct risk defence) provided that the threat to safety is based on an objective assessment and not stereotypes. In Canada, the

minority concurring opinion in **Stewart** (supra) observed that accommodating a person with substance dependency would cause undue hardship to the employer in a safety-sensitive workplace. The Court of Justice of EU also recognised workplace safety as a legitimate occupational requirement for imposing certain occupational standards. However, it ruled that the standard should be proportionate to the objective of workplace safety that is sought to be achieved. In this context, it will be useful to refer to the minority opinion in **Stewart** (supra) which emphasizes that the duty to accommodate is individualized. The employer must be sensitive to how the individual's capabilities can be accommodated. The Committee on the Rights of Persons with Disabilities in General Comment Six expressly notes that the duty to accommodate is an "individualised reactive duty" and "requires the duty bearer to enter into dialogue with the individual with a disability". Thus, a blanket approach to disability-related conduct will not suffice to show that the employer has discharged its individualized duty to accommodate. It must show that it took the employee's individual differences and capabilities into account;

(iii) Mental health disorders pose a unique challenge in disability rights adjudication. Very often, persons are not aware of or are in denial of their mental disability. Even if they hold the awareness, to avoid stigma and discrimination, they tend to not disclose their mental illness before an incident of purported misconduct. Thus, they may fall foul of the requirement to request a reasonable accommodation. In the US, for

instance, the requirement to provide reasonable accommodation is prospective. In Canada, the majority in **Stewart** (supra) observed that despite the substance dependency, the employee had the ability to make a prior disclosure of the dependency to the employer and could have availed of the reasonable accommodation. However, the minority opinion, emphatically observed that self-reporting cannot be construed as accommodation for persons who are in denial of their disability. The Committee on the Rights of Persons with Disabilities in General Comment Six notes that the duty to accommodate also arises in cases where the duty bearer "should have realized that the person in question had a disability that might require accommodations to address barriers to exercising rights"; and

(iv) An issue that remains contentious is the examination of misconduct charges against persons with mental health disorders. There are two strands of argument. One argument is that mental disability often manifests as atypical behaviour that may fall within the ambit of misconduct. If such conduct is causally connected to the disability, then dismissal on grounds of misconduct is discrimination based on disability. This argument has been accepted by a few courts in the US. In the minority opinion in **Stewart** (supra), it was observed that making a distinction between the disability and the disability-related conduct is akin to making a distinction between a protected ground and conduct that is intertwined with the protected ground. On the other hand, it is argued that while mental health disorders may diminish the control a person has over

their actions, it does not necessitate that the persons have completely lost their ability to comply with acceptable standards of workplace conduct. In the US, most courts have held that misconduct is not protected under ADA. In **Stewart** (supra), the majority opinion of the Canadian Supreme Court held that the employee with substance dependency retained some control to comply with the policy of making prior disclosure of dependency. Thus, non-compliance with standards of workplace conduct can rightfully lead to dismissals and would not constitute discrimination. South Africa adopts a middle ground in this debate. In **Legal Aid South Africa** (supra), the court observes that a two-pronged enquiry is required. It must first be considered based on the evidence whether the mental health disorder is so incapacitating that the person is not able to appreciate the wrongfulness of the conduct or is unable to conduct themselves in accordance with the required standard. Alternatively, if the evidence suggests that the person can appreciate the wrongfulness of their conduct and act accordingly, then their culpability stands diminished because of the mental health disorder, and sanctions should be imposed accordingly.

C.4.2 Disciplinary Proceedings against the Appellant

90. The question that comes up before this Court is whether it is sufficient for the appellant to show that his mental health disorder was one of the factors that led to the initiation of disciplinary proceedings against him for misconduct or is he required to prove that his disability was the sole cause of disciplinary proceedings being instituted against him. Section 3 of the RPwD Act provides a

general guarantee against non-discrimination and equality to persons with a disability. Section 20 specifically provides that no government establishment shall discriminate against any person who has acquired a disability in any matter relating to employment. Discrimination has been given an expansive definition under Section 2(h) of the RPwD Act, which states thus:

> "(h) "discrimination" in relation to disability, means any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation"

91. Section 2(h) prohibits discrimination on the basis of disability. It is pertinent to note that the provision does not use the phrase 'only' on the basis of disability. This Court in its decisions has observed that while a causal connection may need to be established between the ground for discrimination and the discriminatory act, it is not required to be shown that the discrimination occurred solely on the basis of the forbidden ground. As long as it can be shown that the forbidden ground played a role in the discriminatory action, the action will violate the guarantee against non-discrimination.

