Bhavya Nain vs High Court of Delhi: Bipolar Disorder and Competence, Agency, Disability

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Litigation involving mental health conditions often raises questions of agency or competence. The law, which imagines the legal subject as a rational individual, must determine whether the person with a mental health condition has the requisite mental competence to be considered on the same footing as others, or whether they can be considered capable of fulfilling 'normal' social obligations, or whether and to what extent society (family, employer, State) has particular obligations towards them. Conventional social prejudices involving mental health play an important role in these determinations. In this article, I explore how Indian courts have addressed issues of agency and competence in cases involving bipolar disorder. While focusing on the Delhi High Court's judgement in Bhavya Nain vs. High Court of Delhi, I undertake a comprehensive overview of the jurisprudence in the contexts of criminal law, family law, and disability benefits, showing how the courts have typically lacked a clear conceptualisation of the disorder, and how a rights-based approach is more readily adopted when questions of agency and competence are not at issue. Finally, I suggest that the Bhavya Nain judgement has the potential to counter this trend, as well as to bring some much-needed coherence to the legal understanding of bipolar disorder in India.

I. Introduction

"…as a consequence of the disability of Bipolar Affective Disorder (BPAD), even despite treatment with established methods and medication, a patient suffers from inability of think clearly[sic]*…"*

The above passage is quoted from a counter-affidavit filed by the Delhi High Court in *Bhavya Nain vs High Court of Delhi* .[1] The case involved a question of the petitioner's appointment to the Delhi Judicial Services under the

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1 *Bhavya Nain v. High Court of Delhi* (2020) 2 SLJ 419 (Delhi) (citation not found).

category of Persons with Disabilities. The petitioner had passed the preliminary and main examinations, and applied for one of the six seats reserved for persons with disabilities, including two for persons with mental disabilities, as per the provisions of the Rights of Persons with Disabilities Act, 2016 ('RPwDA'). The petitioner provided a disability certificate establishing that he suffered from bipolar disorder.[2]

The petitioner's application was rejected on the grounds that his disability was not permanent and so did not qualify for the reservation (the grounds quoted above from the counter-affidavit do not seem to have been cited in the original rejection of the application.) The petitioner challenged this decision in a writ petition before the High Court, which ruled in his favour, overturning the rejection and directing the respondent to admit the petitioner to the Delhi Judicial Services.

The judgement analysed the RPwDA and the nature of bipolar disorder in some detail, as I will discuss later in this note. The issues raised in this case are interesting because they bring to the fore some fundamental difficulties that emerge in the relationship between mental health and the law, between mental health and the usual construction of 'disability', and, for bipolar disorder in particular, the questions of agency and competence. 'Mental illness', of whatever kind, is typically associated with some amount of cognitive impairment or 'backwardness', as the term 'retardation' tells us; the existence of mental illness has retarded the individual's journey to full adult competence (hence the common grouping of the mentally ill with children). How does the existence of mental illness affect the law's assumptions of competence and agency in social contexts? How does it condition what the law may consider 'reasonable', both in terms of society's expectations from the individual and the individual's expectations from society? A short note such as this one does not have the scope for exploring any of these questions in detail; I would like merely to indicate them to the reader, and discuss how the *Bhavya Nain* judgement appears to be an important development in the legal discourse on bipolar disorder in India.

Bipolar disorder is a mental health condition that involves mood swings ranging from mania to depression.[3] Mood disorders such as bipolar disorder are particularly hard for the law to conceptualise, because they are characterised by

[2] I will use the term 'bipolar disorder' throughout, as it is the most common term, and is used interchangeably with 'bipolar affective disorder'. Some of the judgements discussed in this note use other terms such as 'bipolar depression', 'depression (bipolar)' or the formerly common 'manic depression'. As will be mentioned later, in some cases the varying terminology seems to be associated with the difficulty in attaining a precise diagnosis.

[3] See Iria Grande and others, 'Bipolar Disorder' (2016) 387 The Lancet 1561; Andre F Carvalho, Joseph Firth, and Edward Vieta, 'Bipolar Disorder' (2020) 383 New England Journal of Medicine 58; National Institute of Mental Health (NIMH), 'Bipolar Disorder' <https://www.nimh.nih.gov/health/topics/bipolar-disorder/> accessed 8 June 2022; American Psychiatric Association, 'What is

flux: the individual's mental state is constantly shifting. This creates fundamental difficulties for the law, which must rely on definitions and classifications that are founded on stable characterisation. The individual's positioning with respect to the line between 'normal' and 'abnormal' or 'healthy' and 'unhealthy', so essential for the legal determination of responsibility or capacity,[4] may constantly shift because of the very nature of this condition. Indeed, the law assumes an individual with a stable existence and identity, whereas people with mood disorders experience the world through a subjectivity that is constituted in flux.

The problem of diagnosis[5] also appears here. The fact that bipolar disorder is hard to diagnose in a one-off psychiatric examination,[6] and is often misdiagnosed as schizophrenia or depression, is reflected in many of the judgements discussed below, which do not necessarily dwell on the specific nature of bipolar disorder, and indeed don't always identify it clearly.[7] In India, there is no Supreme Court judgement and only a handful of High Court judgements that deal specifically with bipolar disorder as a distinct mental health condition.

II. The Jurisprudence of Bipolar Disorder in the Indian Courts

Indian courts have typically addressed bipolar disorder in three contexts:[8] criminal cases, family law matters, and cases involving disability benefits. The criminal cases mostly involve the question of whether the accused could claim 'unsoundness of mind' as a defence under Section 84 of the Indian Penal Code, 1860 ('the IPC'). The family law matters may be further divided into those

Bipolar Disorder?' <https://www.psychiatry.org/patients-families/bipolar-disorders/what-are-bipolar-disorders> accessed 8 June 2022 (For general information on bipolar disorder).

