Mx Of Bombay Indian Inhabitant

vs

M/S. Zy And Another

3 April 1997

Bombay High Court

Citations: AIR 1997 Bom 406, 1997 (3) BomCR 354, (1997) 2 BOMLR 504

Bench: V.P.Tipnis, D Trivedi

ORDER

Tipnis J.

1. It is permissible of the State, under our Constitution, to condemn a person infected with HIV to virtual economic death before the must eventually meet his death due to the ailment is the question before us. The question is of great contemporary significance and importance.

2. The petitioner was working as a casual labourer with respondent No. I Corporation, through a contractor in the year 1982.In 1984, the petitioner was interviewed for a vacancy against a regular post by the respondent-Corporation. However, the petitioner was not selected. In the year 1986, the petitioner was interviewed again by the Corporation and, thereafter, was employed as a casual labourer from 1986 till about 1994.The petitioner was required sign a register/muster and was issued a muster card. In the year 1990, the petitioner was directed to go for a medical examination. The petitioner submitted himself to medical examination conducted by one Dr.V.S.Kulkarni who is a panel Doctor for the respondent-Corporation. Said Dr. Kulkarni referred the petitioner to various other specialists like Pathologist.Eye Specialist and also for lung test. There was nothing adverse revealed in the pathological report. The Eye Specialist certified that from the ophthalmic point of view, the petitioner is fit to do any work. The Doctor who examined the petitioner for lungs certified that no significant abnormality is detected in the examination of the petitioner. Although the petitioner was not appointed in a regular vacancy, he was included in the select list of persons to be appointed on a regular basis. It is the case of the petitioner that during 1991 to 1993, persons above as well as below the petitioner in the selection list were appointed in regular vacancies. On 1-9-1993, the petitioner was asked again to go for a medical test. Dr Bhide certified after test for Australia Antigen that HBS Ag was absent. Dr.Bhide further certified that test HIV (1 and 2) antibodies, revealed that HIV (1 and 2) antibodies were present. In respect of other test like lung function, eyes, etc., the petitioner was found to be normal, the petitioner was found to be normal, the petitioner was also examined in the J.J.Hospital, Mumbai. The report of ELISA test showed HIV (1 and 2) positive for antibodies. The certificate of Dr.Alka Deshpande of J.J.Hospital states that the patient is fit for duty. However, she advised follow-up once a year. The certificate further mentions that the disease is a prolonged one. The patient after acquiring the infection can remain asymptomatic for a long time extending up to one twelve years and the patient (petitioner)is presently asymptomatic. The Doctor further mentioned that as per the Government's policy, an employee cannot be discontinued because of his seropositivity. Dr.Gokhale, the Doctor of the

respondent-Corporation, relying on the report of the J.J.Hospital, stated that the petitioner was examined at the J.J.Hospital. His HIV-1 and HIV-2 tests are positive for antibodies. As per the remarks of Professor of Medicine. Grant Medical College (Dr.Alka Deshpande) he is physically fit for duty and was advised repletion of blood test every year.

3.It appears that as the petitioner tested positve for HIV (1 and 2),the Senior Manager (Lube Complex). Trombay Unit of the respondent-Corporation, by notice dated 16-2-1994 deleted the name of the petitioner from selection panel of casual labourers with immediate effect. The petitioner wrote letters to the respondent-Corporation stating that otherwise he is fit for performance of his job, viz,,, loading drums on the truck and that it will take 8 to 10 years before he develops AIDS and he should be continue to be employed at least as a casual labourer. The petitioner submitted in that correspondence that he is the only earning member of the family and if his not offered work, the whole family will find it difficult to survive. The petitioner also wrote to the Addl. Director of Health Services(AIDS).Government of Maharashtra, Mumbai, on 7-5-1994. After narrating all the facts, the petitioner stated that he is physically fit to do the duty. The petitioner submitted that he is the only earning member of the family, he is very poor, having wife and two children to look after. He requested the authority to direct the respondent-Corporation to allow the petitioner to continue to work as so casual labourer, if not as a regular employee of the Corporation. The AddI.Director of Health Services (AIDS).Government of Maharashtra, wrote a letter dated 7-3-1994 to the respondent-Corporation regarding the case of the petitioner. In the said letter, the Addl. Director of Health Services pointed out that though the petitioner is at present HIV positive, he may take 8 to 10 years to develop symptoms of AIDs. The Director mentioned that, as a matter of fact, it cannot be emphatically stated as to when he will develop the symptoms, but it not likely to be earlier than 8 to 10 years. The Director drew the attention of the respondent-Corporation to the fact that HIV/AIDS is not transmitted by casual contact by working together. It is transmitted only if blood of HIV positive is transfused to other person or if there is sexual intercourse with another person. The letter states that barring theses two modes of transmission, the petitioner is not going to pose any risk to any of his colleagues where he is working or where he is likely to work in future. The letter further mentions that the guidelines of the Government of India under the National AIDs Control Programme are not to sack or remove anybody from the services. Whether private or public, only because of HIV status. The letter further states that keeping this scientific views in mind and also the need of support to the HIV positive person, the Director requested the Corporation to allow the petitioner to work in his capacity as a drum casual labourer as he was working previously. The Director specifically enclosed a copy of Health Education material for the perusal of the Corporation. The last para records the gratitude of Dr.Salunke. Addl.Director of Health Services (AIDS).Government of Maharashtra, for the promise given by the Director of the respondent-Corporation that he will issue necessary instructions to take back the petitioner on job to avoid hardship to the petitioner only because of his HIV status.

4. Literature of the World Health Organization is annexed to the petition and a compilation thereof is also produced. The resolution passed by the Forty-first World Health Assembly under the auspices of the World Health Organisation Global Programme on AIDS at Geneva on 13th May, 1988 shows that inter alia it was strongly convinced that respect of the human rights and dignity of HIM infected people and people with AIDS and of members of population group, is vital control programmes and of the global strategy. It urged the Member States, particularly in devising and carrying out National programmers for the prevention and control of HIV infection and AIDS to protect the human rights and dignity of HIV infected

people and to avoid discriminatory action against and stigmatization of them in the provision of services employment and travel.

5. A Consultation on AIDS and the Workplace was convened in Geneva by the World Health Organisation's Global Programme on AIDS in association with the World Health Organisation's office of Occupational Health and the International Labour Office between 27th and 29th June, 1988.Thirty-six participants from 18 countries attended, including representatives of Government, union, business, public health, medical, legal and health education. The general statement contained that infection with the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) represent an urgent worldwide problem with board social, cultural, economic, political, ethical and legal dimensions and impact. In introduction, it is stated as under:--

"Epidemiological studies from throughout the world have demonstrated that the human immunodeficiency virus (HIV) is transmitted in only 3 ways:

(a) through sexual intercourse (including semen donation):

(b) through blood (principally blood transfusions and non-sterile injection equipment: also includes organ or tissues transplant):

(c) from infected mother to infant (perinatal transmission).

There is no evidence to sugges that HIV transmission involves insects, food, water, sneezing, coughing, toilets, trine, swimming pools, sweat, tears, shared eating and drinking utensils or other items such as protective clothing or telephones. There is no evidence to suggest that HIV can be transmitted by casual person-to-person contract in any setting.

HIV infected and AIDS(HIV/AIDS)are global problems. At any point in time, the majority of HIV-infected persons are healthy: over time, they may develop AIDS or other HIV-related conditions or they may remain healthy. It is estimated that approximately 90% of the 5-10 million HIV-infected persons worldwide are in the economically productive age-group. Therefore, it is natural that questions are asked about the implications of HIV/AIDS for the workplace.

In the vast majority of occupations and occupations settings, work does not involve a rick of acquiring or transmitting HIV between workers, from worker to client, or from client to worker. This document deals with workers who are employed in these occupations. Another consulation to be organized by the WHO Global Programme on AIDS will consider those occupations or occupational situations such as health workers, in which a recognized risk of acquiring or transmitting HIV may occur."

6. The policy principles adopted in the very document states that protection of the human rights and dignity of HIV-Infected persons, including persons with AIDS is essential to the prevention and control of HIV/AIDS. Workers with HIV-related illness, including AIDS, should be treated the same as any other worker. Workers with HIV-related illness including AIDS, should be treated the same as any other worker with an illness. Most people with HIV/AIDS to continue working, which enhances their physical and mental well-being and they should be entitled to do so. They should be enabled to contribute their creativity and productivity in a supportive occupational setting.

7. In respect of persons applying for employment, the policy statement in the said document states that pre-employment HIV/AIDS screening as part of the assessment of fitness to work is unnecessary and should not be required. Screening of this kind refers to direct methods (HIV testing) or indirect methods (assessment of risk behaviours)or to questions about HIV tests already taken, pre-employment HIV/AIDS screening for insurance or other purposes raises serious concerns about discrimination and merits close and further scrutiny.

8. In the document entitled "AIDS and the workplace -- General Recommendations" regarding fitness for work, it is observed as under:--

"1. In view of the modes of HIV transmission, a seropositive person's fitness for work cannot be called into question by the purely theoretical risk of virus transmission, and any discrimination is unacceptable.

2. In the current state of knowledge, there is no evidence to suggest that neurological or neuropsychiatric disorders occur relatively early in the course of HIV infection. There is, therefore, no reason to exclude asymptomatic HIV seropositive individuals from certain job assignments in accordance with the recommendations formulated by the WHO, ILO expert and the Council of the European communities.

3. It is recommended that health personnel aware of a job applicant's HIV seropositivity base their decision solely on the actual capacity of the individual to satisfy the job requirements. In this context, only the usual aptitude tests and adherence to health and safety measures are of any real value.

4. Routine screening the HIV seropositivity in the work context must be prohibited: it is recommended that the WHO/ILO expert's statement and the conclusions of the Council of European Communities act as guidelines."

9. "Conditions of Work Digest" Vol. 12.2/1993 on page 53 states as under:--

"In 1990, an international meeting on the subject of AIDS and the workplace, which was co-sponsored by UNESCO, WHO, ILO, the Council of Europe and the European Communities, among others, adopted recommendations against mandatory testing in the workplace. These recommendations note that "the recogni/modes of HIV transmission make it clear that no risk of infection from seropositive person exists in the vast majority of occupational settings. HIV seropositivity does not affect an individual's fitness to work: there is no reason to refuse work to seropositive employees who remain able to perform their job duties and any discrimination is unacceptable". With respect to testing, the recommendations state that

"HIV screening in the workplace or for purposes of employment should not be undertaken. HIV screening should not be required for employees, candidates for employment or others to enter or reside in another country."