92. In **Navtej Johar** (supra), one of us (Dr DY Chandrachud) in the concurring opinion expressed in the context of interpreting Article 15 of the Constitution that the non-discrimination clause does not permit only single ground claims. Article 15 states that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them". The concurring opinion observed that limiting discrimination-related

claims to a single ground by placing reliance on 'only' is a formalistic interpretation of the guarantee against non-discrimination. It was observed that discrimination, for instance, based on "sex and another ground ('sex plus')" would fall under the ambit of Article 15. The opinion placed reliance on a judgment of this Court in **Anuj Garg** v. **Hotel Association of India**[108], which held that socially ascribed gender roles or stereotypes regarding sex would not be distinguishable from discrimination solely based on sex. The relevant extract of the opinion is reproduced below:

> "431. This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ("Sex plus") and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics."

93. In **Patan Jamal Vali** v. **State of Andhra Pradesh**[109], this Court noted the single-axis legislations which prohibit discrimination based on a single ground make it difficult for an individual claiming differential treatment to provide sufficient evidence because often "evidence of discrete discrimination or violence

[108] (2008) 3 SCC 1.
[109] 2021 SCC OnLine SC 343.

on a specific ground may be absent or difficult to prove." While interpreting Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 (prior to the amendment in 2015), this Court observed that the terms "on the ground of" would not entail proving that the offence against a person belonging to a Scheduled Caste or Scheduled Tribe took place solely on the ground of their caste or tribal identity. If it is one of the factors, it will fall within the ambit of Section 3(2)(v). This Court held thus:

> "62. In the above two extracts, this Court has interpreted Section 3(2)(v) to mean that the offence should have been committed "only on the ground that the victim was a member of the Scheduled Caste." The correctness of this exposition. Is debatable. The statutory provision does not utilize the expression "only on the ground". Reading the expression "only" would be to add a restriction which is not found in the statute. The statute undoubtedly uses the words "on the ground' but the juxtaposition of "the" before "ground" does not invariably mean that the offence ought to have been committed only on that ground. To read the provision in that manner will dilute a statutory provision which is meant to safeguard the Scheduled Castes and Scheduled Tribes against acts of violence which pose a threat to their dignity. As we have emphasized before in the judgment, an intersectional lens enables us to view oppression as a sum of disadvantage resulting from multiple marginalized identities. To deny the protection of Section 3 (2) (v) on the premise that the crime was not committed against an SC & ST person solely on the ground of their caste identity is to deny how social inequalities function in a cumulative fashion. It is to render the experiences of the most marginalized invisible. It is to grant impunity to perpetrators who on account of their privileged social status feel entitled to commit atrocities against socially and economically vulnerable communities. This is not to say that there is no requirement to establish a causal link between the harm suffered and the ground, but it is to recognize that how a person was treated or impacted was a result of interaction of multiple grounds or identities. A true reading of Section 3(2)(v) would entail that conviction under this provision can be sustained as long as caste identity is one of the grounds for the occurrence of the offence. In the view which we ultimately take, a reference of these decisions to

> a larger bench in this case is unnecessary. We keep that open and the debate alive for a later date and case."

94. Similar considerations would govern our understanding of discrimination under the RPwD Act. A person with a disability is not required to prove that discrimination occurred solely on the basis that they had a disability. Disability needs to be one of the factors that led to the discriminatory act. Thus, in the present case, the appellant is only required to prove that disability was one of the factors that led to the institution of disciplinary proceedings against him on the charge of misconduct. A related enquiry then is to examine whether the conduct of the employee with a mental disability must be solely a consequence of their disability or it is sufficient to show that the disability was one of the factors for the conduct.