4 Especially in the context of criminal law, as discussed in Part IIA. below. See Stephen J Morse, 'Mental Disorder and Criminal Law' (2013) Journal of Criminal Law and Criminology 885, 888-896 (For a discussion of the difficulties involved in identifying and defining mental illness for the purposes of determining criminal responsibility).

5 NIMH (n 3); Carvalho (n 3). In addition to the difficulty of distinguishing between different mental illnesses, there is the difficulty of distinguishing between what counts as an 'illness' and, by contrast, what counts as a 'personality' disorder. See Deirdre M Smith, 'The Paradox of Personality: Mental Illness, Employment Discrimination, and The Americans With Disabilities Act' (2006) 17 George Mason University Civil Rights Law Journal 79 (For an overview of these difficulties. Smith explores how American courts rely on the distinction between 'mental disorder' and 'personality traits' when deciding cases involving discrimination in employment, while highlighting that the distinction itself is not based on clear scientific research but is socially constructed.)

6 See Grande (n 3) 1563. (There is on average a gap of several years between the initial onset of illness and the diagnosis).

7 See (n 2) regarding terminology.

8 I have based this study on a Manupatra search of all Supreme Court and High Court decisions. There are a handful of cases mentioning bipolar disorder that do not fit into the three broad categories I have mentioned, but I could find nothing in them of any relevance for the current analysis.

involving marriage and divorce and those involving custody. The former category again contains two sub-categories: cases where one spouse's mental health is asserted as a ground for divorce, and cases where the non-disclosure of one spouse's mental illness is asserted to be a ground for declaring the marriage voidable. Finally, the disability cases typically involve the question of whether someone is entitled to disability benefits or pension from State authorities because their disability could be attributed to their employment.

As we shall see, there is a lack of clarity and coherence in the approaches taken by the courts in these different contexts. The absence of a Supreme Court judgement dealing specifically with bipolar disorder is certainly relevant to this plurality of interpretations.

A. Criminal Law

The criminal law cases most starkly raise the question of agency. It is often emphasized that legal insanity or 'unsoundness of mind' does not correspond to medical insanity, but involves an evaluation of whether, at the moment of commission of the acts, the accused was capable of distinguishing right from wrong.[9] The law thus tends to rely on moral judgements rather than psychiatric categories. Section 84 of the IPC states that 'Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law'.[10]

For the present discussion, the most significant phrase here is "at the time of doing". As the criminal law must fix responsibility at a particular moment in time (however the moment is defined or delimited), it comes into tension with the diagnosis of those states of mind that are hard to 'pin down' at any moment. If the essential characteristic of a mood disorder such as bipolar disorder is flux, i.e., a flow or continuous change, the law needs to isolate an instant in that flux. While there is a fair amount of research on the relationship between bipolar

[9] See generally Patricia E. Erickson and Steven K. Erickson, *Crime, Punishment and Mental Illness: Law and the Behavioral Sciences in Conflict* (Rutgers University Press, 2008), 79-114; Morse (n 4). The interface of mental health and criminal law brings to the fore many difficult questions about intention, reason, free will, and responsibility. These questions lie beyond the scope of this case note, but are reflected in the issues it raises. See Suresh Bada Math, Channaveerachari Naveen Kumar and Sydney Moirangthem, 'Insanity Defence: Past, Present and Future' (2015) 37 Indian Journal of Psychological Medicine 381; Mahesh A Tripathi and Anand Kumar Tripathi, 'Paradigm Shift in Indian Legislature with Reference to Criminal Responsibility of an Unsound Mind' (2020) 10(1) Pragyaan: Journal of Law 29 (For a discussion of the insanity defence in India).

[10] Indian Penal Code, 1860, s 84.

disorder and violence or criminal behaviour[11], there is little that deals specifically with the insanity defence.[12]

A number of cases have dealt with the applicability of Section 84 in a situation where the accused allegedly suffered from bipolar disorder. Given what has already been observed about the difficulty in diagnosing bipolar disorder in general, it is not surprising that courts have struggled with the further interpretive challenge involved in deciding whether or not someone was of unsound mind at a specific moment in time due to their bipolar disorder. It is difficult to identify a pattern in these cases, because very often bipolar disorder is only mentioned in passing, or discussed very briefly with no real investigation of its nature or implications. In several cases, the courts established that the accused had bipolar disorder and Section 84 was therefore applicable or, on the contrary, that the existence of the disorder had not been proven and that Section 84 was therefore not applicable. From the few instances where a more substantive discussion appears, it does not seem possible to draw any conclusions for a broader jurisprudence of mood disorders.

In *State of Gujarat v Thakor Nagjiji Babuji Nathuji*,[13] the Gujarat High Court explored the nature of bipolar disorder and cited medical literature on it, but only for the purpose of concluding that it was "a serious brain illness" that should have been taken into account by the Trial Court in order to determine whether the accused was a person of unsound mind for the purposes of Section 329 of the Criminal Procedure Code, 1973, which lays down the procedure to be followed in such a case.

In *Jeevan Rana v State of Himachal Pradesh*,[14] the accused, convicted of sexual assault, claimed that he had been of unsound mind at the time the offence was committed, relying on a diagnosis of bipolar disorder. The Court quoted at length from the *Nalini Kumari* case (discussed below in Part B), and held that Section 84 was not applicable as the accused "knew what he was doing since he ran away."[15] This conclusion was not however directly linked to the *Nalini Kumari* quotation, nor was there an independent analysis of the case using the literature on bipolar disorder. It would be a bit of a stretch to cite this case as a judicial

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[11] Thomas Fovet and others, 'Individuals with Bipolar Disorder and Their Relationship with the Criminal Justice System: A Critical Review' (2015) 66(4) Psychiatric Services 348. (The authors conclude that criminal acts are common among people with bipolar disorder, especially when it is combined with addiction or other personality disorders).