10. In an article "HIV/AIDS and discrimination in workplace. The ILO perspective" by Louis Nadaba, Equality and Human Rights Co-ordination Branch, ILO, Geneva, the ten WHO/ILO principles inter alia include the following:--

"Pre-employment: HIV/AIDS screening as part of an assessment of fitness to work is unnecessary and should not be required.

Screening recruits of AIDS is undesirable, Why? Because screening is futile, socially irresponsible, irrational and unfair.At the same time it is time-consuming and expensive.Pre-employment testing is futile because is cannot achieve what it sets out to do.It cannot guarantee a sanitized AIDS-free workplace.The test is not conclusive:there is a "window" period in which the presence of virus in the bloodstream is not revealed by the test.Most significantly, an applicant who test negative may contract the disease after being hired for the job and his or her condition will be hidden from the employer.

Testing for AIDS is socially irresponsible.If all employers screened out HIV positive people,a "leper colony" of unemployed and unemployable people would be created, the social consequences of this (alienation, deprivation, discrimination)are undesirable.

HIV positive job applicants may have years of constructive, healthy service ahead of them.To exclude them lacks a rational foundation and is unfair.They can be hired without compunction.When the symptoms eventually emerge and the sufferer becomes incapacitated, the usual employment laws amply protect the employer.No employer can be forced to retain someone who is unfit for the job, and this applies equally to AIDS sufferers.

Extracting and testing blood is both time-consuming and expensive.But the cost does not stop there:standard guidelines indicate that before the test is administered,employees should be counselled on its implications and, if it proves positive, they should be intensively counselled about the consequences of the disease.Are employers ready to pay for this counselling"Or are they to cast the rejected applicant out on the street,jobless and without professional guidance and assistance?Disrriminatory testing is wasteful.The money spent on it could be better used on education and information on AIDS."

The article also refers to the provisions of reasonable arrangement.It is stated that HIV infection by itself is not associated with any limitation in fitness to work.If fitness to work is impaired by HIV-related illness, reasonable alternative working arrangements should be made.In conclusion it is observed that the rights of HIV positive persons or persons with AIDS,specially in the labour and employment field, must be protected.This is not only a moral imperative, but a public health principle:discrimination and stigmatization drive infected people away from the support, care and information they need, thus encouraging the spread of infection. If also prevents them from taking part in programmers to promote behavioural change among their peers.The only responsible answers to the AIDS epidemic lie in prevention, education and non-discrimination.It has been said that "the most significant obstacle to progress" against the AIDS epidemic is the threat of discrimination.Nondiscrimination is not only the humane and compassionate response, it is also the most sensible.Irrational and unfair treatment of AIDS suffers and HIV positive persons is not only inhumance:it also threatens the power limitation of the epidemic.To discriminate and to drive infected people away from support, care and information and programmers to promote behavioural changes encourages the spread of infection. Employers particularly large companies, the State and the big institutional enterprises -- bear a special responsibility to refrain from irrational conduct and to fulfil their public obligations to combat the crisis.

11. Similar thinking is also reflected in the Southern african Code on HIV/AIDS and employment.

12. The National AIDS Control Organisation has published in 1995 a National HIV Testing Policy under the auspices of the Government of India.Ministry of Health and Family Welfare.National AIDS Control Organisation.It is observed therein that:--

1. HIV infection is believe to be invariably fatal irrespective of best possible treatment.

2.HIV infection and AIDS are still associated with high degree of discrimination stigmatization. The implications of positive test go well beyond those related to physical and mental health and may involve the loss of employment,medical and social benefits, insurance, friends, family and freedom of movement.

On the other hand since during the prolonged asymptomatic carrier stage of HIV infection,one remains fully active physically and mentally, this demand an appropriate intervention which maintains the life style,dignity and rights of the patient and the same reduces of eliminates transmission."

In the ultimate recommendations,some of the relevant recommendations are as under:--

"(ii) Any testing procedure without explicit consent of the patient/mandatory testing must be discouraged when patient/mandatory testing must be discouraged when it tends to identify an individual except in exceptional situations.

(v) Any kind of mandatory liked testing(unless otherwise required by the Court)excepting blood unit (not necessarily the donor)should be discouraged which includes testing of international traveller, refugees, reproductive age group women,hospital inpatients or those seeking admission, injecting drug users,sex workers, prison inmates,sportsman,pre or in service employment screening or insurance procedure."

13. By amendment, the petitioner has annexed a circular dated 31st October, 1991 and another circular dated 8th April, 1993 issued by the respondent-Corporation.The circular dated 31-10-1991 declares that the management has decide to include the following medical tests in addition to the existing tests for fresh recruits in order to ensure that they do not have any serious communicable diseases:

(1) HIV test for AIDS:

(2) to (4)....."

In para 2 of the circular dated 8th April, 1993 it is stated as under:--

"It has now been decided that HIV test for AIDS (ELISA) is mandatory for reconfirmation."

Para 4 of the aforesaid circular states as under:--

"Please ensure that pre-confirmation test of HIV (ELISA) for AIDS is carried out at least a month in advance so that the test result is obtained before the due date of confirmation.However, till HIV test result is obtained,the concerned employees should not be

confirmed in the service of the Corporation.If the employee is found to be HIV positive by ELISA test, his services will be terminated."

14. In the aforesaid circumstances, the petitioner has prayed for quashing or setting aside the order dated 16-2-1994, I removing his name from the select list of casual labourers, for direction to the respondent-Corporation to absorb the petitioner in regular vacancy in the post of class IV employee with effect from 1993 and give him seniority from that date in the said cadre with all back wages and benefits to which he would be entitled to as if he were in service from that date.It is also prayed that the circular dated 31-10-1991 and 8-4-1993 be quashed.

15. Affidavit-in-reply has been filed on behalf of the respondent-Corporation.It is admitted that the petitioner started reporting as a casual labourer at the Trombay terminal of the respondent-Corporation from 1986.The petitioner was engaged as a casual labourer as and when work was available and there was no continuity of service.It is denied that the petitioner was ever interviewed to fill up any regular vacancy as alleged. It is stated that it is the policy of respondent No. 1 Corporation that casual labourers whose names are included in the panel are required to undergo medical examination. Accordingly, the year 1990,all the empanelled casual labourers, including the petitioner, were required to undergo a medical examination.It is asserted that the said medical examination was not a pre-employment medical check-up.It is stated that respondent no.I Corporation by circular dated 31-10-1991 while reiterating the requirement of a pre-employment medical examination, stipulated that the medical tests to be performed shall specifically include an HIV test for AIDS,X-ray test for Tuberculosis, VDRL for sexually transmitted disease and Australian Antigen blood test for Hepatitis B. By circular dated April 8.1993,the respondent-Corporation reiterated that in order to ensure that fresh recruits do not have any serious disease, the aforesaid four tests be included as additional test as part of the pre-employment medical examination.The circular contemplated that an employee testing HIV positive should not be continued.It is stated that during the year 1993,as a result of a few vacancies, the petitioner and some other persons were asked to undergo the pre-employment medical check-up. As the ELISA test revealed that the petitioner is HIV positive, as per the terms and conditions prescribed by the Corporation, the petition being HIVs positive, was not found fit for employment. Under the policy of respondent No. 1 Corporation, the petitioner does not fulfil the requirement of medical fitness and, therefore, is not eligible for appointment.It is asserted that the petitioner has no constitutional or legal right of absorption.The claim must be tested in terms and conditions prescribed under the instant policy.The Corporation is entitled to stipulate that amongst other norms of eligibility,the candidate fulfils medical requirements.Such requirement is not merely in the interest of the proper conduct of the affairs of the Corporation, but also in the interest of the wide body of its employees and the public interest.The Corporation, is asserted, can and has legitimate ground to provide that an applicant who after a competent medical examination is found to be suffering from a serious disease should not be recruited, absorbed or regularised. Apart from above, taking such a person into the service of the Corporation will impose upon it financial and administrative consequences which it ought not to bear. The classification of persons found not to satify the medical requirements is intelligible and rational.The public body cannot be saddled with responsibility and liability of extending medical facility and treatment to a candidate who is confirmed to have been inflcited with a disease which is mot likely to assume serious proportions in due course.The prescription of particular medical requirements is a mater of managerial function of how best he affairs of the Corporation should be organised.In effect, the petitioner is seeking re-framing of personnel policy which is not permissible.Regarding the claim of back wages, it is stated that

since the petitioner has not been engaged, there is no question of any payment and the principle of "no work no pay" would apply to the facts and circumstances of the case.It is, therefore,prayed that petition be dismissed.

16. We must also mention that initially, the petition was filed disclosing the name of the petitioner as well as the name of the respondent-Corporation.Thereafter, upon specific motion, the Division Bench passed an order permitting the petitioner to prosecute the petition by suppressing his identity and , therefore, as "Mr.MX" and also the respondent-Corporation as "XY". The learned Counsel for the petitioner and the learned Counsel for the respondent-Corporation have addressed us on the aspect of requirement of non-disclosure of the identity of the petitioner in such matters and before we deal with the main petition, it may be convenient to deal with the aspect of requirement of suppression of the identity of the persons infected with HIV or AIDS in the proceedings before the Court. Mr. Grover submitted that in view of the stigma which is attached to HIV infection, the persons infected with HIV may be reluctant to approach the Court of law with the fear that the disclosure of his HIV status may expose him to social ostracisation and also discrimination in every walk of lie and, therefore, such person should be permitted in the proceedings before the Court to suppress his identity.The decision dated 4-2-1994 of the Supreme Court of New South WAles, Common Law Division, rendered by Cole,J.in DM v. ID was cited before us.In the aforesaid matter, the plaintiff, an eighty five year old lady, alleged that she became infected with HIV as a result of the medical treatment administered by medical practitioner whom she sued for negligence.The plaintiff wished to commence the proceedings, without her name and address being disclosed and an application for leave was made by Notice of Motion.It was contended on behalf of the plaintiff that if her name is disclosed, It would attract wide media coverage and the plaintiff and her children and grandchildren would be harassed by media which will result in stress for the plaintiff. It was further mentioned that there is a stigma attaching to persons with HIV infection and persons associated with such person.The stigma is said to arise from an absence of understanding in the community generally as to the possible methods of transfer of HIV.Thus the family of the plaintiff, and the plaintiff herself, may be ostracised in consequence of public ignorance and misinformation disseminated by the media.It was further contended that proper administration of justice does not require the publication of the name and address is to be made public, the plaintiff may consider whether she wishes to proceed with the action.The publication of her name and address thus may result in the plaintiff being denied access to justice because she may decide that any stress or stigma flowing from her identification and that of her family are such that she would prefer not to proceed with her claim in negligence against the medical practitioner.

