

15. REASONABLE ACCOMMODATION: A COMMENT ON RAVINDER KUMAR DHARIWAL v. UNION OF INDIA

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Abstract

This paper delves into the intricacies of reasonable accommodation (RA), particularly focusing on the landmark judgment of Ravinder Kumar Dhariwal v Union of India. The objective is to critically analyse the Supreme Court's interpretation and application of RA, coupled with a comparative analysis drawing from the unified discrimination assessment framework offered by Canada's Meiorin test.

Keywords: Reasonable Accommodation, Disability Law, Mental Disability, Physical Disability, CRPF

INTRODUCTION

On 17 December 2021, a 3-judge bench of the Supreme Court held that reasonable accommodation (hereinafter 'RA') is a facet of substantive equality and thus, part of the right to equality under Article 14 of the Constitution of India, 1950.¹ Justice Dr. DY Chandrachud, who delivered the judgment, held that the denial of RA amounts to indirect discrimination.² Relying heavily on international jurisprudence,³ the court expanded the scope of RA to persons with mental disorders.

The judgment is noteworthy on two grounds. *First*, the court, for the very first time, recognised the unique challenges posed by people with mental disorders. *Second*, holding that the disability jurisprudence in India is in the nascent stages, it relied heavily on foreign jurisprudence. However, it failed to effectively adopt the foreign jurisprudence beyond the case.

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¹ *Ravinder Kumar Dhariwal and Ors v The Union of India (UOI) and Ors*, [2021] SCC 1293

² *ibid* 98

³ *ibid* 70-88

This paper seeks to critically analyse the judgment and argue that while the decision is noteworthy, it fails on two grounds. *First*, it fails to provide a proper test to assess RA and merely reiterates what has already been settled in the previous decisions. It is argued that instead of analysing the facts against the concept of RA, the decisions have analysed RA in the context of specific facts, rendering the analysis factual with no general principles for future applicability. *Second*, the court, at once, held that the denial of RA amounts to indirect discrimination,⁴ which is problematic.⁵

To that end, the *first* part of the paper puts the judgment in context. The *second* part provides a summary of the judgment, primarily focusing on its merits. The *third* part elaborates on the two criticisms highlighted above. The *final* part concludes.

THE JUDGMENT AT A GLANCE

The crux of the case revolved around the plea of the appellant, Central Reserve Police Force (hereinafter ‘CRPF’) personnel with a certified mental disability of more than 40%, who allegedly had stated that he was obsessed with killing and even made a threat that he could shoot.⁶ Subsequently, a disciplinary proceeding was instituted against his misconduct.

The respondent contended that CRPF is exempted from the application of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights, and Full Participation) Act, 1995, because of the proviso to Section 47, which allows the government to exempt any establishment from the provisions of this section.⁷ In effect, it allows discrimination based on disability. The court, however, rejected this contention on two grounds. *First*, the present case is not governed by the 1995 Act, which was repealed during the pendency of the current proceedings,⁸ and thus, the exemption provided under that act is not applicable. *Second*, even the exemption given to the CRPF under the new

⁴ *Ravinder* (n 1) [106]

⁵ Lisa Waddington, ‘Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?’ (2011) 36(2) NJCM Bulletin 197
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1847623> accessed 7 May 2024

⁶ *Ravinder* (n 1) [2], [6]

⁷ *ibid* 7

⁸ *Ibid* 34

Act (the Rights of Persons with Disabilities Act, 2016; hereinafter ‘RPwD Act’) was notified once the present petition was instituted before the Supreme Court.⁹ Thus, no exemption applies in the present case.

While the court did not deal with the validity of the absolute exemption provided under the proviso of Section 20(1), it is important to note that no other foreign jurisdiction, analysed by the Court, gives such an absolute exemption in favour of the government establishment without any proper procedure to be followed.

On the basis that no exemption is applicable in the present case, the court ruled that the main issue to be decided is whether the institution of disciplinary proceedings against persons with mental disorders amounts to discrimination.¹⁰ Specifically, in the present case, no causal connection between the disability and the misconduct was established.

Mental Disability under the RPwD Act, 2016

The RPwD Act does not make a distinction between persons with physical disability vis-a-vis persons with mental disability.¹¹ However, it has been the case in India and worldwide to discard mental health issues and concentrate primarily on ensuring RA for persons with physical disabilities.¹² The judgment was noteworthy in this sense, which demonstrated a commendable sensitivity toward persons with mental disabilities.