[12] One study from Iran looked at two homicide cases committed by people with bipolar disorder, and emphasized the importance of the forensic psychiatrist in determining whether the accused could be considered medically insane: Azadeh Memarian, Seyed Hossein Moosavinezhad Baboli, and Hanieh Saboori Shekofteh, 'Insanity Defence in Bipolar Patients at the Time of Committing murder According to Iranian Law: Case Studies' (2019) 88(1) Medico-Legal Journal 24.

[13] *State of Gujarat v Thakor Nagjiji Babuji Nathuji* (2019) 2 Crimes 420 (Guj).

[14] *Jeevan Rana v State of H.P.* 2015 SCC OnLine HP 1821 : 2015 Cri LJ 4619.

[15] *Jeevan Rana v State of H.P.* 2015 SCC OnLine HP 1821 : 2015 Cri LJ 4619, ¶29.

determination of agency and responsibility in a criminal case involving bipolar disorder; however, it is the closest the Indian higher courts have come to it.

A most unusual instance—without any precedent or any similarity to earlier cases—is to be found in the high-profile rape case *Mahmood Farooqui v State*.[16] For present purposes, the relevant portion of the judgement is the passage that discusses the mention of bipolar disorder in some correspondence between the wife of the accused and the complainant after the alleged rape. The Court states:

> *"However, it would be necessary to know as to what a bipolar disorder in a human being entails. Bipolar disorder is one of the most severe of the mental illness. It is a brain disorder which impairs a person's mood, energy and basic ability to function. Symptoms of the mania include increased energy or restlessness; extreme irritability; inability to concentrate; poor judgment and at times aggressive behavior. In some cases, impatience and volatility have also been noticed. There are symptoms of depression in a person suffering from bipolar disorder. Though no specific plea has been taken about the bipolar disorder of the appellant but from the evidence available on record, there appears to be some hint that the appellant suffered from the same. The appellant has been stated to be, on the day of the incident, crying and crying so loud and bitterly that nasal mucus was dripping down till his moustache. This is how the prosecutrix has described the state of the appellant sometimes prior to the alleged incident."*[17]

This passage is unusual for several reasons. First, the detailed discussion of bipolar disorder is made without any reference to medical literature or earlier case law. Second, the court impliedly makes a connection between the existence of the mental disorder and the accused's physical appearance and conduct; the stigma of the mental disorder is inscribed on the body. Third—and this is the most strikingly unusual aspect—the court makes these observations without any reference to Section 84 IPC and in the absence of any argument made by the defence relating to bipolar disorder. I have shown elsewhere how this is part of the Court's reliance on different narrative elements that operate to lessen the accused's agency, and hence make them less responsible for their actions.[18] In terms of the legal conceptualisation of bipolar disorder, however, unlike every other case discussed here, the judgement operates entirely at the level of implication and perception, and consequently of stigma.

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[16] *Mahmood Farooqui v State (Govt of NCT of Delhi)* 2017 SCC OnLine Del 6378 : 2018 Cri LJ 3457.

[17] *Mahmood Farooqui v State (NCT of Delhi)* 2017 SCC OnLine Del 6378 : 2018 Cri LJ 3457, ¶101.

[18] Arun Sagar, 'Judicial Narrative and Rape Myths: The Farooqui Case' (2019) 15(1) NLS Socio-Legal Review 44, 53-58.

B. Family Law

The family law cases are perhaps where the social perception of mental illness is most directly at issue. The answer to the question of 'how much' mental illness is required for it to become a ground for divorce—i.e., what extent of mental illness in one spouse makes it impossible for the other spouse to be reasonably expected to stay in the marriage—depends not on medical evaluation but on a normative evaluation of spousal behaviour and spousal expectations. The stigma-by-association[19] is itself part of what makes the marriage difficult for the other spouse.

The stigmatisation of mental illness is even more clearly inscribed in legal discourse when it comes to the voidability of marriages where a material fact was suppressed at the time of marriage—courts have repeatedly held that the concealment of mental illness amounts to fraud under Section 12 of the Hindu Marriage Act, 1955 ('HMA').[20] I do not propose to explore this issue here, but one case involving the concealment of a diagnosis of bipolar disorder is particularly interesting and relevant for the legal characterisation of the condition.

In *Nalini Kumari v K.S. Bopaiah*,[21] the wife had been treated for bipolar disorder before marriage, and the husband had not been made aware of this. Was this fact in itself sufficient to constitute fraud that could be invoked to annul the marriage? The Karnataka High Court quoted at length from medical literature,[22] including several passages establishing that bipolar disorder could not be cured but could be treated. However, the court then proceeded to ignore this when it discussed the wife's medical history, because it determined that she had been cured when a prior episode of psychosis had been successfully managed. In an impressive judicial sleight-of-hand, the court noted that one of the doctors who had treated her had advised her to continue treatment to avoid a relapse, and concluded from this that she had been 'completely cured' of her disorder. The judgement thus implied that each episode (or 'relapse') of bipolar disorder was a discrete medical event, which is of course contrary to the medical literature that had been quoted in the judgement itself.

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[19] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1963), 43.