17. The learned Judge referred to several decisions an support of his observations that there is a significant body of prior decisions in which the plaintiff in medically acquired HIV or AIDS cases have been relived from disclosing their name and address in write.The learned Judge found that the evidence before him regarding the likely effect or publicity upon the health of the prospective plaintiff, and likely ostracism, discrimination and difficulties in social situations which might be inflicted upon the plaintiff's family in particular,appears similar to that before Malcolm C.J. wherein Malcolm C.J.ordered permitting issue of writs without disclosure of names and address of the plaintiff.After discussing the fact and circumstances in the case before him,the learned judge observed that where the matter untrammelled by precedent and dependent upon the application of established authority to the evidence before him,he would decline the application.However, the learned Judge was influenced towards according to the application by the circumstance that there is now,in various courts throughout Australia, a large number of cases involving allegations of

medically acquired HIV infection or AIDS in which Judges have made orders permitting anonymity for the plaintiff,at least at the stage of issue of writ.In particular,the learned Judge thought that great weight should be given by a the Chief Justice of Victoria and Western Australia and its is for the aforesaid is reasons that learned Judge formed the view that he should not depart from a commonly adopted judicial finding and that he should accede to the application of the plaintiff.However, it is Significant to notice that a similar application by the defendant medical practitioner was rejected by the learned Judge.

18. The decision of the Supreme Court in Naresh v.State of Maharashtra, ,though deals with the power of the High

Court to order that the evidence of the witness in the open trial before it should not be published by the press, the discussion and observations therein may be fruitfully adverted to.In 21, after having enunciated the universally accepted proposition in favour of open trials, the apex Court considered whether this rule admits any exceptions or not.The Court observed that case may occur where the requirement of the administration of justice itself may make it necessary for the Court to hold a trial in camera.While emphasising the importance of public trial,observed the Supreme Court,it cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it.If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or ever defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? The apex Court felt no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course.In para 29, the apex Court observed that the overriding consideration which must determine the conduct of proceedings before a court is fair administration of justice.The principle that all cases must be tried in public is really and ultimately based on the view that it is such public trial of cases that assists the fair and impartial administration of justice.The administration of justice is thus the primary object of the work done in Courts: and so, if there is a conflict between the claims of administration of justice itself and those of public trial, public trial must yield to administration of justice.

19. We must notice that the Judgment of the Supreme Court of New South Wales deals with the issue of permitting the suppression of the identity of the plaintiff in "medically acquired HIV or AIDS cases". However, whether HIV infection is acquired medically or otherwise, it is clear that the person who is infected with HIV is likely to be exposed to several embarrassments, including bad publicity and consequential discrimination making it difficult for him to prosecute the proceedings before a Court of law. On the basis of the judgment of the apex Court in Naresh's case (supra),there is no difficulty in holding that the High Court in proper cases and in the interests of the administration of justice can always permit the plaintiff or the petitioner or the party before it to suppress its identity at proper stage and to prosecute or defend the proceedings in the assumed name.

20. Therefore, whether a particular petitioner should be allowed to prosecute his petition by suppressing his identity will depend on the facts of each particular case and as has been done in the present case, after filing the petition disclosing the full particulars of name and address of the petitioner as required under the rules, the petitioner may take out a Notice of Motion or make an application to the Court seeking orders from the Court to suppress his identity and to prosecute the petition in an assumed name. Whether the petitioner should be so permitted will obviously depend upon the facts circumstances of each particular case.

21. On merits of the main petition, we have heard Mr.Grover, learned Counsel appearing for the petitioner, and Dr.Chandrachud, learned Counsel appearing for the respondent-Corporation. Mr.Grover contended that the petitioner had satisfied all the medical tests and although the petitioner has tested positive for HIV antibodies, the competent Doctor certified that the petitioner is fit for performing the duty.Mr.Grover emphasised that HIV can be transmitted by only three known modes:(i) by unprotected sexual intercourse from an HIV positive person;(ii)by transfusion of blood and transplant of organs from an HIV positive individual; and (iii)from an HIV positive mother to her child.Mr.Grover contended that by everyday casual contact, sharing of clothes, utensils, toilets, and working together does not transmit HIV.Mr.Grover further submitted that HIV positive persons remains asymptomatic and healthy for a considerable period of time which can even be up to 18 years and recent combination drug therapy has increased the life span even further.In the submission of Mr.Grover, such asymptomatic person is fit to perform all the functions.It is only when opportunistic infections set in that a person may be debilitated from performing some functions. Mr. Grover contended that under Article 21 of the Constitution of India, a person has right to livelihood and depravation of the right of livelihood must satisfy the rigours of Article 14 of the Constitution,Mr.Grover submitted that Article 14 requires that State action must satisfy in the case of classification (a)that the classification must be based on an intelligible differentia and/or on a rational basis; and (b) that the intelligible differentia must have a rational nexus to the object sought to be achieved and be otherwise fair, just and reasonable. Mr.Grover further submitted that Articles 14 and 21 come into play both at the time of initial recruitment (prerecruitment stage)and during the course of employment(post-recruitment stage). Mr.Grover submitted that for the purpose of the physical of medical fitness for the job, it is not "general fitness" which is material, it is the fitness which relates to the actual job functions that are to be performed by the employee which is relevant.Mr.Grover thus submitted that the requirement can stipulate that the person must be able to carry out the job functions assigned to him or her.Conversely, if there is disability reported, such disability should not affect the person's ability to carry out the job functions and the person should not pose a substantial risk to others in the work force.In the submission of Mr.Grover, the aforesaid tests are universally accepted by the Court and in that behalf.Mr.Grover relied upon the following authorities:--

School Board of Nassau County,Florida v. Gene H.Arline,(1987)94 L.Ed.2nd 307:480 US273;Vincent L.Chalk v.United Stages District Court Central District California, 840 F 2nd 701: 1987 US App KEXIS 17629: Anand Bihari v. Rajasthan S.R.T.C.:;

Jayshankar Pratap v. State of Bihar, Oneill v.,

Beneton Cable Pty. Ltd. 1986 EOC 92-159:Urie v. Cadbury Schweppes Pty.Ltd.,1986 RDC 92-180.

According to Mr.Grover, the common thread running through these decisions bear out the principles which the has mentioned earlier.According to Mr.Grover, on the basis of medical and scientific knowledge,it is clear as of this date that mere HIV seropositivity does not indicate any illness or disability.The disability or illness may set in later,if at all, when opportunistic infections, such as T.B., etc.set in when the persons may be disabled to perform his duties.Secondly, HIV seropositivity does not pose a substantial risk to others at the work place as HIV is transmitted by only three modes as referred to earlier.Mr.Grover, therefore,contended that to employ or not to employ an HIV positive person

would,therefore,depend on the persons's fitness to perform the assigned tasks on a case to case basis.Grouping all HIV seropositive persons together as class as being unfit, which is what the impugned circular do,apart from being arbitrary and irrational, is discriminatory as it has no rational nexus to the object sought to be achieved and therefore ,violative of Article 14 of the Constitution of India. Mr.Grover further submitted that on account of the window period in antibodies testing, the HIV test does not achieve the object sought to be achieved, as it does not ensure that the person tested is free from HIV.The person tested negative may, in fact, be positive. Mr. Grover also submitted that there is no justification to consider the pre-recruitment test as different from post-recruitment test in the matter of medical fitness.According to Mr. Grover,the judicial authorities have applied the same test at the pre-recruitment stage as have been accepted for the post-recruitment stage in the case of physical fitness.Mr.Grover,in that behalf,relied upon the decision in O'Neill v. Burton Cable Pty.Ltd.,1986 EOC 92-159;Uries v. cadbury Schweppes Pty.Ltd. 1986 EOC 92-180,in support of his submissions.According to Mr.Grover,the circular relied upon by the respondent-Corporation treated all HIV position persons as a class when assessing whether the HIV positive person is fit for performance of duties or not and as,such,the circular are violative of Articles 14 and 21 of the Constitution of India.Mr.Grover,therefore,submitted that,in the facts and circumstances of the case, the circular are clearly unconstitutional and circular are clearly unconstitutional and the removal of the same of the petitioner from the list of casual labourers and the refusal of the respondent-Corporation to employ the petitioner as a drum loader in its regular employment is clearly illegal and unconstitutional and the petition deserves to be allowed and the petitioner is entitled to the various reliefs sought in the petition.