Having regard to the social model of disability,¹³ the court recognised that mental health disorders pose a unique challenge in disability rights adjudication. It held that as long as mental disorders fulfil the defining criteria, they are a recognised form of disability.¹⁴

The Reliance on Foreign Jurisprudence

⁹ *ibid* 41

¹⁰ *ibid* 90

¹¹ The Rights of Persons with Disabilities Act 2016 (Act No. 49 of 2016), s 2(s)

¹² *Ravinder* (n 1) [53]; DA Hantula and NA Reilly, ‘Reasonable Accommodation for Employees with Mental Disabilities: A Mandate for Effective Supervision?’ (1996) 14 John Wiley & Sons <[https://doi.org/10.1002/\(SICI\)1099-0798\(199624\)14:1%3C107::AID-BSL221%3E3.0.CO;2-6](https://doi.org/10.1002/(SICI)1099-0798(199624)14:1%3C107::AID-BSL221%3E3.0.CO;2-6)> accessed 8 May 2024

¹³ *ibid*

¹⁴ *ibid* 89

The court's reliance on foreign jurisprudence marked a significant change from the previous judgments, which did not sufficiently analyse the concept of RA.¹⁵ It analysed the jurisdictions of the US, Canada, the European Union, and South Africa to develop disability jurisprudence in India. By doing so, it aligned the Indian disability law with global standards. The court primarily relied on the minority opinion of the Canadian SC in *Stewart v Elk Valley Coal Corporation*,¹⁶ which had ruled that where a neutral policy impacts a person with a disability, it amounts to indirect discrimination.

While this could have been a substantial boost to the concept of RA, as demonstrated in part III, the court's analysis remained factual with no substantive principles to be adopted for future cases.

ASSESSING THE COURT'S REASONABLE ACCOMMODATION FRAMEWORK

While it seems that the judgment is a stepping stone in the disability jurisprudence of India, it fails to provide a test to assess RA in future cases. The foreign jurisprudence analysed could have been used to introduce a foreign test in India as well. However, the court's analysis remained factual. Previous decisions on disability rights, primarily RA, also fail on similar grounds. Further, the court's holding that denial of RA amounts to indirect discrimination is problematic.

Lack of a Clear Test for RA

In its deliberation, the court underscored the necessity for RA to be an individualised assessment in the form of a dialogue with the person concerned.¹⁷ It further established that to claim protection under the RPwD Act, a direct causal link between the disability and the misconduct is not required; it suffices if the disability is a contributing factor.¹⁸

¹⁵ *Vikash Kumar v Union Public Service Commission and Ors*, [2021] 5 SCC 370; *The State of Kerala and Ors v Leesamma Joseph*, [2021] 9 SCC 208; *Avni Prakash v National Testing Agency and Ors*, [2021] SCC OnLine SC 1112

¹⁶ *Ravinder* (n 1) [81].

¹⁷ *ibid* 89

¹⁸ *Ibid* 97

However, the judgment falls short of providing a comprehensive framework for assessing RA. While it examined the Canadian model for evaluating RA,¹⁹ it did not adopt the same. The court also touched upon potential defences related to RA, such as the direct risk defence, which posits that the duty to accommodate must be balanced against workplace safety, but left its applicability in the Indian context ambiguous.

Further, the court acknowledged that people with mental disorders tend not to disclose their mental illness to avoid stigma and discrimination.²⁰ Thus, they may fall foul of the requirement to request an RA. The court did not conclusively address whether such a requirement is mandatory, nor did it outline how to effectively provide RA when a disability is not declared. Without clear guidelines to enforce and regulate individualised assessments, even the court's insistence on such assessments remains largely theoretical. Further, this is a mere reiteration of the court's previous decision.²¹

The court itself clarified that its analysis will not influence the jurisprudence on Section 20 of the RPwD Act.²² This stems from the fact that the court's analysis hinged on the peculiar facts that the exemption provided under Section 20(1) was not applicable in the present case. It remains doubtful whether the court would have held the proceedings against the appellant discriminatory even with such an exemption.

The task of developing a standard to review the exemptions under Section 20(1) proviso was deferred,²³ despite the argument that the depth of analysis conducted was sufficient to establish such a standard. The notion of absolute exemption could have been considered within the concept of undue burden itself, negating the need for accommodation if it results in undue hardship. Granting an absolute exemption contradicts the principle of RA as an individualised assessment, as it absolves certain establishments entirely without considering the specific needs of different individuals.