[20] Cases involving bipolar disorder follow this pattern. In *Kiran Kumari v Sharvan Jha* 2016 SCC OnLine Jhar 3157 : (2017) 3 AJR 126, the existence of an undisclosed bipolar disorder (along with an unrelated other medical condition) was considered sufficient ground for the marriage to be held voidable under Section 12. A similar conclusion was reached in *Mamta Rani v Sudhir Sharma* 2014 SCC OnLine Del 6694 : (2015) 217 DLT 51, where the court set aside the question of whether the wife's bipolar disorder was sufficient ground for the marriage to be held voidable under Section 12(1)(b), but held that the non-disclosure of the disorder was clearly sufficient under Section 12(1)(c).

[21] *Nalini Kumari v K.S. Bopaiah* 2006 SCC OnLine Kar 697 : (2007) 1 Kant LJ 342.

[22] *Nalini Kumari v. K.S. Bopaiah* 2006 SCC OnLine Kar 697 : (2007) 1 Kant LJ 342 [20]-[24].

We need not concern ourselves with the details of *Nalini Kumari* or dwell on the 'fraud' aspect any further, but this part of the judgement is particularly interesting as it brings into relief the profound difficulty both of diagnosing mood disorders and of determining the legal lens through which we should try to look at them. Is the interval between two 'episodes' one of 'normality' during which the individual does not have a mental disorder or disability? The court in *Nalini Kumari* seemed to answer in the affirmative, and relied on this answer to decide in favour of the person with bipolar disorder. But the medical literature supports the opposite answer, as does the fact that 'mood disorders' are listed in the RPwDA, a statute that focuses on permanent disabilities. This discussion elides the fact that it is very difficult to clearly delimit an 'episode' from 'normality'; bipolar disorder is characterised by flux, and something in flux cannot always be divided into discrete components. This is clearly true of the regular 'mood swings' that define the disorder, but even more extreme episodes of bipolar-related psychosis do not have a clear start date and end date.[23]

I could not determine any clear pattern in the cases involving bipolar disorder as a ground for divorce.[24] In *Nisha v Rakesh Kumar*,[25] the Punjab and Haryana High Court held that the fact that the wife had been diagnosed with bipolar disorder was not enough to warrant a divorce. However, in the operative part of the judgement, the court appeared to disregard the diagnosis of bipolar disorder made by two doctors, and relied instead on the evidence of one doctor who, while acknowledging that bipolar disorder was treatable but not curable, declared that the wife was not suffering from any mental disorder at the time of observation; therefore, according to the court, the husband could not reasonably claim that he could not be expected to live with her. The court also added that the disorder could possibly flare up again, and advised the husband to provide a calm and stable environment at home to help avoid this. The court thus appears to adopt the *Nalini Kumari* approach of treating each 'episode' as a discrete event.

The custody cases do not provide any clarity on this point, but they are interesting for present purposes because they involve questions of competence

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[23] I base these observations on personal experience as well as on accounts from other individuals with bipolar disorder. The published accounts I have found do not dwell in detail on this aspect of living with bipolar disorder, but it emerges from a few statements: "I'm constantly aware of it. I am bipolar all of the time"; "I feel like I'm riding a constant rollercoaster of moods"; Chris O'Sullivan, 'What it's like to have bipolar, by people who have bipolar' (Mental Health Foundation, 30 March 2016) <https://www.mentalhealth.org.uk/blog/what-its-have-bipolar-people-who-have-bipolar> accessed 8 June 2022. Attempts to delimit and categorise 'episodes' are further complicated by the fact that each experience of bipolar disorder is unique.

[24] The difficulty of diagnosis is, however, apparent. For instance, in *Pankaj Mahajan v Dimple* (2011) 12 SCC 1, some doctors diagnosed the wife with schizophrenia, others with bipolar disorder. It seems that this was because her conduct could equally have been a manic episode of psychosis or a manifestation of paranoid schizophrenia; a more certain diagnosis would have required a much longer period of observation and treatment.

[25] *Nisha v Rakesh Kumar* (2019) 4 RCR(Civil) 710.

more starkly than the marriage and divorce cases do; the issue is usually to determine whether or not one parent is fully competent to take care of the child and what custody arrangement would be in the child's best interest. When there is a claim by one of the parties that the other party has bipolar disorder and hence should not be granted custody of the child, the courts have typically avoided making a clear pronouncement on whether the existence of bipolar disorder (or other mental ailments) is in itself a disqualification. However, there does seem to be an underlying tendency to take it into consideration as a factor weighing against the parent with the diagnosis.

In *Anil Kumar Pradhan v Madhabi Pradhan*,[26] the Orissa High Court noted that a lower court's order handing over custody of the child to the mother had incorrectly determined that the mother was not suffering from any mental illness, as she had been diagnosed with bipolar disorder. The custody order was reversed, however, on other grounds such as the fact that the child was already residing with the father and had better access to health care and education in her current environment. The mother's mental illness was not specifically cited as a ground for the decision. Similarly, in *Ranjeet Dnyaneshwar Kadu v Sushma Ranjeet Kadu*,[27] the Bombay High Court overturned a trial court's interim order that had directed the father to hand over custody of the child to the mother, who was under treatment for bipolar disorder and depression. The trial court had determined that the mother was mentally and physically fit to take care of the child. The High Court, however, declared that the trial court had not given sufficient importance to the fact that the mother was under treatment for "depression and related disorders", and that it was in the child's best interest that custody remain with the husband until there was a final resolution of the ongoing divorce petition. While the fact that the husband already had custody was also cited as a relevant factor, it does seem that the High Court considered the mere existence of the mental illness to be a disqualifying factor.