22. Dr. Chandrachud, learned counsel appearing for respondent No. 1 Corporation very fairly accepted that the issue involved is of great public importance. He futher stated that there cannot be two opinions that HIV infected persons need maximum understanding and help whenever possible.However, Dr.Chandrachud submitted that the entitlement of an employer to scrutinise the medical fitness of an employee who is to be absorbed into his permanent services is not restricted to those considerations which condition the exercise of the power to retrench an existing employee on the ground of continued ill-health under Section 2(oo) of the Industrial Disputes Act, 1947(hereinafter referred to as the "Act").The employees who are already in the permanent employment of an employer constitute a separate constitutional classification is given legislative recognition by Section 2(oo) of the Act. The discharge of an employee on the ground of ill-health does not constitute retrenchment unless that ill-health is "continued" and the nature of the ill-health renders him or her unfit for rendering those duties for which he was recruited and those duties for which he was recruited and those duties which are attached to his job.Dr.Chandrachud submitted that the object of an"entry level" medical test is different; It is wider than the medical requirement that must condition the discharge on the ground of continued ill-health under Section 2(oo) of an existing permanent employee and is permissible to be of a much more generalized nature and character.An employee who desires entry into the permanent service of the employer will upon entry have a likely span of service spread out over a large number of years between absorption into regular service and superannuation.Therefore, when considering whether to grant permanent absorption or regularization, the employer as a part of the requirement for absorption can stipulate that the employee must be in a condition of health which is "medically fit".An employee who at or prior to the date of entry into service as a permanent employee is detected to be suffering from a serous form of ailment or disease will not meet the medical standards for entry into permanent service.The petitioner suffer from A.I.D.S. which is a terminal ailment or disease.The impact of contracting the HIV virus is that progressively, the

human body loses its immunity to counteract those external factors which the normal body is immunity.The progress of the disease is, as the U.S. Court of Appeals for the Ninth Circuit called it in chalk v.U.S., 840 F 2ND 701 "inexorable". Though the time frame as in the case of any terminal disease may not be precise, to use the words of the U.S.Ninth Circuit Court of Appeals, "the course of the petitioner's condition is certain".In the said case, the Court noted that Chalk's immune system will deteriorate over time,leaving him increasingly susceptible to opportunistic infections. Unfortunately, there is no cure.Dr.Chandrachud submitted that when a person suffers from an ailment of a terminal nature and that on the present state of medical science,it is known that in the case of a human being who suffers from such an ailment,there is a certainty of a progressive degeneration of bodily functions which will affect his efficiency and ability to work in the foreseeable future, such a person shall not be recruited into permanent service.The employer will be entitled to scrutinise the medical condition of a person who seeks permanent employment with a view to fairly assess on a reasonable basis the ability and efficiency of the person to render service during the span of service that is left and if a debilitating ailment from which such person suffers even prior to entry into permanent service will seriously impinge upon efficiency and ability,the decision of the employer not to recruit such a person should not to recruit such a person should not be disturbed.Dr. Chandrachud submitted that there is no unrestricted right to absorption and regularization and an applicant who seeks the position of a permanent employee must fulfil the requirements that are generally made applicable to all employees who seek permanent

recruitment.Dr.Chandrachud,in that behalf,relied upon the decisions of the Supreme Court in State of Haryana v.Piara Singh,reported in (1992) 4 SSC 118:(AIR SC 2130) and Delhi Development Horticulture Employees Union v. Delhi Administration,reported in,. The

medical examination required by the respondent-Corporation consists of a number of medical tests,only one of which is the ELISA test for HIV virus.Dr.Chandrachud contended that the medical examination is not AIDS specific nor is it administered to an exclusive class or category of persons.The requirement of general medical fitness includes the requirement that the prospective employee should not be HIV positive. Referring to various judgments on which reliance was placed on behalf of the petitioner, Dr.Chandrachud contended that they were cases where duly appointed employee who was in the regular employment was sought to be terminated from service on the ground of a medical ailment. Dr.Chandrachud submitted that the petitioner cannot question the validity of medical tests prescribed by the given case a person who may be in the "window period" may, in fact,escape detection for the HIV virus or that AIDS tests may discourage persons from coming forward for testing.These are,in the opinion of Dr.Chandrachud,issues of policy which raise issue of social and ethical dilemmas for policy makers.The test is whether the prescription of medical tests prior to recruitment in permanent employment is constitutional or not.The Court is not concerned with the wisdom of a particular policy or measure and that judicial review is not concerned with the decision but the decision making process.Dr.Chandrachud, in that behalf, relied upon the decisions of the apex Court in Tata Cellular v. Union of India, and G.B. Mahajan v.Jalgaon Municipal

Council, . According to Dr. Chandrachud,

the decision of the Corporation not to employ the petitioner in the present case is broadly reasonable.Dr.Chandrachud submitted that reliance placed on the studies conducted by the WHO, the General Recommendations on AIDS and the Workplace, the ILO perspective, the South African Code or the National HIV testing policy cannot be dispositive of constitutional validity.Dr. Chandrachud submitted that an employee who has contracted a serious or

terminal illness may presently be in a state of temporary remission.The employer must fairly and reasonably determine not merely his present state of health but health over a period of time wherein he would be required to discharge duties under the employer.The managerial discretion of the employer cannot be whittled down by reading into the discretion a requirement that even in case where an employee has a terminal illness, he should be taken into permanent employment if momentarily he or she may discharge some duties. The employer can legitimately take a perspective of health as it is likely to be over a period of time on the basis of objective facts disclosed by a medical examination immediately prior to the grant of a request for regularization.

23. We will now make a reference to the various judgments cited by the parties before us.In School Board of Nassau County,Florida v. Gene H. Arline (1987 (94) Law Ed 2d 307) (supra), a school teacher, who was fired from her job solely because of her susceptibility to tuberculosis, brought an action alleging that her dismissal violated the Rehabilitation Act. The United States District Court for the Middle District of Florida,John H.Moore, II,J.,entered judgment for the school board and superintendent.The teacher appealed.The Court of Appels,Eleventh Circuit, 772 F.2d 759,reversed and remanded.Certiorari was granted.The Supreme Court,Justice Brennan, J.,held that school teacher afflicted with contagious disease of tuberculosis was a "handicapped individual" within the meaning of the Rehabilitation Act section prohibiting federally funded state program from discriminating against handicapped individual solely by reason of handicap. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C 794 (Act), provides, inter alia that no "otherwise qualified handicapped individual", as defined in 29 USC Section 706(7),shall solely by reason of his handicap, be excluded from participation in any program receiving federal financial assistance. Section 706(7)(B) defines "handicapped individual" to mean any person who "(i)has a physical.....impairment which substantially limits one or m,ore of (his) major life activities,(ii) has record of such an impairment, or (iii)is regarded **1124 having such an impairment."Department of Health and Human Services(HHS) regulations define"physical impairment"to mean,inter alia,any physiological disorder affecting the respiratory system and define "major life activities" to include working.Respondent was hospitalized for tuberculosis in 1957.The disease went into remission for the next 20 years,during which time respondent began teaching elementary school in Florida.In 1977,March 1978,and November 1978,respondent had relapses, after the latter two of which she was suspended with pay for the rest of the school year.At the end of the 1978-1979 school year, petitioners discharged her after a hearing because of the continued recurrence of tuberculosis.After she was denied relief in state administrative proceedings, she brought suit in Federal District Court, alleging a violation of Section 504.The District Court held held she was not a "handicapped person" under the Act, but that, even assuming she were,she was not "qualified" to teach elementary school.The Court of Appeals reversed, holding that persons with contagious diseases are within Section 504's coverage, and remended for further findings as to whether respondent was "otherwise qualified" for her job,504.It was held:--

"1. A person afflicted with the contagious disease of tuberculosis may be "handicapped individual" within the meaning of Section

504.Pages 1127-1130.

(a) Respondent is a "handicapped individual" as defined in Section 706(7)(B) and the HHS regulations.Her hospitalization in 1957,for a disease that affected her respiratory system, and

that substantially limited "one or more of (her) major life activities," establishes that she has a "record of.....impairment."Pages 1127-1128.

*27(b)The fact that a person with a record of impairment is also contagious does not remove that person from Section 504's coverage.To allow an employer to justify discrimination by distinguishing between a disease's contagious effects on others and its physical effects on a patient would be unfair, would be contrary to Section 706(7)(B)(iii)and the legislative history,which demonstrate Congress' concern about at impairment's effect on others, and would be inconsistent with Section 504's basic purpose to ensure that handicapped individuals are not denied jobs because of the prejudice or ignorance of others.The Act replaces such fearful, reflexive reactions with action based on reasoned and medically sound judgment as to whether contagious handicapped persons are "otherwise qualified" to do the job Pages 1127-1130.

2. In Most cases,in order to determine whether a person handicapped by contagious disease is "otherwise qualified" under Section 504, the district Court must conduct an individualized inquiry and make appropriate findings of fact,based on reasonable medical judgment given the State of medical knowledge, about (a) the nature of the risk (e.g.,how the disease is transmitted),(b)the duration of the risk (how long is the carrier infectious),(c) the severity of the risk(what is the potential harm to harm to third parties),and (d)the probabilities the disease will be transmitted and will cause varying degrees of harm.In making these findings, Courts normally should defer to the reasonable medical judgments of public health officials.Court must then determine, in light of these findings, whether any "reasonable accommodation" can be made by the employer under the established standards for that inquiry. Page 1130-1132."

24. In Voncent L. Chalk v. United States District Court Central District of California (840 F.2d 701: 1987 US App.LEXIS 17629) decided by the United States Court of Appeals for the Ninth Circuit, the petitioner Chalk was a certified teacher of hearing-impaired students in the Orange Court Department of Education.In February 1987,Chalk was diagnosed as having AIDS.Subsequently,the Department reassigned Chalk to an administrative position and barred him from teaching in the classroom.Chalk then filed the action in the District Court,claiming that the Department's action violated Section 504,as amended, which proscribes recipients of federal funds from discriminating against otherwise qualified handicapped persons.Chalk's motion for a preliminary injunction ordering his reinstatement was denied by the District Court and,therefore, Chalk filed the appeal.In its opinion,the Court addressed the question which is of central importance to the case:under what circumstances may a person handicapped with a contagious disease by "otherwise qualified"within the meaning of Section 504? Relying on its earlier opinion in Southeastern Community Collage v. Davis,the Court said:

"An otherwise qualified person in one who is able to meet all of a program's requirements in spite of his handicap.In the employment context,an otherwise qualified person is one who can perform (**10)"the essential function" of the job in question. When a handicapped person is not able to perform the essential functions of the job,the Court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions.Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee,or requires a "fundamental alteration in the nature of (the) program."

In applying this standard to the facts before it, the Court recognised the difficult circumstances which confront a handicapped person,an employer, and the public in dealing with the possibility of contagion in the workplace.The problem is in reconciling the needs for protection of other persons,continuation of the work mission,and reasonable accommodation--if possible--of the afflicted individual.The Court effected this reconciliation by formulating a standard for determining when a contagious disease would prevent an individual from being "otherwise qualified".A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.The Act would not require a school board to place a teacher with active,contagious tuberculosis in a classroom with elementary school children.The application of this standard requires,in most cases,an individualized inquiry and appropriate findings of fact,so that "Section 504 (may)achieve its goal of protecting handicapped individuals from deprivations based on prejudice,stereotypes,or unfounded fear,while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risk.

Chalk submitted in evidence to the District Court,and that Court accepted,more than 100 articles from prestigious medical journals and the declarations of five experts on AIDS,including two public health officials of Los Angles county.Those submissions reveal an overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS.AIDS is caused by infection of the individual with HIV, a retrovirus that penetrates chromosomes of certain human cells that combat infection throughout the body.Individuals who become infected with HIV may remain without symptoms for an extended period of time.When the disease takes hold,however,a number of symptoms can occur,including swollen lymph nodes,fever,weight loss,fatigue and night sweats.Eventually,the vires destroys its host cells,thereby weakening the victim's immune system.When the immune system is in a compromised state,the victim become susceptible to a variety of so-called"opportunistic infections",many of which can prove fatal.