¹⁹ *ibid* 79

²⁰ *ibid* 89

²¹ *Vikash* (n 15) [48].

²² *Ravinder* (n 1) [67], [105]

²³ *ibid* 102

In *Vikash Kumar*, the appellant's request for a scribe despite his writer's cramp was denied.²⁴ While the SC allowed the appeal, it is argued that its analysis remained factual with no principles to be adopted in future cases. The judgment primarily distinguished between 'persons with disability' and 'persons with benchmark disability,'²⁵ a statutory distinction already clear from the Act's definitions.²⁶ On RA, it held that assessing it is an individualised assessment.²⁷ While this could be interpreted as a general guideline, it essentially reiterates the position already established in the definition of reasonable accommodation, which underscores the need for an individualised assessment.²⁸ It even emphasised that determining undue burden must be based on objective criteria.²⁹ However, it fell short of providing a concrete test to ascertain what constitutes an undue burden.

Even the directive for guidelines on providing scribes was a limited solution rather than a comprehensive policy on reasonable accommodation. Thus, the judgment, while impactful for the appellant, did not extend its principles to broader applications, leaving the larger regulatory framework for reasonable accommodation unaddressed.

Further, in *Leesamma Joseph*, the SC addressed the specific question of whether persons with disability, appointed on compassionate grounds, are eligible for reservation in promotion.³⁰ The court affirmed that eligibility for promotion reservations extends to any PwD, regardless of the basis of their initial appointment.³¹ However, this ruling was within the framework of the 1995 Act, which has since been superseded by the 2016 Act. The latter implicitly acknowledges such rights,³² rendering the judgment less pivotal for future cases.

²⁴ *Vikash* (n 15) [3]

²⁵ *ibid* 36

²⁶ The Rights of Persons with Disabilities Act 2016, (Act No. 49 of 2016), s 2(r) and (s)

²⁷ *Vikash* (n 15) [48]

²⁸ The Rights of Persons with Disabilities Act 2016, (Act No. 49 of 2016), s 2(y)

²⁹ *Vikash* (n 15) [61]

³⁰ *Leesamma* (n 15) [3]

³¹ *ibid* 29

³² *ibid* 30

Moreover, the court's directives were confined to the issue of reservation in promotions and did not address the concept of reasonable accommodation. As a result, while the judgment resolved the immediate dispute, it did not establish general principles for assessing reasonable accommodation or clarify its application in other contexts.

Much like *Vikash Kumar*, the judgment primarily offers a factual analysis specific to the case at hand, without laying down a generalisable legal principle for future reference. This approach underscores a pattern where the court's decisions on disability rights, primarily RA, have yet to coalesce into a cohesive set of guidelines that can be universally applied.

Even in *Avni Prakash*, delivered just before *Ravinder*, no such principles were developed. Highlighting the persistent confusion among authorities regarding the application of the RPwD provisions³³, the SC allowed the appeal of the appellant who was denied the extra time she was eligible for in the exam. While the confusion was highlighted, no clear guidelines were given. Even in assessing RA,³⁴ the court illustrated reluctance to engage with evidence or establish guidelines when determining the reasonableness of a re-examination and whether it would impose an undue burden on the testing agency. Instead, the court relied on precedent, ruling that a re-examination would be unreasonable and burdensome. Finally, the court deferred to the respondent the task of determining what constitutes reasonable accommodation in the specific case,³⁵ without providing clarity or a framework for such decisions.

It can be concluded that even *Avni Prakash*, while resolving the immediate issue at hand, did not venture into the establishment of general principles or guidelines for future cases. The court's analysis remained fact-specific, addressing the appellant's situation without extending its principles to a broader legal context. This pattern of adjudication, starting from *Vikash Kumar* to *Ravinder*, suggests a judicial tendency to focus on the particulars of each case rather than formulating overarching legal standards for the assessment of reasonable accommodation. While the court in *Ravinder* recognised the need for

³³ *Avni* (n 15) [33]

³⁴ *ibid* 49

³⁵ *ibid* 57

developing such a standard,³⁶ it did not do so for some unknown reason. The lack of guidance for interpreting the concept of RA increases the risk of it being denied without consideration.³⁷

Problematic Assertion of Indirect Discrimination

While the court did not categorically state that denial of RA amounts to indirect discrimination, such a conclusion is implied. It found that the appellant was disproportionately vulnerable to disciplinary actions and determined that initiating such actions equates to indirect discrimination,³⁸ as the ostensibly neutral policy adversely affected the appellant. Had the appellant received the necessary accommodations, he may not have been as susceptible to disciplinary action. Thus, the lack of RA can be viewed as a factor in the indirect discrimination faced by the appellant, suggesting that the denial of RA could indeed be considered indirect discrimination.