Another hint of the possible judicial attitude emerges in *Ramit Kumar Dey v Rituparna Dey*,[28] where the father claimed that the mother suffered from "recurrent Depressive Disorder", which he alleged "to be a form of Bipolar Disorder". The Calcutta High Court's judgement does not mention bipolar disorder again, but does consider the existence of the possibility of the mother "relapsing to her depressive condition"[29] as being sufficient ground to deny her custody of her child. Interestingly, the court derived this conclusion from a doctor's certificate that emphatically affirmed the mother's competence "provided she continues medication and maintains regular professional follow-up". The doctor also noted that she had "held" her job and displayed "normal functionality" in her "day-to-day

[26] *Anil Kumar Pradhan v Madhabi Pradhan* 2015 SCC OnLine Ori 417 : (2016) 1 OLR 11.
[27] *Ranjeet Dnyaneshwar Kadu v. Sushma Ranjeet Kadu* (2021) 1 AIR Bom R 65.
[28] *Ramit Kumar Dey v Rituparna Dey* (2019) 2 CHN 115 (CAL).
[29] *Ramit Kumar Dey v. Rituparna Dey* (2019) 2 CHN 115 (CAL), ¶11.

activities". In an impressive feat of exegesis, the court picked up these words as "intermittent cautionary terms" that indicated the possibility of relapse "upon social triggers arising", and noted that such a relapse would *obviously* be detrimental to the welfare and safety of the child.[30] The key word *obviously* allows the court to turn the doctor's certificate against itself without further justification, reminiscent of the interpretive gymnastics of *Nalini Kumari*, but in the opposite direction. The 'common sense' argument allows certain preconceptions about mental health and competence to be asserted as fact. Because of the complexities of diagnosis and of procedure, however, they do not emerge as doctrine.

For both criminal law and family law, then, bipolar disorder due to its very nature poses difficult problems of interpretation. Given this, it is perhaps not inappropriate that judges tend to decide each case on facts and no certain guidelines can be identified in the jurisprudence. However, where the jurisprudence does seem lacking is in the absence of a clear legal conceptualisation of the disorder itself. The manner in which one conceptualises bipolar disorder has implications for the law in any context, because the law requires certainty. As we have seen, *Nalini Kumari* (and to a lesser extent, *Nisha v Rakesh Kumar*) attempted to provide certainty by establishing that someone who was not at that moment showing symptoms[31] of a mental disorder was to be considered 'normal'. Another way of achieving certainty is to decide that the existence of the diagnosis establishes the disorder as a permanent condition (at least until there is a new diagnosis); this is the approach taken by the RPwDA and affirmed by the Delhi High Court in *Bhavya Nain*.

C. Disability Benefits

The cases involving disability benefits are closest to *Bhavya Nain* in that they deal with bipolar disorder in the context of public employment. However, in substance they are less relevant for the current analysis because only rarely do they engage with questions of agency and competence. One instance arose in *Nazmal Hasan Siddiqui v Union of India*[32], where the Delhi High Court held that it would be dangerous for a person with bipolar disorder to carry arms. In *Surender v Union of India*,[33] it hinted that, since the Border Security Force was a "disciplined and armed force", discharging a person with bipolar disorder was justified even when the condition was mild and under treatment. In *Tapas Kumar Dey v Union of India*,[34] the petitioner was held to be competent to carry out light duties without arms despite having bipolar disorder.

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30 ibid.

31 Of course, there is no clarity on what constitutes a 'symptom'.

32 *Nazmal Hasan Siddiqui v Union of India* 2011 SCC OnLine Del 2471.

33 *Surender (Ex. Constable) v Union of India* LQ/DelHC/2019/3210.

34 *Tapas Kumar Dey v Union of India* 2015 SCC OnLine Cal 134 : (2016) 2 SLR 738.

Most of the cases, however, do not concern agency, but involve a determination of whether or not an individual's disability arose in the course of their service; disability benefits are typically denied when the condition is determined to have already existed at the time of recruitment. Questions of diagnosis and causation thus come to the fore, and as we have seen, these are the questions for which even the medical and scientific community do not always have clear and consistent answers. In cases where the disability pension has been granted to an individual with bipolar disorder, the courts have often determined that the disorder was caused by some circumstance in the course of employment, which is incompatible with the prevailing medical understanding of bipolar disorder.

For instance, in *Arjun Singh v Union of India*,[35] the Jammu and Kashmir High Court held that since the Indo-Tibetan Border Police Force had found the petitioner fit for recruitment, in the absence of any clear medical evidence to the contrary it had to be assumed that the petitioner's bipolar disorder was attributable to or aggravated by the conditions of service, and he was thus entitled to receive a disability pension. Similarly, in *Gopal Singh Dadwal v Union of India*,[36] one of the petitioners was held to be entitled to disability benefits on his discharge from the Army, because the Medical Specialist determined that his bipolar disorder had not existed at the time of his recruitment and so the Army could not claim that it was a "constitutional" disease.

In *Naresh Kumar v Union of India*,[37] however, the Delhi High Court observed that mental disorders such as bipolar disorder and schizophrenia are not easy to detect, and that it may happen that a pre-existing disorder is not noticed at the time of recruitment. This case, however, involved a provision in the rules for casualty pension that specifically excluded non-detected existing conditions from being considered as diseases that had arisen during service. Since the court determined that there was no incident during the petitioner's service that could have triggered his schizophrenia—no medical literature was cited on this or on any other point—it was held that it must have existed prior to recruitment.

Some cases involve rather unusual diagnostic reasoning employed by the courts. In *N.K. Sadhu Singh v Union of India*,[38] the petitioner's bipolar disorder was attributed to depression caused by a boxing injury to the chest. In *Tapas Kumar Dey vs Union of India*,[39] it was implied—although not expressly stated—that a bullet injury had caused bipolar disorder.