Footnotes 6 and 8 read as under:--

"n7. It is not yet known what percentage of individuals who test positive for HIV will actually develop AIDS, but estimates range between 30 and 90 per cent.

n8. The vast majority of opportunistic infections that prey upon AIDS patients are not transmissible to other with uncompromised immune systems.Some opportunistic infections, however,such as tuberculosis,may be communicable in a classroom setting.There is no evidence, nor does the Department contend,that Chalk lis currently suffering from any opportunistic infections.If he should later develop a communicable infection,it would, of course, be proper for the Department to treat him as it would any other teacher with a communicable infection. See Arline, 107S.Ct.at 1131 n. 16.and discussion infra at 710-711."

Based on the accumulated body of medical evidence,the Surgeon General of the United States has concluded:

"There is no known risk of non-sexual infection in most of the situations we encounter in our daily lives.We know that family members living with individuals who have the AIDS virus do not became infected except through sexual contact.There is no evidence of transmission (spread)of AIDS virus by everyday contact even though these family members shared food,towels,cups,razors,even toothbrushes and Kissed each other."

U.S.Public Health Service,Surgeon General's Report on Acquired Immune Deficiency Syndrome at 13 (1986) (hereinafter Surgeon General's Report).The Surgeon General also specifically addressed the risk of transmission in the class-room setting:

"None of the identified cases of AIDS in the United States are known or are suspected to have been transmitted from one child to another in school, day care or foster care settings.Transmission would necessitate exposure of open cuts to the blood or other body fluids of the infected child,a highly unlikely occurrence.Even then,routine safety procedures for handling blood or other body fluids.....would be effective in preventing transmission from children with AIDS to other children in school.....Casual social contact between children and persons infected with the AIDS virus is not dangerous".

The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites,even bites that break the skin.Based upon the abundant medical and scientific evidence before the Court,Ryan poses no rick of harm to his class-mates and teachers.Any theoretical risk of transmission of the AIDS virus by Ryan in connection with his attendance in regular kindergarten class is so remote that it cannot form the basis for any exclusionary action by the School District.

In a concurring judgment, Sneed,Circuit Judge,observed:--

"I concur in Judge Poole's opinion.Confronted with some uncertainties about scientific truth,judges, perhaps above all others, should act on the basis of that which is known,or,where this is not possible,on the basis of that which is known,or,where this is not possible,on the basis of that which those best qualified to speak say is known.Judge Poole has set out clearly which those best qualified say they know,and we have no choice but to accept their version of the truth.We can neither await ultimate validation nor reject their version(**33)on the basis or our awareness that the truths of medical science are frequently revised in the light of new data."

25. In Anand Bihari v.Rajasthan S.R.T.C.,,workers were appointed as drivers to drive the roadways buses of the Corporation in the region of Ajmer, Jaipur and Bharatpur. They had put in a long service discharging their duties to the satisfaction of the Corporation.Some time in 1987, routine medical examination showed that they had developed defective eye-sight and did not have the required vision for driving heavy motor vehicles like buses for which they were engaged by the Corporation.The Corporation, therefore, constituted a Medical Board and directed the workers to appear before it for testing their eye-sigh.The Board found them totally unfit for driving heavy motor vehicle.The Corporation issued notices to the workmen to show cause as to why their services should not be terminated since they were found unfit for driving its buses.The workmen submitted their explanations in which they asked for conducting a second test of their eye-sigh and also prayed that in case they were found unfit for driving the buses,they should be given some other job in the Corporation.The Corporation decided that since the workmen's eye-sight was not of the standard required to drive the buses they could not be retained in service,and terminated their services.The decision was challenged by filing a writ petition in the High Court.It was contended before the High Court by the Corporation that the termination of the services did not amount to retrenchment within the meaning of S. 2(oo) of the Act.The High Court upheld the contentions of the Corporation and dismissed the writ petition. In some other matter,the workman's service as driver by the Corporation were terminated on the ground of loss of vision of his right eye.He approached

the High Court.The workman contended that since he had lost the sight of one year on March 11,1986,he was not working as a driver but was working in the maintenance section of vehicle and he was not found unfit for that work and, hence, his termination on the ground of his incapacity to work as a driver is illegal.The High Court held that though he had lost vision of one eye, he was fit to discharge the duties of a Technician or a helper and,therefore, his services should not have been terminated in that category.In para 7,the Supreme Court has observed as Under:--

"Even otherwise, it can scarcely be disputed that the expression "ill-health" used in sub-clause (c) has to be construed relatively and in its context. It must have a bearing on the normal discharge of duties. It is nt any illness but that which interferes with the usual orderly functioning of the duties of the post which would be attracted by the sub-clause. Conversely, even if the illness does not affect general health or general capacity and is restricted only to a particular limb or organ but affects the efficient working of the work entrusted, it will be covered by the phrase. For it is not the capacity in general ut that which is necessary to perform the duty for which the workman is engages which is relevant and material and should be considered for the purpose. The expression "ill-health" is defined in the new Collins Concise English Dictionary to mean "not in good health; sick"; in Webster's Comprehensive Dictionary (International Edition) to mean "disordered in physical, condition; diseased; unwell; sick"; in the Concise Oxford Dictionary (3rd edn.) to mean "out of health; sick; with disease; with anxiety (of health), unsound; dis-ordered, morally bad", and in Shorter Oxford English Dictionary to mean "unsound, disordered; out of health, not well". Therefore, any disorder in health which incapacitates an individual from discharging the duties entrusted to him or affects his work adversely or comes in the way of his normal and effective functioning can be covered by the said phrase. The phrase has also to be construed from the point of view of the consumers of the concerned products and services. If on account of a workman's disease or incapacity or debility in functioning, the resultant product or the service is likely to be affected in any way or to become a risk to the health, life or property of the consumer, the disease or incapacity has to be categorized as ill-health for the purpose of the said sub-clause. Otherwise, the purpose of production for which the services of the workman are engaged will be frustrated and worse still in cases such as the present one they will endanger the lives and the property of the consumers. Hence, we have to place a realistic and not a technical or pedantic meaning on the said phrase. We are, therefore, more than satisfied that the said phrase would include cases of drivers such as the present ones who have developed a defective or sub-normal vision or eye-sight which is bound to interfere with their normal working as drivers."

26. The decision of the Apex Court cited by Mr. Grover in Neera Mathur v. Life Insurance Corporation of India, reported in (, in our view, is not very relevant to the matter in issue before us.

27. In Jai Shankar Prasad v. State of Bihar, , the Apex Court has observed that by 'infirmity of body' what is spoken of in Art. 317(3)(c) is an infirmity which disables the Member from discharging his functions as such member effectively. It is not every infirmity of body or every loss of use of any limb of the body. The defect or deficiency must be such as would disable the Member from carrying out his duties satisfactory and consistent with the trust reposed in him. Of course, the Apex Court has also observed, that the infirmity of body or mind which is referred to in the sub-clause, further must necessarily be such as has arisen after the appointment and not the one which existed at the time of the appointment, unless of course, the Government was unaware of the same at the time of the appointment. In the case

before it, the Apex Court observed that blindness of respondent No. 6 does not prevent him from discharging his duties expected of him.

28. In support of his arguments based on Art. 14, Mr. Grover placed reliance on the judgment of the Apex Court in D.S. Nakara v. Union of India, , it is observed as under:--

"Thus the fundamental principle is that Art, 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguished persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question."

In para 16, the Apex Court has observed as under:--

"As a corollary to this well established proposition, the next question is, on whom the burden lies to affirmatively establish the rational principle on which the classification is founded correlated to the object sought to be achieved? The thrust of Art. 14 is that the citizen is entitled to equality before law and equal protection of laws. In the very nature of things the society being composed of unequals a welfare State will have to strive by both executive and legislative action to help the less fortunate in society to ameliorate their condition so that the social and economic inequality in the society may be bridged. This would necessitate a legislation applicable to a group of citizens otherwise unequal and amelioration of whose lot is the object of state affirmative action. In the absence of the doctrine of classification such legislation is likely to flounder on the bed rock of equality enshrined in Art. 14. The Court realistically appraising the social stratification and economic inequality and keeping in view the guidelines on which the State action must move as constitutionally laid down in Part IV of the Constitution, evolved the doctrine of classification. The doctrine was evolved to sustain a legislation or State action designed to help weaker sections of the society or some such segments of the society in need of succour. Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. The State, therefore, would have to affirmatively satisfy the Court that the twin tests have been satisfied. It can only be satisfied if the State established not only the rational principle on which classification is founded but correlates it to the objects sought to be achieved. This approach is noticed in Ramana Dayaram Shetty v. International Airport Authority of India, , the

Court observed that a discriminatory action of the Government is liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory." (E)

29. Mr. Grover cited the decision on O'Neill v. Burton Cables Pvt. Ltd., reported in (1986) EOC 92-159 of the Equal Opportunity Commission constituted under the provisions of the Equal Opportunity Act, 1984. In the aforesaid case, the complainant applied for a position as a purchasing officer with the respondent company. He was offered the job subject to undertaking a medical examination. At the examination, mentioned to the doctor that his back, arms, legs and shoulders were stiff from spending the previous two days digging in his garden. Upon turning up for work the next day, he was advised that he had failed the medical examination. The doctor had advised the respondent that the complainant had an acute back

condition and was not fit to commence work. The respondent's purchasing manager had contacted the complainant's previous employer, who advised that there had been no work absences due to back problems. However, the respondent feared that the complainant could injure himself while either lifting goods or turning to answer the telephone. In evidence, the complainant produced references and details of his previous work history, which indicated a favourable work record and no injury or health problems. Although he had been injured in a car accident nine years earlier, this had not had a long-term effect on his ability to work. Section 21(1) of the Equal Opportunity Act provides as under:--

"21(1) It is unlawful for an employer or a prospective employer to discriminate against a person on the ground of status or by reason of the private life of the person-

(a) in determining who should be offered employment;

(b) in the terms on which the employer or prospective, employer offers employment;

(c) by refusing or deliberately omitting to offer employment; or

(d) by denying the person access to a guidance programme, an apprenticeship training programme or other occupational training or retraining programme."

