

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE

Writ Petition No. 1856 of 2002

X of Mumbai Indian Inhabitant

Residing at x x x Mumbai..... Petitioner

Vs

State Bank of India

16<sup>th</sup> floor State Bank Bhavan

Madam Cama Road Nariman Point

Mumbai. 400021

...Respondent

Mr. Anand Grover i/b Mr. Prakash Mahadik for

Petitioner

Mr. K. Kaushik for respondent

CORAM; A.P. SHAH & S.C. DHARMADHIKARI JJ.

DATED 16.1.2004

Per A.P. Shah J:

Rule. Respondents waive service. By consent rule is taken up for hearing forthwith.

1                                 In June 1987 the petitioner had joined Golden Enterprize as a sweeper. He was given sweeping work on contract basis at the State Bank of India, the respondent no. 1 herein. The petitioner satisfactorily performed his duties for more than 9 years. In or about 1997 the State Bank of India considered the case of the petitioner for recruitment for part-time hamal cum sweeper. By letter dated 18.3.1997 the State Bank of India informed the petitioner that as per the settlement dated 20.5.1996 arrived at between the State Bank of India and Mumbai Mazdoor Sangh in the presence of Asst Labour Commissioner (Central III), Mumbai the bank had decided to absorb his services for the post of part time hamal cum sweeper, subject to his being found suitable for the job in an interview. The petitioner remained present for the interview along with the concerned

documents. His application was accepted and he was asked to undergo medical investigations. The petitioner carried out the required medical investigation such as Chest P.A. View and blood check up etc. The petitioner's report of the Chest P.A. View was clear and the concerned doctor gave certificate stating that the petitioner is fit to perform sweeper's job. The petitioner also gave blood sample for ELISA test at the J.J. Hospital and was diagnosed that he is HIV asymptomatic.

2 It is the case of the petitioner that he was informed by his superior Shri Shashi Nair orally that his application for the said job has been rejected on medical ground and he was not required to come for his work from that day onwards. He was also told that he should report only when he gets clear reports i.e. he is tested HIV negative. It is the further case of the petitioner that in the month of October 1997, he approached J.J. Hospital and carried out blood tests but the sample was heamolysed and hence could not get the results. Thereafter on 21.10.1997 the petitioner got tested which showed he was positive for HIV 1 and 2 antibodies. The petitioner was also diagnosed asymptomatic by the report dated 24.10.1997.

3. According to the petitioner he again approached the respondent in November 1997 when he was informed by the officials orally that the bank do not allow recruitment of HIV positive at the pre-recruitment stage and therefore he would not be made permanent sweeper with the respondent. Thereafter the petitioner had been periodically approaching the respondent to know about his case of recruitment. But he was never informed by the respondent that he had to undergo further medical examination so that he can obtain a medical fitness certificate which is pre-requisite for recruitment. The petitioner was never appraised of the real situation. In the meanwhile from 1998 the petitioner started working as a casual labourer on daily wages from time to time. His financial condition forced him to work as casual labourer. The petitioner

had realized that his rights had been violated but he was unaware of the course of action to be taken.

4. The petitioner sent letter dated 22.2.2002 to the respondent calling upon the respondent to recruit him as permanent hamal cum sweeper with effect from April 1997. The respondent by the said notice, was also called upon to provide the petitioner with the copy of the bank rules/policies/circulars/notifications/ documents that it has referred and relied upon in rejecting the petitioner's application for the said post. The respondent replied to the notice dated 18.4.2002 vide letter dated 10<sup>th</sup> April 2002. In the said reply the respondent stated that the petitioner was found HIV I and II virus test positive. In terms of the policy of the respondent before making appointment to any candidate found HIV positive, Bank's Chief Medical Officer is required to examine and confirm that the candidate is capable to perform his normal job requirements and also absence of any risk or health hazard he may pose to others at the work place. The respondent in the said reply alleged that the petitioner did not turn up for further medical investigations nor did he report to Office Administration Department. Thus his medical examination remained incomplete. Thus in the absence of a medical fitness certificate, a mandatory requirement for appointment, the petitioner could not be given appointment in the bank. The respondent's offer of appointment to the petitioner, in view of the above has been withdrawn and cancelled. In the circumstances the petitioner has approached this court seeking direction to absorb him as hamal cum sweeper with the respondent bank.