95. An interpretation that the conduct should solely be a result of an employee's mental disability would place many persons with mental disabilities outside the scope of human rights protection. It is possible that the appellant was able to exercise some agency over his actions. But the appellant was still a person who was experiencing disabling effects of his condition. Thus in any event his agency was diminished. The over-emphasis on the choice or agency of a person with a mental health disorder furthers the stigma against them. As Justice Gascon's minority opinion in **Stewart** (supra) states, it furthers the stereotype that persons with mental health conditions are "the authors of their own misfortune" (para 58).

96. This is not to say that persons with mental health disorders are never in control of their actions. This may perpetuate another stereotype that such

persons are “dangerous”, who are more prone to commit violent or reckless acts. Studies indicate that there is no direct link between mental health disorders and violence. There is no substantial difference between the patterns of violent conduct exhibited by persons with mental health disorders and others without such disorders.[110] Further, we would like to emphasize that persons with mental disabilities are not static entities. Earlier in the judgment, we had discussed how employment opportunities and affirmative workplace policies help persons with disabilities in coping with their illness and improving their mental health. Thus, what is required is a nuanced and individualized approach to mental disabilities-related discrimination claims, which requires understanding the nature of the disadvantage that such persons suffer.

97. The South African jurisprudence in assessing claims of misconduct relating to disability presents a middle path where an enquiry is to be conducted to assess whether the mental disability is incapacitating, which would then nullify the charge of misconduct. In the event, it is not incapacitating, the mental disability would still serve as a mitigating factor in the imposition of sanctions. However, this approach also has a limitation where it focuses too much on the nature of impairment than the disadvantage. It has the possibility of making disability rights adjudication more complex and less accessible since it would require reliance on medical experts to assess how debilitating the mental disability is.[111] This also makes the disability regime vulnerable to being

[110] Linda A. Teplin, *The Criminality of Mentally Ill: A Dangerous Conception*, 142(5) American Journal of Psychiatry 593-599 (1985). See also Claire Wilson, Raymond Nairn et. al., *Constructing Mental Illness as Dangerous: A Pilot Study*, 33(2) Australian and New Zealand Journal of Psychiatry 240-247.

[111] Lesli Bisgould, *Human Rights Code v. Charter: Implications of Tranchemontagne Twists and Turns and Seventeen Volumes of Evidence, or How Procedural Developments Might Have Influenced Substantive Human Rights Law*, 9 JL & Equality 33 (2012).

relegated to a medical model of disability rather than a social model. Thus, in the Indian context, a person with a mental disability is entitled to the protection of the rights under the RPwD Act as long they meet the definitional criteria of what constitutes a 'person with a disability' under Section 2(s).

98. Having regard to the complex nature of mental health disorders, any residual control that persons with mental disabilities have over their conduct merely diminishes the extent to which the disability contributed to the conduct, it does not eliminate it as a factor. The appellant has been undergoing treatment for mental health disorders for a long time, since 2009. He has been diagnosed with 40 to 70 percent of permanent disability by a government hospital. While all CRPF personnel may be subject to disciplinary proceedings on charges of misconduct, the appellant is more vulnerable to engage in behavior that can be classified as misconduct because of his mental disability. He is at a disproportionate disadvantage of being subjected to such proceedings in comparison to his able-bodied counterparts. The concept of indirect discrimination has been recognized by this Court in **Ltd. Col. Nitisha and Ors.** v. **Union of India**[112], which is closely tied with the conception of substantive equality that pervades the international and Indian disability-rights regime. Thus, the disciplinary proceeding against the appellant is discriminatory and must be set aside.

[112] 2021 SCC OnLine SC 261.

C.4.3 Reasonable Accommodation of the Appellant

99. In section C.1.3 of the judgment, we have held that the 2021 notification exempting the CRPF from the application of Section 20 will not be applicable to the present proceedings since the rights crystallized when the appellant preferred the special leave petition.

100. Section 20 (4) of the RPwD provides thus:

> "(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:
> Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits:
> Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier."