Status in relation to a person is defined in S. 4 of the Act as meaning (among other things) the impairment of that person. Impairment is defined in S. 4 as follows:

'Impairment' means-

(a) total or partial loss of a bodily function;

(b) total or partial loss of a part of the body;

(c) malfunction of a part of the body; and

(d) malformation or disfigurement of a part of the body-- and includes, in relation to a person with a past or present impairment an impairment which presently exists or existed in the past but has now ceased to exist."

In the aforesaid case, it is observed as under:--

"No employer is required to employ a person who cannot undertake the duties of the position they are seeking to fill. But an employer must investigate each particular case and cannot apply a general rule that would exclude a whole class of persons because some members of that class may not be suitable employees."

30. In Urie v. Cadbury Schweppes Pvt. Ltd., reported in (1986) EOC 92-180, the complainant was refused a temporary position as a loader with Cadbury Schweppes Pvt. Ltd. ("the company") on the ground that a prior knee injury and a childhood incident of rheumatic fever rendered him unable to perform work of the nature involved, such as heavy lifting. The complainant had been employed by the company the year before and had performed similar work satisfactorily, even though the disabilities in question had been known at that time. The complainant alleged discrimination on the ground of impairment. It was submitted that he had

fully recovered from the impairments in question. He had successfully participated in a hockey tour of Europe, and a physiotherapist's report was presented which stated that he was capable of carrying out the physical tasks involved in the job. The respondent argued that its actions were reasonable, as they were based on a medical assessment of his condition in relation to the work he would be required to do. Even if there was discrimination, such discrimination was lawful, as the complainant's impairment, in combination with the nature of the work involved, constituted a substantial risk of injury to the complainant and to fellow employees. It was further submitted that the person ultimately selected was the applicant best suited for the position, and that to have employed the complainant would have caused difficulties in the fulfilment of the employer's duties and obligations under common law and statute. It was held as under:--

1. The company's decision not to employ the complainant was not justifiable under the Act. The decision not to employ the complainant was based on inadequate considerations, the one medical report alone, to the exclusion of his past work history and other medical evidence. No evidence was produced as to the superior suitability of the successful applicant.

2. The respondent did not produce sufficient evidence to satisfy the Board that employing the complainant would pose a substantial risk of injury to the complainant or to any other employees. The existence of this risk had to be established in consideration of the circumstances of the particular application and could not be based on generalisations pertaining to the impairments in question.

3. The respondent could not rely on its obligations under common law or statute unless this reliance was based on proper medical examinations which took into account the particular circumstances of the case.

4. Damages were awarded for loss of earnings, but were reduced due to the complainant's failure to mitigate his loss by obtaining alternative employment and his receipt of unemployment benefits."

31. Dr. Chandrachud, learned counsel appearing for the respondent-Corporation, pointed out that in paras 29 to 32 of the judgment of the Apex Court in Krishna Kumar v. Union of India, , the Apex Court has considered the earlier decision in D.S. Nakara v. Union of India, , and the said decision has been explained and distinguished. We must immediately observe that the distinction was on the basis that in Nakara's case, the Court treated the pension retirees only as a homogeneous class. The Court also clearly observed that while so reading down, it was not dealing with any fund and there was no question of the same cake being divided amongst larger number of the pensioners than would have been under the notification with respect to the specified date. The Apex Court observed that in Nakara's case, it was never held that both the pension retirees and the P.F. retirees formed a homogeneous class and that any further classification among them would be violative of Art. 14. Thus, it is clear that Nakara's case was explained and distinguished on facts and the principle of law and the interpretation of Art. 14 was not disturbed.

32. Dr. Chandrachud also brought to our notice the observations of the Apex Court in para 25 of the judgment in State of Haryana v. Piara Singh, which are as under:--

"25. As would be evident from the observations made and directions given in the above two cases, the court must, while giving such directions, act with due care and caution. It must first

ascertain the relevant facts, and must be cognizant of the several situations and eventualities that may arise on account of such directions. A practical and pragmatic view has to be taken, inasmuch as every such direction not only tells upon the public exchequer but also has the effect of increasing the cadre strength of a particular service, class or category. Now, take the directions given in the judgment under appeal. Apart from the fact that the High Court was not right--as we shall presently demonstrate in holding that the several conditions imposed by the two Governments in their respective orders relating to regularization are arbitrary not valid and justified--the High Court acted rather hastily in directing wholesome regularization of all such persons who have put in one year's service, and that too unconditionally."

33. Dr. Chandrachud next cited the decision of the Apex Court in G. B. Mahajan v. Jalgaon Municipal Council,

wherein, in the facts and circumstances of the case before it, the Supreme Court has observed as under (para 14):--

"A project, otherwise legal, does not become any the less permissible by reason alone that the local authority, instead of executing the project itself, had entered into an agreement with a developer for its financing and execution. The criticism of the project being 'unconstitutional' does not add to or advance the legal contention any further. The question is not whether it is unconventional by the standard of the extent practices, bout whether there was something in the law rendering it impermissible. There is, no doubt, a degree of public accountability in all governmental enterprises. But, the question is one of the extent and scope of judicial review over such matters. With the expansion of the State's presence in the field of trade and commerce and of the range of economic and commercial enterprises of government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost over-runs in projects, balancing of costs against time-scales, quality-control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are boa fide and within the limits of authority."

34. Dr. Chandrachud then referred to the decision of the Apex Court in Tata Cellular v. Union of Indian, , the

Apex Court has observed as under:--

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitation sin exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Art. 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Art. 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the

said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

73. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

75. In Chief Constable of the North Wales Police v. Evans (1982 (3) All ER 141) Lord Brightman said:

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160)."

In R. v. Panel on Take-overs and Mergers, ex p Datafin plc 24, Sir John Donaldson, M.R. commented:

"An application for judicial review is not an appeal."

In Lonrho plc v. Secretary of State for Trade and Industry, Lord Keith said:

"Judicial review is a protection and not a weapon."

It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In Amin, Re, Lord Fraser observed that:

"Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made ..... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

5. Dr. Chandrachud also brought to our notice the decision of the Apex Court in Delhi Development Horticulture Employees' Union v. Delhi Administration, , the Apex Court has

observed as under:--

"There is no doubt that broadly interpreted and as a necessary logical corollary, right to life would include the right to livelihood and, therefore, right to work. It is for this reason that this Court in Olga Tellis v. Bombay Municipal Corporation while considering the consequences of eviction of

the pavement dwellers had pointed out that in that case the eviction not merely resulted in deprivation of shelter but also deprivation of livelihood inasmuch as the pavement dwellers were employed in the vicinity of their dwellings. The Court had, therefore, emphasised that the problem of eviction of the pavement dwellers had to be viewed also in that context. This was, however, in the context of Art. 21 which seeks to protect persons against the deprivation of their life except according to procedure established by law. This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any the less fundamental to life. Advisedly,k therefore, it has been placed in the Chapter on Directive Principles, Art. 41 of which enjoins upon the State to make effective provision for securing the same "within the limits of its economic capacity and development". Thus even while giving the direction to the State to ensure the right to work, the Constitution makers thought it prudent not to do so without qualifying it."

36. Dr. Chandrachud next brought to our notice the decision of the Apex Court in Indian Council of Agricultural Research v. Shashi Gupta, , the Apex Court has observed as under:--

"We do not agree with the reasoning and the conclusions reached by the Tribunal. We are of the view that once the medical board and the Appellate Medical Board found the respondent medically unfit for the post of Scientist Grade S the Tribunal had no jurisdiction whatsoever to have got over the medical opinions and directed her appointment to the service. The Tribunal outstepped its jurisdiction and acted with an utter perversity. Medical fitness is the sine qua non for appointment to public services. It is the inherent right of an employer to be satisfied about the medical fitness of a person before offering employment to him/her."

37. The next decision relied upon by Dr. Chandrachud was State Bank of India v. G. K. Deshak, . In para 3 of the

judgment, the Apex Court has observed as under:--

"We have heard the learned counsel for the parties at length. The medical opinion, which is on the records of the case, clearly indicates that the defect in his eyes is very serious and he is unfit for the post. He was allowed to join in obedience to the writ issued by the High Court.

The reasons given in the impugned judgment indicate that the High Court took upon itself to decide the question of medical fitness of the respondent and on reaching a conclusion in favour of the respondent, preferred the same as against the medical opinion of the specialist doctor. It is significant to note that it is not suggested on behalf of the respondent that the authorities of the appellant State Bank of India have acted mala fide or with any malice against the respondent. In the circumstances, we do not approve of the approach adopted by the High Court in allowing the writ petition."

38. The next case cited by Dr. Chandrachud is the decision of the Apex Court in Anil Kumar Singh v. Union of India, reported in 1995 Supp (4) SCC 467, wherein in para 2 the Apex Court has observed as under:--

"One of the cases pointed out on behalf of the appellant and accepted by the Union of India is of a constable Surat Singh who was suffering from hernia at the time of recruitment. He was, however, enrolled after he got himself operated and cured of the ailment. We find that there is no justification for giving a differential treatment to the appellant whose case is slightly better. He developed hernia after recruitment and during the training period. In the facts and circumstances of the case, therefore, we direct that if the appellant gets himself operated and thereafter is found to have been cured of the ailment and fit to resume service, he should be reinstated in service. If and when he is so reinstated, he would get the benefit of the lost period for the purpose of his seniority and all other benefits, except the back wages."

39. The next case cited by Dr. Chandrachud was the decision of the Apex Court in Ram Lal v. Union of India, .

However, we do not feel that the said decision is any way helpful for determining the issue before us.

40. In the light of the aforesaid facts and circumstances, submissions and the various decisions cited before us, we propose to consider the issues arising in this petition.

41. The first question is whether the employer or the State as the employer is entitled to scrutinise the medical fitness of an employee who is to be absorbed in its permanent services. There can hardly be any dispute that the employer will be entitled to scrutinise what is known as "medical fitness" of the prospective employee. However, the real question always is what are the actual tests or considerations to be applied for judging the employee to be "medically fit".

42. We are considering specifically a question as to whether a person who has been tested positive for H.I.V. can lawfully and justifiably rendered "medically unfit" solely on that ground so as to deny him the employment. We must also record that there is no dispute before us that the respondent-Corporation is a 'State' within the meaning of Art. 12 of the Constitution.