5. The learned counsel for the Petitioner has brought to our notice the judgment of the Division Bench of this court reported in AIR 1997 Bombay 406 in the case of MX of Bombay Indian Inhabitant vs. M/s. ZY and another. In the said judgment, this court has, categorically held that HIV positive person cannot be denied employment only on the ground that the person is HIV positive, even though otherwise fit. Justice Tipnis speaking for the bench observed:

“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 rigour of Art 14. The rule providing that a 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 work place. The persons who are rendered incapable, due to 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 work place can be reasonably and justifiably denied employment or discontinued from the employment in as much 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 work place. 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 work place 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.

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 prospective of the fact that he does not pose any threat to others at the work place is clearly arbitrary and unreasonable and infringes the wholesome requirement of Art 14 as well as Art 21 of the Constitution of India. Accordingly, the circular in so far 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 invalid.”

(emphasis supplied)

6. In the case of MX of Bombay Indian Inhabitant the court also observed that the State and public Corporations 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. 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. In another decision of the Division Bench in the case of V.P.G.S.P. Mandal vs State of Maharashtra, 2001 (4) Mah L J. 561 the employee of the petitioner society died of Aids. The widow of the employee was denied employment on compassionate ground suspecting her to be patient of Aids. The Court held that the approach of the petitioner society was illegal and the petitioner cannot be denied employment in law when she was entitled to employment on compassionate ground as her husband died while in service.

7. The learned counsel for the State Bank of India, however, urged that the petitioner after he was tested HIV positive never turned up for further medical examination. The petitioner of his own volition and choice opted out of the process of absorption and did not contact the medical department of the respondent for investigation in the medical history of the petitioner and therefore he is not entitled to

discretionary reliefs. The learned counsel submitted that as the petitioner has waived the right of consideration for absorption conferred on him by the terms of the settlement before the Assistant Labour Commissioner, the vacancy was filled in and the petitioner cannot claim absorption at such belated stage. On the other hand Mr. Grover, appearing for the petitioner submitted that the HIV positive person cannot be denied employment only on the ground that the person is HIV positive. The petitioner had complied with all the formalities but he was orally denied employment by the officials of the respondent bank and he was asked to bring HIV negative certificate. According to Mr. Grover the petitioner cannot be deprived of his employment merely because there was some delay in approaching the court.

8    In the instant case the petitioner had worked on contract basis with the State Bank of India for more than 9 years and he was entitled for absorption in accordance with the settlement arrived at between the State Bank of India and the Union workers. In 1997 the petitioner was subjected for several tests and except for the test for HIV 1 and 2 antibodies in respect of other tests, petitioner was found medically fit. However, it is the contention of the petitioner that he was told orally by Shri Nair that his application for the said job had been rejected on medical ground and he was not required to come for work. He was also told to report only when he gets clear HIV negative test. The petitioner again underwent medical test and the test showed that he was HIV positive for antibodies. The petitioner claims that he periodically approached the bank, however, he was denied employment. It cannot be gainsaid that protection of human rights and dignity of HIV infected persons is essential to the prevention and control of HIV/AIDS. The workers with HIV related illness including AIDS should be treated the same as any other worker with an illness. Most people with HIV/ AIDS 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. HIV positive persons may have years of constructive, healthy service ahead of them. To exclude them lacks a rational foundation and is unfair. HIV infected persons need maximum understanding and help wherever possible.

9                    In our opinion, in facts and circumstances of the case, and in light of the decision in the case of MX of Bombay Indian Inhabitant vs M/s. ZY, the petitioner cannot be denied opportunity of employment. However, 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. The respondent bank shall have to consider whether to employ the petitioner permanently or not on the basis of medical opinion regarding petitioner's fitness to work and his ability to perform the duties and satisfy the job requirement as also whether he poses any risk in health hazard to others at the work place. Hence we direct that the petitioner shall be examined by a panel of doctors to be appointed by the Dean of J.J. Hospital shall make a report to the respondent bank about the petitioner's eligibility for absorption in the employment within four weeks from today. The respondent bank shall consider petitioner case on priority basis against first available vacancy in the post of hamal cum sweeper or in class IV post on the basis of the medical opinion on the aforesaid aspects in respect of the petitioner and appoint him in regular post if found medically fit. Till the petitioner is finally absorbed he may be considered as casual labourer as and when work is available.

Rule is made absolutely accordingly.