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[35] *Arjun Singh v Union of India* MANU/JK/0508/2018 (citation not found).
[36] *Gopal Singh Dadwal v Union of India* 2006 SCC OnLine Del 1641 : (2006) 4 SCT 342 (Delhi).
[37] *Naresh Kumar v Union of India* ILR (2012) 1 Del 156.
[38] *N.K. Sadhu Singh v Union of India* 1995 SCC OnLine P&H 312 : (1995) 111(3) PLR 474.
[39] *Tapas Kumar Dey v Union of India* 2015 SCC OnLine Cal 134 : (2016) 2 SLR 738.

In most of the disability cases, the courts have pronounced on the nature and causes of bipolar disorder without any reference to medical literature. One exception is to be found in *Union of India vs Bankim Chandra Debnath*,[40] where the Calcutta High Court cited medical literature on mood disorders and psychosis. Curiously, however, the Court then proceeded to make a general statement about causation that had only been hinted at in one sentence in the cited passage, and that is certainly not widely accepted: it declared that while bipolar disorder without psychotic features has genetic causes, if psychotic features are present the disease may be attributable to external causes. Since the petitioner displayed psychotic features and no disease had been detected at the time of recruitment, the Court held that the disease must be attributable to the stress and strain of his employment.

The disability cases thus display a clear trend. The courts are typically keen to allow the petitioners to receive disability benefits, and regularly make diagnostic pronouncements as well as pronouncements about causation that do not seem supported by scientific evidence. In the absence of questions of competence, agency or responsibility, the outcome is typically an assertion of the petitioner's right to welfare benefits. In other words, the law most clearly adopts a rights discourse in the context of bipolar disorder when the individual's active participation (in a profession, in a family) is not at stake. Whether a similar trend can be observed in other Indian mental health jurisprudence—or in disability jurisprudence more broadly—is a question worth exploring. The significance of the *Bhavya Nain* judgement, to which I will now return, is that the rights discourse appears in the context not of discharge from service but of recruitment.

III. The Bhavya Nain Judgement

Mental health conditions have different implications in different contexts, because the 'impairment' of mental faculties alleged (or established) may have a different meaning. In one way or another, the individual's competence is in doubt, but 'competence' may involve different kinds of agency or capacity. Agency under criminal law requires a determination of whether the accused is mentally competent in terms of comprehension of an act's consequences and its moral rightness or wrongness. Capacity in terms of employment involves an evaluation of the individual's ability to carry out the tasks required by the work in question. The ability to carry out tasks required in a work context, however, is conditioned by the nature of the work and the conditions of employment; the question is thus one of disability and the social experience of disability, whereas in the criminal law context the focus remains on the nature of the impairment. This brings to the fore one of the key concepts in disability theory—the difference between thinking about disability as a social phenomenon and thinking about disability as an

[40] *Union of India v Bankim Chandra Debnath* (2019) 3 SLR 249.

individual, medical problem.[41] Since criminal responsibility is determined in an individual, atomistic manner, it stands to reason that legal discourse aligns itself closer to the medical paradigm of disability in the context of criminal justice;[42] a more nuanced understanding of disability as a social phenomenon can take hold only in a context (such as the family or employment) where social and economic phenomena are conceived of in relational terms.

The medical paradigm, however, is inescapable as soon as legal questions of classification and definition arise. In *Bhavya Nain*, the petitioner's application had been rejected because his disability was said to not be permanent, as the medical certificate the petitioner provided stated that his disability was to the extent of 45% but was currently in remission. The certificate was valid for 5 years. The percentage is relevant because a "benchmark disability" is defined in the RPwDA as being not less than 40%;[43] persons with benchmark disabilities qualify for reservations under the Act.[44]

The court explored the nature of bipolar disorder in detail, and held that the possibility of improvement or remission did not change the fact that it was a permanent disability, and that the 5-year duration of validity did not imply otherwise. The rejection of the petitioner's application was thus incorrect. The court thus brought the interpretation of the RPwDA in line with prevailing scientific opinion about the nature of the disorder.

The last part of the judgement is very interesting, because the court goes beyond this technical legal question to look at the context in which the matter arose. The court deduces from the counter-affidavit filed by the respondent that the real reason for rejecting the application was the respondent's doubts about the petitioner's competence. I have quoted a few lines from the counter-affidavit (as

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[41] See generally Tom Shakespeare, 'The Social Model of Disability' in Lennard J. Davis (ed), *The Disability Studies Reader* (5th edn, Routledge 2017), 195 (On the social and medical 'models' of disability).

[42] For an argument that criminal law should be more concerned with a behavioural understanding of mental illness than with a diagnostic one, see Morse (n 4) 888-892.

[43] Rights of Persons with Disabilities Act 2016, s 2(r).

[44] I will not explore the matter further here, but it is it worth noting that the attribution of a numerical figure to determine the extent of disability is uncertain and problematic enough in any context, and it begins to appear absurd in the context of a mental health condition, where the line between 'normal' and 'disabled' can itself be blurred; establishing a percentage figure is fraught with uncertainty. It is even more difficult to fathom in the context of a mood disorder that is characterised by mood swings of varying duration and frequency. I have not been able to find any studies dealing with the diagnostic complications of benchmarks for mental disabilities. On the uncertain consequences of the benchmark figures for disability politics in India, see Michele Friedner, Nandini Ghosh and Deepa Palaniappan, ' "Cross-Disability" in India?: On the limits of Disability as a Category and the Work of Negotiating Impairments' (2018) South Asia Multidisciplinary Academic Journal [Online], <http://journals.openedition.org/samaj/4516> accessed 8 June 2022, 7-10.

