



**LAW**

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# Our rights

"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW" - Article 27 of the Constitution of the People's Republic of Bangladesh



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## Star LAW report

# No dismissal or forceful retirement for in-service disabilities

## Indian Apex courts verdict

MILLAT HOSSAIN

EMPLOYEES cannot be dismissed or forced to take voluntary retirement for acquiring disabilities while service. In stead, they must be shifted to posts of same class, payment and benefits and when it is not possible they should be on supernumerary post until a suitable post is available or he attains the age of retirement, whichever is earlier. A division bench of Indian Supreme Court comprising Justice J P Mathur and Justice Aftab Alam delivered this judgment in the case of Bhagwan Dass & Another v Punjab State Electricity Board (Civil Appeal no. 8 of 2008) on 4th Jan 2008.

### Case history

A man named Sree Bhagwan Dass joined the Punjab State Electricity Board (PSEB) on July 19, 1977, on ad-hoc/work-charged basis. He became regular in his service as an Assistant Lineman on June 16, 1981. While in service he became totally blind on January 17, 1994. Thereafter, being unable to perform his duty, he was absent from his office. As a result, after issuing notice to him for his long absence, PSEB impliedly forced him to take voluntary retirement on March 22, 1997. Subsequently, some internal correspondences took place between the officers of the Board over the question how to deal with the appellant. Being aggrieved by the decision of the PSEB in 2004 the disabled employee approached the Punjab

& Haryana High Court in Civil Writ Petition No.12534 of 2004 seeking relief in terms of section 47 of the Act and the Circulars issued by the State Government and the Board in its furtherance.

Here, it may be noted that the rights of an employee who acquires disability during his service are protected and safeguarded by Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PDA). Section 47 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."

In the petition Bhagwan Dass joined his son as petitioner no. 2, and an alternative relief was sought for the employment of the son in his place. Forthnly, however, focusing on the second relief the High Court dismissed the writ petition by a brief order referring to the decision of the same court in Umesh Nagpal vs. State of Haryana [1994 (3) SCT 174]. In the order High Court mentioned neither the Section 47 of the Act nor the disabled employee's claim/right on that basis.

Then, the petitioner filed this appeal before the apex court in which the disabled employee agitates his rights on the basis of Section 47 of the Act. While disposing of the appeal the learned judges said that the HCD failed to appreciate the directives and humanitarian spirit of S. 47 of PDA, which enumerated the claims of a disabled person. In some very touchy



words and language the court condemned the act of the official of the Board, who forced the blind employee to take voluntary retirement. The Bench observed-

"Appellant No.1 was a Class IV employee, a Lineman. He completely lost his vision. He was not aware of any protection that the law afforded him and apparently believed that the blindness would cause him to lose his job, the source of livelihood of his family. The enormous mental pressure under which he would have been at that time is not difficult to imagine. In those circumstances it was the duty of the superior officers to explain to him the correct legal position and to tell him about his legal rights. Instead of doing that they threw him out of service by picking up a sentence from his letter, completely out of context. The action of the concerned officers of the Board, to our mind, was depreciable.

We understand that the concerned officers were acting in what they believed to be the best interests of the

Board. Still under the old mind-set it would appear to them just not right that the Board should spend good money on someone who was no longer of any use. But they were quite wrong, seen from any angle. From the narrow point of view the officers were duty bound to follow the law and it was not open to them to allow their bias to defeat the lawful rights of the disabled employee. From the larger point of view the officers failed to realise that the disabled too are equal citizens of the country and have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or largess but their right as equal citizens of the country." (Source: www.legalserviceindia.com)

Describing the Board's decision of terminating the disabled employee as 'bad and illegal' the court directed that in view of the provisions of Section 47 of the Act, Bhagwan Dass must be deemed to be in service and he would be entitled to all service benefits including annual increments and promotions etc. and shall continue in service till his date of superannuation according to the service records and all due payments, after adjustments, should be made to him within six weeks from the date of presentation of a copy of the judgment before the Secretary of the Board.

It is extremely expected that the reverberation of this humanitarian verdict of Indian apex court be heard in our legal system. As in most of our mill-factories, workers and employees are to work in a very miserable, insecure and unhygienic working environment, they are the most vulnerable to be victims of in-service disabilities. It is frequently reported that workers are suffering from injuries or amputation of limbs at working hours. Discontentedly enough, the wounded workers are awarded the punishment of being sacked instead of the desired commiseration and essential compensations from the office. As way to be free from these heartless practices, it is necessary to take affirmative actions for building up protection or safeguard mechanisms as well as remedial measures in our country for those wretched workers.

The writer is working in Ain O Salish Kendra.

