

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1623 OF 2000

A

....Petitioner

v/s.

Union of India, through
Ministry of Home Affairs
New Delhi

... Respondents

Mr. Anand Grover i/by Mr. Prakash Mahadik for the Petitioner.
Mr. V. H. Kantharia for Respondents.

CORAM :- B. P. Singh, C. J. & S. Radhakrishnan, J.

Dated : November 28, 2000

P.C.

The Petitioner, who is employed by the Indian Navy in the rank of Master Chief Engine Room Artificer-II class has been filed this petition seeking the relief of reengagement for a period of 3 years in the same rank in a submarine cadre after completion of service of 15 years. The Petitioner is due for retirement on 30th November, 2000.

By the above petition, the Petitioner is also seeking a declaration that a letter dated 28.9.1999 issued by Respondents, being Exhibit -F to the Petition and Navy order 26/93 being Exhibit -G to the petition to the extent of placing personnel who are HIV positive in a low medical category and not grant reengagement or retention, would be violative of Article 14 and 21 of the Constitution of India. The Petitioner has also challenged the two orders dated 9.6.1999 and 12.6.2000 issued by the Respondents, declining to grant reengagement to the Petitioner.

The Petitioner had joined the Indian Navy as a Direct Entry Artificer in October 1985 and was posted in the Submarine branch of Indian Navy. The Petitioner was deputed in the crew, to bring the submarine INS Sindhurakshak from Russia in 1997. At that time he had to undergo medical examination, wherein he was tested HIV positive. Therefore on 21st November, 1997, the Petitioner was placed in low medical category and was continued in service, so as to enable him to complete 15 years of service, which will entail the Petitioner full pensionary and other benefits.

On 26th May, 1999, the Commanding Officer of INS Vajrabahu had recommended the Petitioner for reengagement for a further period of three years. To the above, the Respondents informed that the Petitioner's case was not recommended as he was HIV Positive. Again the Staff Officer (Personnel) had requested on 6th January 2000 that the Petitioner be reengaged, but the same was rejected on 12th June, 2000. Therefore this petition.

Mr. Grover, the learned Counsel for the Petitioner has strongly contended that the Respondents are declining to reengage the Petitioner in the submarine cadre, only because he is HIV positive. Mr. Grover contends that the Respondents by not granting reengagement have discriminated and acted arbitrarily against the Petitioner. The learned Counsel contends that the Petitioner is otherwise medically fit, ought to have been granted reengagement and not discriminated only because he is HIV positive. Mr. Grover also submitted that the aforesaid letter dated 28.9.1999 and Navy Order 26/93, to the extent of placing the navy personnel who are HIV positive in a low medical category and not grant reengagement or retention would be violative of Article 14 and 21 of the Constitution of India.

The learned Counsel for the Petitioner has relied upon a Division Bench Judgement of this Court in *MX of Bombay Indian Inhabitant v/s. ZY*, AIR 1997 BOM 406. In the said judgement, it was held as under:-

"So tested, the impugned rule which denies employment to the HIV infected person merely on the ground of his HIV status irrespective of his ability to perform the job requirements and irrespective of the fact that he does not pose any threat to others at the work place is clearly arbitrary and unreasonable and infringes the wholesome requirement of Article 14 as well as Article 21 of the Constitution of India."

In the above case, the Court held that the deletion of the name of the Petitioner from the casual labourer's panel and denial of work to the Petitioner as a casual labourer merely because of his HIV status was unjustified and illegal.

Mr. Grover also referred to and relied upon a judgement of a labour court of Namibia in the case of N. v/s. Minister of Defence wherein it was held that the Applicant who was serving in the Armed Forces was delisted as he was found to be HIV positive. The Court was of the view that if the Applicant's CD 4 test and viral load test were to indicate that he was within the permissible range, then he should be enlisted in armed forces.

The Learned Counsel for the Petitioner also relied on a judgement of Canadian Human Rights Tribunal in the case of Simon Thwaites v/s. Canadian Armed Forces wherein it was held that Simon Thwaites who was serving with the Canadian Armed Forces was dismissed as he was HIV positive was not based on upto date authoritative medical and scientific data and that his potential risk to others was also not considered properly.