However, this interpretation is problematic. The criterion for identifying indirect discrimination, as established in *Nitisha*, requires an objective analysis to determine if an action ‘disproportionately’ affects a particular group.³⁹ This implies that indirect discrimination is not recognised unless a substantial number of individuals are significantly impacted. While the whole distinction created is debatable,⁴⁰ these conflicts with RA being an individualised assessment. According to this test, a neutral provision that disadvantages a single PwD does not constitute indirect discrimination unless it also affects a larger group.⁴¹

Moreover, the test necessitates a causal link between the provision and its disproportionate effect on a group.⁴² This contradicts the court’s ruling in *Ravinder*, that

³⁶ *Ravinder* (n 1) [102]

³⁷ Adya Jha and Jasel Mundhra, ‘How Accommodating is Reasonable Accommodation: Analysing India’s Rights of Persons with Disabilities Act, 2016’ (2023) 16(3) NUJS L Rev 22 <<https://nujlawreview.org/wp-content/uploads/2023/11/16.3-Jha-Mundhra.pdf>> accessed 8 May 2024

³⁸ *Ravinder* (n 1) [98]

³⁹ *Nitisha and Ors v Union of India (UOI) and Ors*, MANU/SC/0216/2021 [65]

⁴⁰ Vandita Khanna, ‘Indirect Discrimination and Substantive Equality in *Nitisha*: Easier Said Than Done Under Indian Constitutional Jurisprudence’ (2022) 22(1) International Journal of Discrimination and the Law 79 <<https://doi.org/10.1177/13582291211062363>> accessed 8 May 2024

⁴¹ Waddington (n 5) 188

⁴² Khanna (n 40) 80

a direct causal link between the disability and the misconduct is unnecessary; it is sufficient if the disability is a contributing factor.⁴³

The RPwD Act doesn't draw such a distinction either.⁴⁴ It clearly states that denial of RA amounts to discrimination. Given that the statute itself doesn't make a distinction, the court's application of the doctrine is contentious.

In this context, the *Meiorin* test,⁴⁵ as developed in Canada, can be adopted. While the court in *Ravinder* mentioned this test in passing,⁴⁶ it did not explicitly rule on its application in India. The *Meiorin* test is notable for eliminating the distinction between direct and indirect discrimination. Instead, it established a single unified test for assessing instances of discriminatory treatment/ denial of RA. Even the Standing Committee report on the RPwD Act advocated for the creation of a clear roadmap to facilitate the assessment of RA.⁴⁷ In light of these considerations, the *Meiorin* test, suitably modified to the Indian context, stands as a potential model for implementation.

CONCLUSION

In conclusion, this paper has critically examined the *Ravinder* judgment and its implications for the disability jurisprudence in India. While the judgment represents progress by recognising the challenges faced by individuals with mental disorders and aligning Indian law with international standards, it falls short of providing a clear framework for assessing RA. The court's failure to establish a definitive test for RA and its problematic assertion that denial of RA amounts to indirect discrimination raise concerns.

The paper argues that adopting a unified test like the *Meiorin* test, with necessary modifications, could address these shortcomings. Such a test would eliminate the

⁴³ *Ravinder* (n 1) [97]

⁴⁴ The Rights of Persons with Disabilities Act, 2016 (Act No. 49 of 2016), s 2(h)

⁴⁵ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, MANU/SCCN/0017/1999 [54]

⁴⁶ *Ravinder* (n 1) [79]

⁴⁷ Standing Committee on Social Justice and Empowerment, The Rights of Persons with Disabilities Bill, 2014 (Fifteenth Report, Ministry of Social Justice and Empowerment, 2015) 42

distinction between direct and indirect discrimination by integrating RA within the framework of substantive equality under Article 14.⁴⁸ It would also align with the recommendations of the Standing Committee report on the RPwD Act to develop a clear roadmap for assessing.

⁴⁸ The Constitution of India 1950, art 14