## FACT file

# High Commissioner for Human Rights resigns

Louise Arbour has confirmed that she is to resign from her position as United Nations High Commissioner for Human Rights. She announced on Friday that she will leave office on 30 June.

The 61-year-old former Canadian Supreme Court justice disclosed her decision in a speech to the 47-nation UN Human Rights Council.

Reacting to the news, Amnesty International paid tribute to her achievements. Martin Macpherson, Director of Amnesty's International Law and Organizations Programme, called on UN Secretary-General Ban Ki-Moon to ensure that her successor is of a similar high international standard with a proven track-record as a strong and independent advocate for human rights.

As High Commissioner for Human Rights since 2004, Louise Arbour has been a forceful and formidable advocate for human rights protection, stressing the need to apply and enforce legal obligations and establish accountability for the perpetrators of human rights violations. During her time in office, the resources for the Office of the High Commissioner for Human Rights were increased.

"In an increasingly challenging global environment, the High Commissioner's position is that of a resolute and outspoken champion for human rights," said Macpherson. "The new High Commissioner must be a strong and independent advocate for human rights with a clear vision and a proven ability to inspire the broader

human rights community."

Amnesty International has called on UN Secretary-General Ban Ki-Moon to ensure that the new High Commissioner for Human Rights is selected by means of a transparent process that includes thorough consultation with all stakeholders, including civil society.

Arbour's office deploys nearly 400 human rights monitors in UN peace-keeping missions in hotspots such as



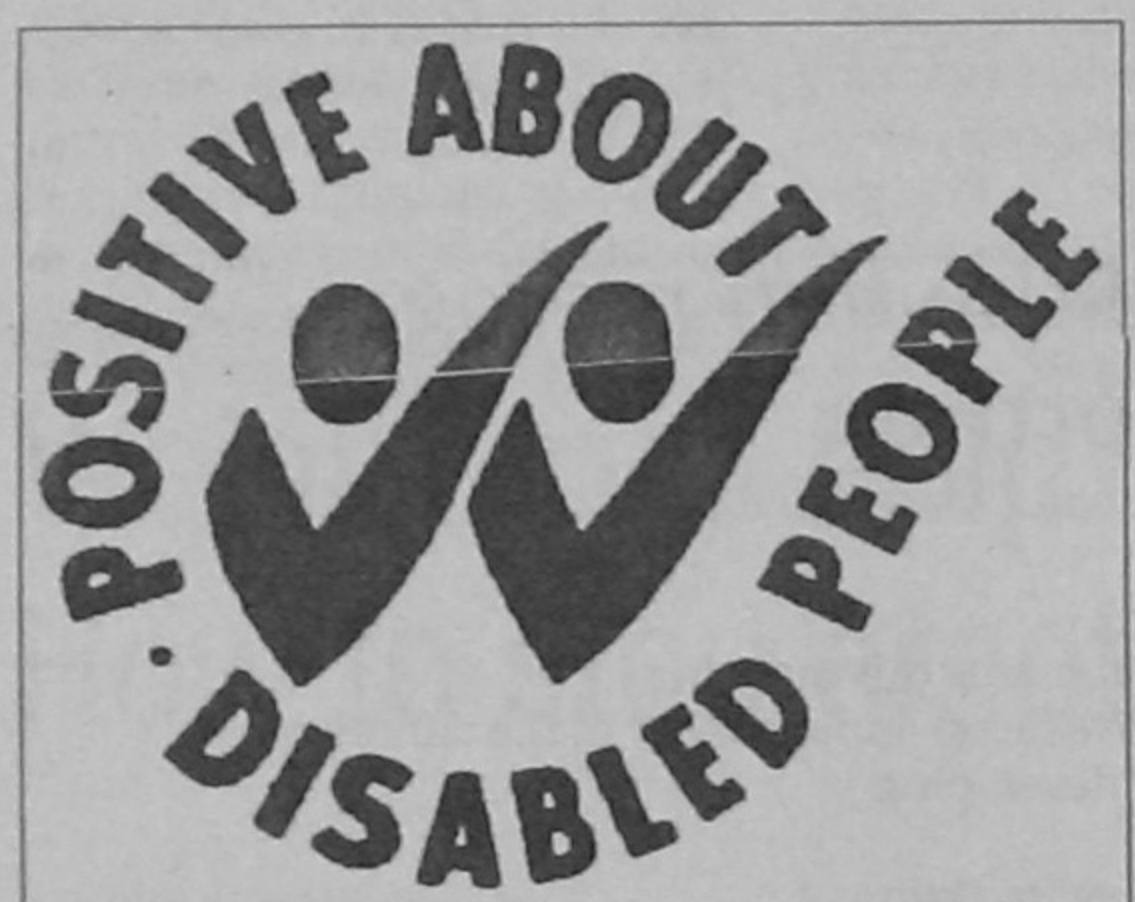
the Democratic Republic of Congo. Her office is independent but works closely with the UN Human Rights Council.