The learned Counsel also relied on a judgment from the Constitutional Court of South Africa in Jaques Charl Hoffman v/s. South African Airways wherein in Court has deprecated discrimination solely on the basis of HIV positive status.

The learned Counsel therefore submitted that the Respondents ought to reengage the Petitioner in submarine cadre and also those circulars which discriminate against HIV positive status ought to be struck down as violative of Article 14 and 21 of the Constitution of India.

Mr. Kantharia, the learned Counsel for the Respondents, at the outset submitted that there is an alternative remedy as per Section 23 of Navy Act, 1957 read with regulation 234 and 239 of Navy Part II, the Petitioner has a remedy to approach the Central Government by a representation against the decision of the Respondents.

The learned Counsel contended that in the instant case the Petitioner was found to be HIV positive in November 1997 and declared to be of low medical category, his services were not terminated and was allowed to continue the full period of employment, i.e. 15 years, so as to enable him to earn full pension and other benefits.

The learned Counsel submitted that what the Petitioner is seeking is reengagement for a period of three years after completing his full term of 15 years. The learned Counsel submits that there is no legal right to get a reemployment. In that behalf the learned Counsel referred and relied upon a judgement of the Apex Court in the case of Union of India and Ors. V/s. R. P. Yadav, (2000) 5 SCC 325. In para 21 it is held by the Supreme Court as under:-

"21. The provision of Navy Order (Str.) 17 leave no manner of doubt that re-engagement of sailors can neither be claimed by a sailor as a matter of right nor can cancellation of re-engagement and release from the force be claimed by a sailor as a matter of right. It is to be decided by the competent authority keeping in view the relevant factors, the most important one being the service requirements."

The learned Counsel submitted that the Petitioner was working in a highly specialised submarine cadre. He also drew our attention to paragraph 3 of the affidavit in reply of Officiating Commodore Commander Prakash Yadav dated 11th October 2000. In the said paragraph, in detail it is set out as to the various hazards in the working atmosphere inside the submarine. Especially in a submarine cadre, the learned Counsel submitted that there can be no compromise, as it would affect the national security.

Mr. Kantharia, the learned Counsel for Respondents submitted that Respondents did not terminate the services of the Petitioner in November, 1997, when it was found that he was HIV positive, but allowed him to continue his full term of employment, i.e. 15 years, taking a sympathetic view of the Petitioner's condition. It was also contended that there was nothing arbitrary and discriminatory on the part of Respondents in not granting reengagement in submarine cadre, and the authorities had taken into account all facts and circumstances and had acted fairly. In any event, the learned Counsel submitted that there is no legal right of reengagement.

After considering the rival contentions in depth, we find that in the instant case the Petitioner was allowed to continue for the full term of employment, i.e. up to 30th November 2000. The Respondents had not terminated the services of the Petitioner, when it was detected in November 1997 that he was HIV positive, but was only kept under low medical category, and continued for the full term of employment.

Another important aspect to be noted is that all the cases cited by the learned Counsel for the Petitioner deal with the cases of termination of employment on detection of HIV positive status and only on that ground. Whereas in the instant case, even after discovery of HIV positive status in November, 1997, the Respondents continued the Petitioner in service for the full term. Therefore in the facts and circumstances of this case, the aforesaid judgments will have no application.

There is a discretion for Respondents to reengage, but there is no legal right to seek reengagement. In the instant case, the learned Counsel for Respondents is right in submitting that national security cannot be jeopardised in any manner by endangering the proper functioning of submarine. The Respondents have taken into account all factors and circumstances and have decided not to grant reengagement to the Petitioner.

Under the aforesaid facts and circumstances, we do not find anything illegal or perverse on the part of Respondents in refusing to exercise their discretion in favour of the Petitioner to grant reengagement for a period of three years. We also do not find that impugned letter dated 28.9.1999 and Navy Order 26/93 to be violative of Articles 14 and 21 of the Constitution of India.

We do not find any merit in the petition for us to exercise our jurisdiction under Article 226 of the Constitution of India, hence the petition stands dismissed.

Personal Assistant to issue an ordinary copy of the order to the parties.

Issuance of certified copy is expedited.;

CHIEF JUSTICE
S. RADHAKRISHNAN J.