43. We are not much impressed by the submission of Dr. Chandrachud that the entitlement of an employer to scrutinise the fitness of an employee who is to be absorbed into his permanent services is not restricted to those considerations which condition the exercise of the power to retrench an existing employee on the ground of continued ill-health as provided under S. 2(oo) of the Act. The medical fitness in the context of employment, in our opinion, has necessarily to be correlated to the requirements of the job, and interest of the persons and

property at the workplace. Although in the case of Arline (1987 (94) Law Ed 2d 307) (supra) and Chalk (840 F 2d 701), the Courts were undoubtedly concerned with "handicapped individual" and "otherwise qualified" as defined under the statute, viz., the Rehabilitation Act of 1973, in our opinion, those cases are relevant to the issue before us. It is held in Arline's case that in order to determine whether a person handicapped by contagious disease is "otherwise qualified" under S. 504, the District Court must conduct an individualized inquiry and make appropriate findings of fact, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (e.g., how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. In making these findings, Courts normally should defer to the reasonable medical judgments of public health officials. In Chalk's case, it was held that an "otherwise qualified" person is one who is able to meet all of a program's requirements in spite of his handicap. In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. Although in both these cases, the Courts were concerned with the statute, viz., the Rehabilitation Act, in our opinion, the principles enunciated therein can be legitimately adverted to in deciding the issue before us.

44. Chalk's case (840 F 2d 701) is also relevant as the said decision also makes a reference to the consensus of medical and scientific opinion regarding the nature and transmission of AIDS. AIDS is caused by infection of the individual with HIV, a retrovirus that penetrates chromosomes of certain human cells that combat infection throughout the body. Individuals who become infected with HIV may remain without symptoms for an extended period of time. When the disease takes hold, however, a number of symptoms can occur, including swollen lymph nodes, fever, weight loss, fatigue and night seats. Eventually, the virus destroys its host cells, thereby weakening the victim's immune system. When the immune system is in a compromised state, the victim becomes susceptible to a variety of so-called "'opportunistic infections" many of which can prove fatal. Chalk's decision also refers to the conclusions of the Surgeon General of the United States, based on the accumulated body of medical evidence to the effect that there in no known risk of non-sexual infection in most of the situations we encounter in our daily lives. That family members living with individuals who have the AIDS virus do not become infected except through sexual contact. That there is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members share food, towels, cups, razors, even toothbrushes, and kissed each other.

45. The literature annexed to the petition and published under the auspices of the World Health Organisation Global Programme on AIDS as also the International Labour Office shows that epidemiological studies from throughout the world have demonstrated that the human immunodeficiency virus (HIV) is transmitted only in three ways: (a) through sexual intercourse (including semen donation); (b) through blood (principally blood transfusions and non-sterile injection equipment; also includes organ or tissue transplant); and (c) from infected mother to infant (perinatal transmission). There is no evidence to suggest that HIV transmission involves insects, food, water, sneezing, coughing, toilets, urine, swimming pools, sweat, tears, shared eating and drinking utensils or other items such as protective clothing or telephones. there is no evidence to suggest that HIV can be transmitted by casual person-to-person contact in any setting. The documentation also shows that at any point of time, the majority of HIV-infected persons are healthy; over time, they may develop AIDS or other HIV-related conditions or they may remain healthy. It is estimated that approximately 90% of the 5-10 million HIV-infected persons worldwide are in the economically productive

age group. In the vast majority of occupations and occupational settings, work does not involve a risk of acquiring or transmitting HIV between workers, from worker to client, or from client to worker. The policy principles adopted by the aforesaid World Organisation state that protection of the human rights and dignity of HIV-infected persons, including persons with AIDS, is essential to the prevention and control of HIV/AIDS. Workers with HIV-related illness including AIDS, should be treated the same as any other worker. Workers with HIV-related illness, including AIDS, should be treated the same as any other worker with an illness. Most people with HIV/AIDS want to continue working, which enhances their physical and mental well-being and they should be entitled to do so. They should be enabled to contribute their creativity and productivity in a supportive occupational setting.

46. As a matter of fact, the policy statement states that pre-employment HIV/AIDS screening as part of the assessment of fitness to work is unnecessary and should not be required. Under the ultimate general recommendations, it is stated in view of the modes of HIV transmission, a seropositive person's fitness for work cannot be called into question by the purely theoretical risk of virus transmission, and any discrimination is unacceptable. That in the current state of knowledge, there is not evidence to suggest that neurological or neuropsychiatric disorders occur relatively early in the course of HIV infection. The is, therefore, no reason to exclude asymptomatic HIV seropositve individuals from certain job assignments in accordance with the recommendations formulated by the WHO, ILO expert and the Council of the European Communities. It is further recommended that the health personnel aware of a job applicant's HIV seropositivity base their decision solely on the actual capacity of the individual to satisfy the job requirements and in this context, only the usual aptitude tests and adherence to health and safety measurers are of any real value.

47. In fact, the international opinion on the subject of AIDS and the workplace as revealed from the various recommendations in the international conventions co-sponsored by UNESCO, WHO, ILO, the Council of Europe and the European Communities, among others, is against mandatory testing for HIV infection prior to employment, or during the employment.

48. Even in this country, the National AIDS Control Organisation has published a National HIV testing policy under the auspices of the Government of India. The said policy states that since during the prolonged asymptomatic carrier stage of HIV infection, one remains fully active physically and mentally which demands an appropriate intervention which maintains the life style, dignity and rights of the patient and at the same time reduces or eliminates transmission. In the ultimate recommendations, 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 (unless otherwise required by the court) excepting blood unit (not necessarily the donor)should be discouraged which includes testing ..... pre or in-service employment screening or insurance procedure.

49. The circular dated 31-10-1991 issued by the respondent-Corporation shows that the management had decided to include inter alia HIV test for AIDS in addition to the existing test for fresh recruits in order to ensure that they do not have any serious communicable disease. The circular dated 8th April, 1993 reiterating the directions in the earlier circular dated 31-10-1991 in para 2 additionally provides that it has been now decided that HIV test for AIDS (ELISA) is mandatory test for pre-confirmation. In para 4, the circular states that if the employee is found to be HIV positive by ELISA test, his services will be terminated.

Thus, the respondent-Corporation, has framed a rule, which denies employment to the fresh recruits and which enables the Corporation to terminate the services of the employee solely on the ground that the employee is found to be HIV positive irrespective of the fact that such a person is able to carry out the job requirements or, that such person does not pose any threat to persons and property at the workplace.

50. If the person who is HIV positive and on that count is disabled to perform the normal job requirements, or if such a person poses a risk to other persons working with him or to persons coming into his contact at the work place, he could be justifiably and lawfully denied employment on the ground that he is "medically unfit". However, the overwhelming medical opinion and the opinion of perons 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 upto 18 years.

51. As observed by the Circuit Judge, Sneed, in Chalk's case, (840 F 2d 701), confronted with some uncertainties about scientific truth, Judges should act on the basis of that which is known, or, where this is not possible, on the basis of that which those best qualified to speak say is known. The material brought to our notice clearly reflects the opinion world over including in this country that the mere fact that the person is HIV infected should not be a ground to discriminate such person in the matter of employment. The material further shows that person having HIV infection may remain asymptomatic for a number of years during which period he would be able to perform the normal job requirements and a person with HIV infection may not pose a threat to other person who may come into his contact at the work place in normal circumstances and the only possible transmission can be through sexual intercourse or blood transfusion.

52. In this context, we may also refer to the observations of the apex Court in paras 15 and 50 in Air India Statutory Corporation v. United Labour Union, reported in 1996 (9) Scales 70 : (1997 AIR SCW 430, Paras 15 and 49), which are as under :--

"15. The founding fathers of the Constitution, cognizant of the reality of life wisely engrafted the Fundamental Rights and Directive Principles in Chapters III and IV for a democratic way of life to every one in Bharat Republic, the State under Art. 38 is enjoined to strive to promot the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life and to minimise the inequalities in income and endeavour to eliminate inequalities in income and in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 39(a) provides that the State shall direct its policies towards securing the citizens, men and women equally, the right to an adequate means of livelihood; clause (d) provides for equal pay for equal work for both men and women; clause (c) provides to secure the health and strength of workers. Article 41 provides that within the limits of its economic capacity and development, the State shall make effective provision to secure the right to work as fundamental with just and humane conditions of work by suitable legislation or economic organisation or in any other way in which the worker shall be assured of living wages, conditions of work ensuring a decent standard of life an d full enjoyment of leisure and social and cultural opportunities to the workmen. The poor, the workman and common man can secure and realise economic and social freedom only through the right to work and right to

adequate means of livelihood, to just and humane conditions of work, to a living wage, a decent standard of life, education and leisure. To them, these are fundamental facets of life."

"50. It is already seen that in D.T.C'S case

(supra), this Court had held that right to life to a workman would include right to continue in permanent employment which is not a bounty of the employer nor can its survival be at the volition and mercy of the employer. Income is the foundation to enjoy many Fundamental Rights and when work is the source of income, the right to work would become as such a fundamental right. Fundamental Rights can ill-afford to be consigned to the limbs of undefined premises and uncertain application. In Bandhu Mukti Morcha v. Union of India , this Court had held that the right to life with

human dignity enshrined in Art. 21 derives its life breach from the Directive Principles of State Policy and that opportunities and facilities should be provided to the people. In Olga Tellis's case, , this Court had held that the right to livelihood

is an important facet of the right to life. Deprivation of the means of livelihood would denude the life itself. In C.E.S.C. Ltd. v. S. C. Bose, , it was held that the right to social and economic justice is a fundamental right. Right to health of a worker is a fundamental right. The right to live with human dignity at least with minimum sustenance and shelter and all those rights and aspects of life which would go to make a man's life complete and worth living, would form part of the right to life. Enjoyment of life and its attainment social, cultural and intellectual without which life cannot be meaningful, would embrace the protection and preservation of life guaranteed by Art. 21. In Life Insurance Corporation case, a Bench of two Judges had held

that right to economic equality is a fundamental right. In Dalmia Cement Bharat Ltd. case , right to economic justice was held to be a fundamental right. Right to shelter was held to be a fundamental right in Olga Tells's case ; P.G.

Gupta v. State of Gujarat ; M/s. Shantisar Builders v. Narayan Khimlal Totame, : ; Chameli Singh v.

