



Mr. Y and Mr. X v. Secretary to the Government, et al.

2011 (1) CTC 645

Country: India

Region: Asia

Year: 2011

Court: High Court - Madras

Health Topics: HIV/AIDS, Infectious diseases, Occupational health

Human Rights: Freedom from discrimination, Right to work

Facts

Mr. Y, Petitioner No.1, was a person belonging to the backward class. He held a valid driving license and was asked to apply for an interview to the Tamil Nadu State Transport Corporation, Respondent, for the post of a driver. He was asked to submit his medical fitness certificate and certificate relating to eyesight to the office of the Respondent. In course of his medical examination Petitioner No. 1 was tested, without his knowledge or consent, for HIV. Due to his HIV positive status, the medical fitness certificate of Petitioner 1 declared him unfit. His HIV status was communicated to the Respondent. Based on his HIV status, the Respondent rejected the application of Petitioner No. 1.

Petitioner No. 1, therefore, filed a petition (W.P. (MD) No. 947 of 2010) in the Madras High Court (Madurai Bench) under Article 226 of the Constitution (original writ jurisdiction of High Courts). He requested the Court to set aside the order and to direct the Respondent to appoint him to the post of driver.

Mr. X, Petitioner No. 2, was also rejected by the Respondent for the post of a driver because he was HIV positive. Petitioner 2, therefore, filed a petition (W.P. (MD) No. 12474 of 2010) in the Madras High Court (Madurai Bench). He requested the Court to direct the Respondent to instate him to the post of the driver.

In both petitions, the Respondent argued that Rule 11(2) of the Common Service Rules stated that the "candidate should possess sound health, active habits and should be free from any bodily defect or deformity." Since the doctor had issued a certificate stating that both Petitioners were unfit, they could not have been hired.

The Court clubbed the two petitions since the facts and issues involved in the cases were similar. The question to be decided by the Court was "whether a person whose blood samples were tested for HIV positive and found to have afflicted by AIDS (as it is referred to in general parlance), can be denied consideration for public employment and whether the condition of his physical health was unfit for such employment."

Decision and Reasoning

On the issue of denial of employment to a person who was HIV positive, the Court placed reliance on Vincent L. Chalk v. United States District Court Central District of California ((1988)840 F.2d 7010). The Court held that employment could not be denied to a person, otherwise qualified to perform essential functions of the job, solely on their HIV status.

Regarding the procedure and requirement of HIV testing, the Court held that "international opinion on the subject of AIDS and the workplace" as mentioned in international conventions was against mandatory testing for HIV either during or prior to employment. The Court also placed reliance on the National HIV Testing Policy (the Policy) published by the National AIDS Control Organization which discourages any testing without explicit consent of the patient. It held that the Policy also discouraged mandatory linked testing including for "pre or in-service employment screening or insurance procedure."

On the issue of discrimination at workplace, the Court held that the guiding principles in the National Policy on HIV/AIDS and the World of Work (guiding principles) stated that there should be no discrimination against workers based on real or perceived HIV status. It further held that the guiding principles also discouraged screening and testing of HIV status for the purposes of employment. The Court held that confidentiality of medical records should be maintained and only conclusions relevant to the employment decision should be disclosed. It also placed reliance on Mr. X Indian Inhabitant v. Chairman State Level Police Recruitment

Board and Ors. (2006 (2) ALD 513), to hold that any policy of the State which caused discrimination in workplace on the basis of a person's HIV status was ultra vires Articles 14 (right to equality) and 16 (equality of opportunity in matters of public employment) of the Constitution.

As to the capacity to work of persons living with HIV, the Court held that according to medical opinion a person living with HIV, in the asymptomatic period, may be healthy and able to fulfill job requirements for a period up to 18 years. Placing reliance on *Mr. X Indian Inhabitant v. Chairman State Level Police Recruitment Board and Ors.* (2006 (2) ALD 513), the Court held that it is only when the CD4 count of a person living with HIV goes below the minimum threshold that they can be deemed unfit for employment.

Setting aside the impugned orders, the Court held that the decision of the Respondent was not based on any scientific evidence and was repugnant to national policies on HIV. The Court allowed the Respondent to test the Petitioners for their CD4 count which was the relevant standard test for employment.

Decision Excerpts

“In the ultimate recommendations [of the National HIV Testing Policy], it is stated that any testing procedure without explicit consent of the patient/mandatory testing must be discouraged when it tends to identify an individual except in exceptional situations. Any kind of mandatory linked testing should be discouraged which includes testing...pre or in-service employment screening or insurance procedure.” Para. 47

“[O]verwhelming medical opinion and the opinion of persons qualified in the field show that, firstly, that except through sexual intercourse and blood transfusion, there is no risk of transmission of HIV. Secondly, during asymptomatic period, the person may continue to be healthy and capable of performing the job requirements for a number of years which may range up to 18 years.” Para. 50

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