it appears in the judgement) at the start of this note; it is worth reproducing the quoted passage in its entirety. The emphasis has been added by the court:

> "*That, without prejudice, it is pertinent to note that, ultimately, the Petitioner is seeking appointment in the Delhi Judicial Service on the basis of claiming status as a 'Person with Disability'. That in the event that the aforesaid Petition is allowed, the Petitioner is likely to be appointed as a Judge in the Delhi Judicial Service. However, admittedly, 'the said post carries with it great and multiple responsibilities, including a severely stressful work-life and environment.'*
>
> *8. That, without prejudice, it cannot be lost sight of that, 'as a consequence of the disability of Bipolar Affective Disorder (BPAD), even despite treatment with established methods and medication, a patient suffers from inability of think clearly*[sic]*, lack of attention and focus, memory problems etc. That further, the stress arising from the appointment being sought by the Petitioner is likely to exaggerate and worsen the disability of the Petitioner, thereby creating a risk not only for the service rendered but also towards the overall mental health and well-being of the Petitioner.'"*[45]

The court succinctly points out the inherent contradiction in the respondent's arguments:

> "*On one hand, the respondent has trivialised the ailment of the petitioner by stating that it is not of permanent nature, and that he would cease to be a PwD with bench mark disability, at some point of time, with his disability falling below 40%. On the other hand, in the aforesaid paragraphs, the respondent states that the condition of the petitioner is so severe that he may not be able to handle the stressful job of a Judicial Officer*".[46]

Behind the technical argument based on the extent and duration of disability, thus, we see the operation of a fairly typical prejudice. There is a lot of research on employment discrimination against people with mental illness.[47] The assumption that the person with mental illness would be incompetent or

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[45] *Bhavya Nain v. High Court of Delhi* (2020) 2 SLJ 419 (Delhi) ¶7.

[46] *Bhavya Nain v. High Court of Delhi* (2020) 2 SLJ 419 (Delhi) ¶51.

[47] Crosby Hipes and others, 'The Stigma of Mental Illness in the Labour Market' (2016) 56 Social Science Research 16; Heather Stuart, 'Mental Illness and Employment Discrimination' (2006) 19(5) Current Opinion in Psychiatry 522; Terry Krupa and others, 'Understanding the Stigma of Mental Illness in Employment' (2009) 33(4) Work 413; Evelyn PM Brouwers, 'Social Stigma is an Underestimated Contributing Factor to Unemployment in People with Mental Illness or Mental Health Issues: Position Paper and Future Directions' (2020) 8, 36 BMC Psychology, <https://doi.org/10.1186/s40359-020-00399-0> accessed 8 June 2022.

unreliable is a central element that emerges in this literature, as well as the fact that discrimination in the sphere of employment (both at the time of hiring and later) has a significant impact on the social condition of those with mental disabilities. People with mental illness are disproportionately likely to be unemployed, and there is often a clear negative wage differential for people with mental illness. This can be considered a systemic social problem because employers tend to have assumptions of unpredictability and incompetence even when there is no particular evidence of this in individual cases; persons with mental illness are thus discriminated against as a group.[48] Popular stereotypes about the unstable and even dangerous nature of some mental health conditions contribute towards the hostile work environment.[49] Stigma manifests itself in multiple cognitive elements, attitudes, structural features, and formal and informal practices that add up to create an exclusionary and discriminatory social structure.[50]

The *Bhavya Nain* case has the further element of being a matter involving not anti-discrimination provisions but an affirmative action provision, which involves its own complex relationship between stigma and identity in the field of employment.[51] On the one hand, one must assert the stigmatised identity in order to claim legal entitlements. On the other hand, revelation of the stigmatised condition triggers the social experience of exclusion and contempt. People with mental illnesses tend to avoid disclosing this in the workplace, precisely to try to avoid the discrimination and prejudice they are likely to face if their condition is known.[52] Paradoxically, this may prevent these individuals from benefitting from supportive mechanisms and policies if they do exist; disclosure and non-disclosure of the condition may both have negative consequences in different ways.[53] Similarly, in contexts of affirmative action, the condition one may go to great lengths to conceal becomes precisely the one that must be asserted and proved. This is the double bind that those who have stigmatised conditions must struggle

48 Brouwers (n 47) 3.

49 ibid.

50 Stuart (n 47) 522.

51 The literature on this issue is mostly centred on race-, caste- or gender-related affirmative action; there are some passing mentions, but I have not been able to find studies that focus specifically on affirmative action in the context of disability. See e.g. Lisa M Leslie, David M Mayer and David A Kravitz, 'The Stigma of Affirmative Action: A Stereotyping-Based Theory and Meta-Analytic Test of the Consequences for Performance' (2014) 57(4) Academy of Management Journal 964; Ashwini Deshpande, 'Double Jeopardy? Stigma of Identity and Affirmative Action' (2019) 46(1) The Review of Black Political Economy 38; Miguel M Unzueta, Angélica S Gutiérrez, and Negin Ghavami, 'How Believing in Affirmative Action Quotas Affects White Women's Self-Image' (2010) 46 Journal of Experimental Social Psychology 120; Rupert Barnes Nacoste, 'Sources of Stigma: Analyzing the Psychology of Affirmative Action' (1990) 12(2) Law & Policy 175; Madeline Heilman, 'Affirmative Action's Contradictory Consequences' (1996) 52(4) Journal of Social Issues 105.

52 Stuart (n 47) 524. See Goffman (n 18) 57-128 (On stigma and 'information control' in general).

53 Brouwers (n 47) 4.

with even when the law has taken cognisance of the injustice of their treatment.[54] In *Bhavya Nain*, the petitioner's competence was doubted precisely because he submitted the medical certificate.