Arbour's forthright candour has prompted criticism from around the world, but she brushed this off as "inevitable".

According to Reuters, she said she wasn't leaving her job because of these pressures. "On the contrary, I have to resist the temptation to stay on to face them."

"It is very much for personal reasons. I am not prepared to make a commitment for another four years of this work. I have a family and find myself working essentially all the time here and travelling," she said. "I'm going home, basically."

Source: Amnesty International.



## LAW campaign

# Towards a just adoption law

MD. ALAMGIR

RECOGNITION of the children as the future of the nation entails a massive responsibility for the states to do everything feasible for them. Childhood is an episode of life when nurture, attention and adequate care are necessary for a balanced promotion towards maturity. A responsible nation must take the mission to ensure those very essential factors necessary for every child. The situation as understood and perceived in poor, developing countries is showing almost an opposite picture. So, as a sophisticated issue the child rights must be brought in a comprehensive manoeuvre encompassing unique, distinctive approaches and some other acceptable experiences to expand its gravity, magnitude and promote and prosecute implementation skills.

In Bangladesh the child rights situation is in the most vulnerable stage. Thousands of children are engaged in domestic work, hazardous jobs in different forms of child labour. And thousands of street children pass their life is even more serious conditions. They face not only denial of basic rights such as safe shelter, food, health care, safe drinking water, education, guidance, security, recreation, but they are also subjected to many risks and different forms of exploitation such as bonded labour, physical torture, sexual abuse, and trafficking. Moreover, a large number of this susceptible segment becomes the victims of trauma, stigma and different types of mental disorder due to varieties of bitter experiences in their street life which in turn make them distrustful, diffident and distasteful towards life. A large criminal network takes advantage of street children in order to make profits, exploiting their vulnerability and ongoing struggle for survival.

They are also engaged in crimes like smuggling and stealing, distribution of drug and weapons.

There is no mention of street children in the government's substantive policy document, the National Child Policy. The absence of legal recognition hampers mainstreaming of this segment to society and extending adequate protection and promotion of their human rights and dignity.

Government and other NGOs, INGOs and donor agencies have been trying to uphold the child rights for the last couple of years and the situation has also improved day by day but their reintegration or mainstreaming in the society has not much progressed yet. So, to establish the child rights and mainstreaming the distressed children in the society, along with the ongoing activities of the government, NGOs, civil societies, some alternative steps could be taken for their sustainability. In this regard I want to draw the kind attention of all the concerned authorities to opt for a new adoption legal framework in Bangladesh without prejudice to Muslim personal law or to the extent possible in conformity with the Islamic law.

Adoption involves the complete transfer of parental rights and responsibilities from one person to another. A transfer may occur from a birth parent to a relative, a step-parent, or even an unrelated person. Both minors and adults may be adopted. Each state has its own adoption laws, which govern the adoption process in their particular jurisdictions.

Adoption in Bangladesh is irrevocably linked to religious affiliation. Since there is no secular law regarding adoption in Bangladesh, so the dominant religion in the country has guidance upon the issue and this greatly decides how orphaned and abandoned children are received in the society. Many times religious institutions, government's shelter homes and other



non-government organizations' shelter homes undoubtedly provide a lot of support both financial and emotional to the orphans and street children within their own jurisdiction. But these supports in many cases do not help the orphans and street children in mainstreaming into the society.

### Bangladesh perspective

Although Bangladesh law does not allow for full adoption of Bangladeshi children, but it is widely practiced and accepted in our society. Adoption of orphan/helpless child is a very popular and moral practice amongst our people. By adopting orphan/helpless child, people consider them as their own child. And very often they declare the

orphan as their own son/daughter and pass onto them their investments including inheritance.

In Bangladesh, adoption happens in two forms: intra and inter. People do adopt children from their own relatives or community. As Islam is the predominant religion in the country, the law is also meticulously inclined by Quranic principles. While Muslim law prohibits adopting children, the Hindu law recognises adoption to continue one's lineage, name and inheritance. There are some instances where it is seen that the foreigners are adopting Bangladeshi children without any recourse to law.

### Adoption in Islam

Adoption in the technical sense is not allowed in Muslim Shariah law.