Sub-Section (4) of Section 20 advances the guarantee of reasonable accommodation to persons with mental disabilities. The Government establishment has a positive obligation to shift an employee who acquired a disability during service to a suitable post with the same pay scale and service benefits. The provision further states that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post becomes available or when they attain the age of superannuation, whichever is earlier. In **Vikas Kumar** (supra), this Court observed that persons with disabilities face unique barriers, which must be mitigated through the provision of specific measures. This Court held:

> "43. There is a critical qualitative difference between the barriers faced by persons with disabilities and other

> marginalised groups. In order to enable persons with disabilities to lead a life of equal dignity and worth, it is not enough to mandate that discrimination against them is impermissible. That is necessary, but not sufficient. We must equally ensure, as a society, that we provide them the additional support and facilities that are necessary for them to offset the impact of their disability."

The principle that reasonable accommodation is a component of the right to equality and discrimination was reiterated by this Court in **Avni Prakash** v. **National Testing Agency**[113].

101. In light of Section 20(4) and the general guarantee of reasonable accommodation that accrues to persons with disabilities, the appellant is entitled to be reassigned to a suitable post having the same pay scale and benefits. The CRPF may choose to assign him a post taking into consideration his current mental health condition. The suitability of the post is to examined based on an individualised assessment of the reasonable accommodation that the appellant needs. The authorities can ensure that the post to which the appellant is accommodated does not entail handling or control over firearms or equipment which can pose a danger to himself or to others in or around the workplace.

D Epilogue

102. The present case involves a complex question of balancing competing interests. Specifically, this entails the right of persons with mental disabilities against discrimination in the course of employment and the interest of the CRPF in ensuring a safe working environment and maintaining a combat force that can undertake security operations. While balancing the two we must also recognize

[113] Civil Appeal No. 7000 of 2021.

the role assigned to the CRPF as a para-military force. Tarunabh Khaitan has commented that rights are rarely of an absolute nature. Constitutions often provide the possibility of limiting those rights through acceptable justifications. He gives an example of Article 19(1) of the Constitution, where a justification clause has been in-built into the text of the Constitution. On the other hand, he points out, while Article 14 is not subject to an express justification clause, judges have evolved the reasonable classification test to assess whether a differential treatment can be justified under Article 14. He argues that the difference between the two models of justification is merely semantic.[114] The proviso to sub-Section (1) of Section 20 of the RPwD Act provides a justification for violating the right against discrimination in employment. It provides that the appropriate government, may, having regard to the type of work carried on in any establishment exempt such an establishment from the provisions of Section 20. The key words here to note are "having regard to the type of work". This indicates that the government's right to exempt an establishment from the provisions of Section 20 which deals with employment discrimination is not absolute. In an appropriate case, a standard for reviewing the justification given by the government may have to be developed.

103. This Court at the very inception of the constitutional republic had observed that a measure that limits rights must have a proportional relationship to the right.[115] With the passage of time, this Court has evolved a test for applying proportionality analysis to a rights-limiting measure.[116] A version of the

[114] Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement*, 50(2) Journal of the Indian Law Institute 177-208 (2008).
[115] Chintaman Rao v State of MP AIR 1951 SC 118; VG Row v State of Madras AIR 1952 SC 196.
[116] Modern Dental College and Research Centre v State of Madhya Pradesh, (2016) 7 SCC 353.

proportionality test was used by this Court in **Anuj Garg** v. **Hotels Association of India**[117] in the context of anti-discrimination analysis. This Court was examining the constitutionality of a provision which prohibited the employment of women in premises that served alcohol to the public. While adjudicating whether such a restriction was justified, this Court considered whether the restriction's "legitimate aim of protecting the interests of women is proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al." The Court held that the measure was not proportional because instead of enhancing the security of women and empowering them, it imposed restrictions on their freedom. The Court, however, used strict scrutiny and proportionality interchangeably in the judgment. Since then, the proportionality analysis has been used in many other judgments in relation to other rights.[118]

104. Sub-Section (3) of Section 3 of the RPwD Act itself contemplates undertaking a proportionality analysis for a rights-limiting measure. Section 3 of the RPwD Act provides thus:

> "3. Equality and non-discrimination.—
>
> (1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.
>
> (2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.