The court firmly rejected the respondent's comments on competence, stating that the reservation for people with mental illnesses had been established by statute, and that it was not open to the respondent to subvert its operation due to their own personal beliefs or opinions. The statute clearly defines mental illness to exclude "retardation" or "sub-normality of intelligence",[55] which showed that the competence question had already been taken into account when the statutory framework was being set up. The court goes on to emphasize the rights-based philosophy underlying the statute's affirmative action provisions for people with mental illnesses: *"Merely because they may need medication and treatment throughout their lives, or may suffer setbacks from time to time, cannot be a reason to deny them equal opportunity to assimilate in the society, make their contribution and have a life of dignity."*[56] The court later also cites other case law to affirm that employment is an essential element of inclusion and empowerment for people with disabilities.

What makes the judgement particularly interesting is the manner in which the tension between formal legal argumentation and the underlying social phenomena emerges from the legal text. In the counter-affidavit, legal argumentation operates at the technical-rational level in terms of its interpretation of the statute, following which the assumptions of the 'consequences' of bipolar disorder are stated as plain fact, with neither any reliance on authoritative sources nor any acknowledgement of the subjective nature of the opinion put forth. As is often the case with exclusionary and discriminatory discourses, they are presented as common sense. Here, the respondent also relies on common sense to dismiss the entire statutory framework. The visual metaphor[57] ("it cannot be lost sight of") subtly brings out that the incapacity of the petitioner (due to bipolar disorder) is clear and obvious, and that the discussion about the interpretation of the legal provisions should not obfuscate it.

The judgement, however, expressly operates at both levels: the technical-rational argument is resolved first using a technical-rational analysis, and the prejudice underlying the order is then highlighted and addressed using a broader

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[54] I have referred above to the rich literature on affirmative action and stigma, which discusses this very problem. Most of this literature focuses on the consequences of affirmative action and the experience of stigma. i.e., the *response* to affirmative action. The question in *Bhavya Nain*, however, is of prejudice which threatens to frustrate the very intent of the affirmative action framework.

[55] Schedule to the Rights of Persons with Disabilities Act, 2016, §3. The underlying ableist emphasis on "normality" is, of course, not disturbed by the judgement.

[56] *Bhavya Nain v High Court of Delhi* (2020) 2 SLJ 419 (Delhi), ¶53.

[57] While this is not directly relevant for the present topic, it bears mentioning that the metaphor is itself an ableist one.

rights-based discourse that references more general legal instruments while reflecting on social and psychological factors. The court is thus at pains to not only provide a beneficial interpretation of the statute, but also to call out prejudice and discrimination that may drive non-beneficial interpretations such as that put forward in the counter-affidavit. The social meaning of mental disability emerges along with the technical construction of the legal provisions. The text provides a discursive space in which these different forms of argumentation operate and reinforce one another.

The most significant aspect of the *Bhavya Nain* judgement, then, is not the Court's interpretation of the RPwDA, but its *obiter* condemnation of the prejudice displayed in the order and its affirmation that mental illness does not preclude competence (which is, of course, already recognised in the statutory scheme).Of course, the Court's observations are unlikely to have any broader political consequences, but within the sphere in which it operates, the judgement is a landmark. The firm rejection of this prejudice and the clear acknowledgement of competence for people with bipolar disorder may possibly set a precedent for the judicial conceptualisation of bipolar disorder in the future. Whether it will have any implications for the jurisprudence of mood disorders in other contexts, or of other mental health conditions, is an open question.

IV. Conclusion

I do not mean to make any broad claims about the significance of the *Bhavya Nain* judgement for disability jurisprudence in general. The court does not try to distance itself from a technical/medical understanding of bipolar disorder, nor from the underlying emphasis on "normality"; its remarks about the petitioner's capabilities should not be seen as revolutionary in this light. Indeed, as I have mentioned above, the legal requirement to identify, define, and categorise means that the law can never give up its reliance on a medical understanding of impairment; instruments such as the RPwDA that intend to incorporate a social understanding of disability must still rely on medical expertise for determining who is entitled to the legal benefits they provide. The determination of impairment thus remains central to the entire legal sphere of disability.

With these caveats in mind, however, it is clear that *Bhavya Nain* is a significant judgement for the legal discourse of mental illness and competence, because the court firmly rejected the 'common sense' association of bipolar disorder with incompetence. The fact that the matter had arisen in the context of an application to the Delhi Judicial Services, i.e., in effect to the court itself, adds symbolic weight to the Court's judgement; the legal apparatus is here in a self-reflexive moment. The judgement is also significant in that it adopts the rights-based approach present in the disability benefits cases into the context of active employment; the Court's observations about the significance of employment in

combating social exclusion and discrimination are thus particularly welcome. It is not clear whether and to what extent such an approach will translate into a more sophisticated understanding of mental illness in the context of family law, where prejudice informs normative assumptions about the roles and conduct of parents and spouses.

And finally, specifically in the context of bipolar disorder, the judgement is of significance because it clearly brings the legal interpretation in line with prevailing scientific opinion about the permanent nature of the condition. The 'episodic' approach of *Nalini Kumari* would not be compatible with the Court's determination that bipolar disorder is a permanent condition as per the terms of the RPwDA. What this might mean for the interpretation of Section 84 of the IPC is yet to be determined, because the criminal law understanding of agency is distinct from competence in terms of employment. In a strictly logical sense, there should be no significance, because the criminal law's conception of a 'sound mind' is perfectly compatible with a diagnosis of bipolar disorder; however, it is certainly possible that the Delhi High Court's judgement will at least provide a coherent precedent, which—as we have seen—is something missing in the earlier jurisprudence from around the country.