The Qur'an gives specific rules about the legal relationship between a child and his/her adoptive family. The child's biological family is never hidden; their ties to the child are never severed. The Qur'an specifically reminds adoptive parents that they are not the child's biological parents:

"...Nor has He made your adopted sons your (biological) sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way. Call them by (the names of) their fathers; that is juster in the sight of Allah. But if you know not their father's (names, call them) your brothers in faith, or your trustees. But there is no blame on you if you make a mistake therein. (What counts is) the intention of your hearts. And Allah is Oft-Returning, Most Merciful." (Qur'an 33:4-5)

Source: [http://www.angelfire.com/la/IslamicView/Adoption.html]

The guardian/child relationship has specific rules under Islamic law, which renders the relationship a bit different from what is common adoption practice today. The Islamic term for what is commonly called adoption is kafala, which comes from a word that means "to feed." In essence, it describes more of a foster-parent relationship. Some of the rules in Islam surrounding this relationship are:

- An adopted child retains his or her own biological family name (surname) and does not change his or her name to match that of the adoptive family.
- An adopted child inherits from his or her biological parents, not automatically from the adoptive parents.
- When the child is grown, members of the adoptive family are not considered blood relatives, and are therefore not mahrim to him or her. "Mahrim" refers to a

specific legal relationship that regulates marriage and other aspects of life. Essentially, members of the adoptive family would not be permissible as possible marriage partners, and rules of modesty exist between the grown child and adoptive family members of the opposite sex.

• If the child is provided with property/wealth from the biological family, adoptive parents are commanded to take care and not inter-mingle that property/wealth with their own. They serve merely as trustees.

These Islamic rules emphasize to the adoptive family that they are not taking the place of the biological family -- they are trustees and caretakers of someone else's child. Their role is very clearly defined, but nevertheless very valued and important.

It is also important to note that in Islam, the extended family network is vast and very strong. It is rare for a child to be completely orphaned, without a single family member to care for him or her. Islam places a great emphasis on the ties of kinship -- a completely abandoned child is practically unheard of. Islamic law would place an emphasis on locating a relative to care for the child, before allowing someone outside of the family, much less the community or country, to adopt and remove the child from his or her familial, cultural, and religious roots.

### Rationalities to establish a pertinent law/regulation

Though in Islam adoption is strictly prohibited but caring for the orphan, destitute children and neglected people who are under grief is always encouraged. The Prophet Muhammad (peace be upon him) once said that a person who cares for an orphaned child will be in Paradise with him, and motioned to show that they would be as close as two fingers of a single

hand. An orphan himself, Muhammad (sm) paid special attention to the care of children. He himself adopted a former slave and raised him with the same care as if he were his own son.

Allah on many occasions calls for the Muslims to take care of orphans, such as:

It is not piety that you turn your faces towards the east or west; but piety is the one who believes in Allah, the last day, the angels, the book, the Prophets, and gives his wealth, in spite of love for it, to the kinsfolk, to the orphans, and to the poor who beg, and to the wayfarer, and to those who ask... (2:177)

The prophet himself was an orphan:

And did He (Allah) not find you (Muhammad) an orphan and gave you a refuge? And he found you unaware and guided you? And He found you poor and made you rich? Therefore treat not the orphan with oppression (94:6-9). Source: [http://www.angelfire.com/la/IslamicView/Adoption.html]

However, there is a long history of care for those without parents in Islam. The Prophet Muhammad's own father died before he was born and by the time he was eight he had lost both his mother and the grandfather who named him. He was subsequently raised by his uncle Abu Talib who continued to be his protector until his own death, when Muhammad was an adult of almost fifty years of age. Indeed when Prophet's first wife Khadijah presented him with a slave named Zaid, the Prophet freed the boy and raised him as if he were his own son. So it can be seen that orphans were cared for in the very advent of the religion, and in my opinion it is this point that needs to be emphasized so that no abandoned or orphaned or helpless child goes uncared for.

If a general law/regulation could be made regarding adoption then it will be helpful in two ways: a. Barren father and mother will get a child which is the ultimate desire of any

father and mother, b. many distressed children will receive permanent shelter, while a legal framework will govern the issue in systematic manner.

Bangladesh, though a signatory to the UN Convention on Rights of the Child, 1989 has made a reservation to Article 21 which entrusts a responsibility to frame a child-favourable adoption legal framework. It runs as follows:

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status."

The best interest theme of this provision hints us to make an adoption law on the point. Indeed, best interest of the children is the ringing tune of CRC. As adoption has become a real practice irrespective of religious barrier, time has come to rethink to lift this reservation. Bangladesh has rationalized many aspects of Muslim personal law to safeguard the interest of children and women some of which are not at par with the Islamic imperatives. It can be argued that schemes based upon purely humanitarian ground should not purport to clash with the religious fervour. Bangladesh Shishu Adhikar Forum (BSAF) a national network of 235 Child Rights organizations under its NACR (Networking and Advocacy for Child Rights in Bangladesh) Project, funded by DANIDA is trying to establish a modified adoption law without prejudice to the Islamic practice.

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