State of U.P. etc."

53. Thus, no person can be deprived of his right to livelihood except according to procedure established by law. Obviously, such procedure established by law has to be just, fair and reasonable. In other words, such procedure also must pass the rigour of Art. 14. The rule providing that person must be medically fit before he is employed or to be continued while in employment is, obviously, with the object of ensuring that the person is capable of or continues to be capable of performing his normal job requirements and that he does not pose a threat or health hazard to the persons or property at the workplace. The persons who are rendered incapable, due to the ailment, to perform their normal job functions or who pose a risk to other persons at the work place, say like due to having infected with some contagious disease which can be transmitted through the normal activities at the workplace, can be reasonably and justifiably denied employment or discontinued from the employment inasmuch as such classification has an intelligible differentia which has clear nexus with the object to be achieved, viz., to ensure the capacity of such persons to perform normal job functions as also to safeguard the interests of other persons at the workplace. But the person

who, though has some ailment, does not cease to be capable of performing the normal job functions and who does not pose any threat to the interests of other persons at the workplace during his normal activities cannot be included in the aforesaid class. Such inclusion in the said class merely on the ground of having an ailment is, obviously, arbitrary and unreasonable.

54. The decision of the apex Court in Anand Bihari's case (supra) although is in the context of the "continued ill-health" as used in Section 2(oo) of the Act is also relevant to test the validity of the impugned rule. In the aforesaid case, the apex Court has observed that the expression "ill-health" used in sub-clause (c) has to be construed relatively and in its context. It must have a bearing on the normal discharge of duties. It is not any illness but that which interferes with the usual orderly functioning of the duties of the post which would be attracted by the sub-clause. Conversely, even if the illness does not affect general health or general capacity and is restricted only to a particular limb or organ but affects the efficient working of the work entrusted, it will be covered by the phrase. For it is not the capacity in general but that which is necessary to perform the duty for which the workman is engaged which is relevant and material and should be considered for the purpose. Therefore, any disorder in health which incapacitates an individual from discharging the duties entrusted to him or affects his work adversely or comes in the way of his normal and effective functioning can be covered by the said phrase. The phrase has also to be construed from the point of view of the consumers of the concerned products and services. If on account of a workman's disease or incapacity or debility in functioning, the resultant product or the service is likely to be affected in any way or to become a risk to the health, life or property of the consumer, the disease or incapacity has to be categorized as ill-health for the purpose of the said sub-clause. In our opinion, the criteria which have been applied by the apex Court in the aforesaid case for determining whether a person suffers from ill-health can justifiably and reasonably apply even to judge "medical fitness" of the person prior to his employment. 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 workplace is clearly arbitrary and unreasonable and infringes the whole some requirement of Art. 14 as well as Art. 21 of the Constitution of India. Accordingly, we hold that the circular dated April 8, 1993 insofar as it directs that if the employee is found to be HIV positive by ELISA test, his services will be terminated is unconstitutional, illegal and in valid and, therefore, is quashed.

55. However, though an employee or prospective employee may not be medically unfit merely by virtue of he having been infected by HIV that he is capable of discharging the normal job functions can be legitimately insisted upon before the person is employed for a particular job. Further, whether by virtue of his ailment, he poses any health hazard to others at the workplace also can be investigated. But then in such a case, there cannot be any generalization and the issue will have to be decided in respect of each individual case. For example, a person may be HIV positive and may also be afflicted by opportunistic disease rendering him disabled to perform the job requirements or rendering him a potential risk or threat to other persons who may come in his contact at the work place. Whether it is so is always a question of fact and these aspects should be determined on the basis of not merely the result of the medical test but on the basis of the opinion of competent medical expert in that behalf.

56. Dr. Chandrachud emphasised that when a person having HIV infection is almost certain to deteriorate in health progressively and the progress of the disease is 'inexorable' and

without any remedy, the employer will be justified in not employing a person who almost certainly cannot be fit to perform the duties during the entire span from appointment till superannuation and the Court should not disturb the policy decision of the employer not to recruit such a person. Undoubtedly, the person who is infected with HIV is most likely to suffer AIDS and, ultimately, sooner or later is also most likely to be victim of the opportunistic disease which may cause his death. He may also contract a disease which is communicative or contagious creating a risk and a threat to other persons who come into his contact at the work place. Therefore, the right of such a person to livelihood and employment, the interests of the employer, co-workers at the workplace and the public which may come into contact with such a person at work place have to be balanced. In our opinion, the State and public Corporations like respondent No. I cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. As is evident from the material to which we have made a detailed reference in the earlier part of this judgment, the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution. The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case. If it means putting certain economic burden on the State or the public Corporations or the society, they must bear the same in the larger public interest.

57. Therefore, in every such ease, the test of medical fitness prior to employment or even during employment has necessarily to be co-related with the person's ability to perform the normal job requirements and any risk of health hazard he may pose 10 others at the workplace.

58. Coming to the facts of the case, it is relevant to notice that the petitioner has been working as a casual labourer admittedly from 1986 onwards till he was- removed from the list of casual labourers by order dated 16-2-1994. In the year 1993, the petitioner was subjected for several tests and excepting the test for HIV (1 and 2) antibodies, which revealed presence of HIV (1 and 2) antibodies, in respect of all other tests, the petitioner was found medically fit. However, it is relevant to notice that Dr. Alka Deshpande of the J.J. Hospital in the certificate though stated the HIV positive status of the petitioner, also certified that the petitioner is fit for duly. The petitioner was advised a follow up once a year. The certificate clearly mentioned that the disease is a prolonged one and the patient after acquiring the infection can remain asymptomatic for a long time extending upto one to 12 years and the petitioner is presently asymptomatic. The Doctor specifically mentioned that as per the Government policy, an employee cannot be discontinued because of his seropositivity. It is furlherrelevanl to notice that the Addl. Direct or of Health Services (AIDS). Government of Maharashtra, by his letter dated 7th May 1994 addressed to the Director of the respondent-Corporation pointed out that though the petitioner is at present HIV positive, he may lake 8 to 10 years for symptoms of AIDS. In fact, it was stated that it cannot be emphatically stated as to when he will develop the symptoms but it is not likely to be earlier than 8 to 10 years. The Addl. Director took care to point out that HIV/AIDS is not transmitted by casual contact or by working together. It is transmitted only if blood of HIV positive is transfused to other person or if there is sexual intercourse with such a person. The letter pointed out that barring

these two modes of transmission, the petitioner is not going to pose any risk to any of his colleague where he is working or where he is likely to work in future. The letter mentions that guidelines of the Government of India under the National, AIDS Control Programme are not to sack or remove anybody from the services, whether private or public, only because of HIV status. Keeping this scientific views in mind and also the need of support to the HIV positive person, the Director requested the Corporation to allow the petitioner to work in his capacily as a drum casual labourer as he was working previously.

59. This material, in our opinion, clearly showed that even according to medical opinion, the petitioner was found fit for his normal duties, viz.. loading of drums in trucks and he did not pose any threat or risk to any persons at workplace: Therefore, on the basis of the facts and circumstances and the material on record, the order dated 16th Feb. 1994 deleting the name of the petitioner from the panel of casual labourers to be regularised or absorbed is clearly arbitrary, unjust and unlawful and the same is hereby quashed.

60. That brings us to the question of further consequential orders or directions to be given in the matter. Mr. Graver fairly stated that so far as the consideration of the petitioner for permanent employment is concerned, undoubtedly, due to passage of time, he may have to submit himself to all the reasonably required medical tests, including for HIV. However, the respondent- Corporation shall have to consider whether to employ him permanently or not on the basis of medical opinion regarding the petitioner's fitness to work and his ability to perform the duties and satisfy the job requirement as also whether he poses any risk or health hazard to others at the workplace. Hence, we direct that the petitioner may submit himself to the routine pre-employment medical test again and the respondent-Corporation shall, on the basis of the medical opinion on the aforesaid aspects in respect of the petitioner, consider appointing him in the regular post if found medically fit.

61. In any case, we find absolutely no justification for deleting the name of the petitioner from the list of casual labourers. The petitioner has been requesting that at least he should be continued to be employed as a casual labourer and it was highly improper and thoroughly unjustifiable on the part of the respondent-Corporation not to permit the petitioner even to work as a casual labourer. We direct that till such lime as the petitioner is considered for regular employment as per the aforesaid directions, the petitioner shall forthwith be put on the panel of casual labourers and given work as and when available.

62. As 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 becausc of his HIV status is thoroughly unjustified and-illegal, we are also of the opinion that the petitioner will be entitled to the payment of the amount from the respondent-Corporation which he could have reasonably earned from 16-2-1904 till today as a casual labourer with the respondent-Corporation. In the very nature of things, it is impossible to determine the said amount accurately, but in such cases, we feel justified in making a broad calculation on the basis of the average number of days per year for which the petitioner has worked from 1986 till his removal in 1994. Mr. Grover, learned counsel appearing for the petitioner, has filed an affidavit of the petitioner wherein the petitioner has asserted that prior to Feb. 1994, he was earning from his work with the respondent organisation an average earning of Rs. 3,500/- per month with additional benefits towards clothes, medicines and an yearly bonus of Rs. 4.000/- approx. He has further stated that since Feb. 1994 till April. 1995. he had no source of employment. Since April, 1995 till today, from time to time, he has been running an autorickshaw on hire, as and when available and that he has been earning on an average an amount of Rs. 1,500/- per month. Dr.

Chandrachud, for obvious reasons, was not in a position to ascertain whether the assertions are factually correct. However, on instructions, he has stated that the petitioner was working as a casual labourer for a maximum of 19 days in any month and the wages were Rs. 79A per day. Accordingly, the petitioner was earning un amount of Rs. 1 ,500/- per month on un average. As stated earlier, it is impossible to determine the accurate figure. However, after hearing both the sides and after taking into consideration the aforesaid submissions and assertions, we hold that the petitioner shall be entitled to an amount of Rs. 1,000/- per month for forty months, the period approximately calculated from the date when he was removed from the list of casual labourers till the end of March 1997 and accordingly, we direct that the petitioner shall be entitled and respondent Not Corporation shall pay to the petitioner an amount of Rs. 40.000/- by way of back wages.

63. In the result, the rule is made absolute in terms of directions in paras 54,55, 57,59,60,61 and 62. There shall no order as to costs.

64. Petition allowed.