[117] (2008) 3 SCC 1.
[118] Puttaswamy v Union of India (2017) 10 SCC 1; Puttaswamy (II) v Union of India (2019) 1 SCC 1; Anuradha Bhasin v Union of India (2020) 3 SCC 637; and Internet and Mobile Association of India v. Reserve Bank of India (2020) 10 SCC 274; Akshay N Patel v. Reserve Bank of India Civil No. 6522 of 2021.

> **(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.**
>
> (4) No person shall be deprived of his or her personal liberty only on the ground of disability.
>
> (5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities**."** **(emphasis supplied)**

105. The jurisprudence of Sections 3 and 20 of the RPwD Act would have to evolve. Our journey has begun. Here we have pondered over the possible trappings which a standard of judicial review may adopt. Such an enquiry is rooted in, "the idea that something protected as a matter of right may not be overridden by ordinary considerations of policy…Reasons justifying an infringement of rights have to be of a special strength".[119] We have not indicated any final thoughts on how the proviso to Section 20 (1) is to be interpreted.

E Conclusion

106. In view of the discussion above, we summarise our findings below:

(i) The validity of the disciplinary proceedings shall be determined against the provisions of the RPwD Act 2016 instead of the PwD Act 1995 for the following reasons:

(a) The respondent holds a privilege under the 2002 notification to not comply with the principles of non-discrimination and reasonable accommodation provided under Section 47 of the PwD Act. However,

[119] Mattias Kumm, *Political Liberalism and the Structure of Rights: On the place and limits of the proportionality requirement*, in LAW, RIGHTS AND DISCOURSE: THEMES FROM THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131-166 (George Pavlakos ed., Hart 2007)

for a privilege to accrue in terms of Section 6 of the GCA, mere expectation or hope is not sufficient. Rather, the privilege-holder must have done an act to avail of the right. The privilege provided by the 2002 notification would accrue only when one of the punishments provided under Section 47 has been imposed. However, in the instant case, the disciplinary proceedings were challenged even before the punishment stage could be reached. Therefore, the privilege available to the respondent under the 2002 notification was not accrued in terms of Section 6 of the GCA;

(b) Section 47 of the PwD Act is not the sole source of the right of equality and non-discrimination held by persons with disability. The principle of non-discrimination guides the entire statute whose meaning and content find illumination in Article 5 of the CRPD. An interpretation that furthers international law or gives effect to international law must be preferred. Therefore, even though the PwD Act does not have an express provision laying down the principle of equality vis-à-vis disabled persons, it will have to be read into the statute; and

(c) The 2002 notification is not saved by Section 102 of the RPwD Act since Section 20 of the RPwD Act is not corresponding to Section 47 of the PwD Act;

(ii) The disciplinary proceedings are discriminatory and violative of the provisions of the RPwD for the following reasons:

(a) A person with a disability is entitled to protection under the RPwD Act as long as the disability was one of the factors for the discriminatory act; and

(b) The mental disability of a person need not be the sole cause of the misconduct that led to the initiation of the disciplinary proceeding. Any residual control that persons with mental disabilities have over their conduct merely diminishes the extent to which the disability contributed to the conduct. The mental disability impairs the ability of persons to comply with workplace standards in comparison to their able-bodied counterparts. Such persons suffer a disproportionate disadvantage due to the impairment and are more likely to be subjected to disciplinary proceedings. Thus, the initiation of disciplinary proceedings against persons with mental disabilities is a facet of indirect discrimination.

107. The disciplinary proceedings against the appellant relating to the first enquiry are set aside. The appellant is also entitled to the protection of Section 20(4) of the RPwD Act in the event he is found unsuitable for his current employment duty. While re-assigning the appellant to an alternate post, should it become necessary, his pay, emoluments and conditions of service must be protected. The authorities will be at liberty to ensure that the assignment to an alternate post does not involve the use of or control over fire-arms or equipment which may pose a danger to the appellant or others in or around the work-place.

108. The Civil Appeal is accordingly allowed in the above terms.

109. Pending application(s), if any, stand disposed of.

…….J
[Dr Dhananjaya Y Chandrachud]

…….J
[Surya Kant]

…….J
[Vikram Nath]

New Delhi:
December 17, 2021