

Mr. Y and Mr. X

v.

The Secretary to the Government, Transport Department, Government of Tamil Nadu, The Principal Secretary (Health and FW) Department of Health and Family Welfare, Government of Tamil Nadu and The General Manager, Virudhunagar Region, Tamil Nadu State Transport Corporation (Madurai) Ltd.

High Court of Madras (Madurai Bench)

W.P. (MD) Nos. 947 and 12474 of 2010 and M.P. (MD) No. 2 of 2010

Decided on: 04.01.2011

Citations: 2011 (1) CTC 645

Bench: K. Chandru, J

ORDER

K. Chandru, J:-

1. Since both writ Petitions raise an identical question, they were grouped together and a common order is passed. In view of the sensitive nature of the case, the names of the Petitioners are not shown in the cause title. The Petitioner in W.P. (MD) No. 947 of 2010 is described as Mr.Y and the Petitioner in W.P. (MD) No. 12474 of 2010 is described as Mr. X.

2. In the first writ petition, the Petitioner seeks to set aside an order dated 5.11.2009 passed by the third Respondent Tamil Nadu State Transport Corporation (Madurai) Ltd. at Virudhunagar and after setting aside the same, seeks for a direction to the third Respondent to appoint him to the post of Driver. The writ petition was admitted on 24.9.2010. In M.P. (MD) No. 2 of 2010, this Court directed one post of driver to be kept vacant on 5.3.2010. Subsequent, it was made

absolute on 24.9.2010. On behalf of the third Respondent, a counter affidavit, dated 20.10.2010 was filed.

3. Likewise, the Petitioner Mr. X in W.P. (MD) No. 12474 of 2010 sought for a direction to the Respondent to appoint him as driver consequent upon the interview conducted on 9.2.2009. When the matter came up on 4.10.2010, this Court directed private notice to be served to the Respondent. Accordingly, notice has been served. The Respondent has filed a counter affidavit, dated 20.10.2010. This Court also directed the original file in respect of both cases to be circulated.

4. Heard the arguments of Mr. T. Lajapathi Roy, the learned Counsel appearing for the Petitioner in W.P. (MD) No. 947 of 2010, Mr. T.A. Ebenezer, the learned Counsel appearing for the Petitioner in W.P. (MD) No. 12474 of 2010, Mr. N. Asaithambi, learned Counsel appearing for the Respondent Transport Corporation and Mr. H.C. Herold Singh, learned Government Advocate appearing for Respondents 1 and 2 in W.P. (MD) No. 947 of 2010.

The facts leading to filing of the cases are as follows:

5. W.P. (MD) No. 947 of 2010 : The Petitioner belonged to a Backward Class. He had passed +2 examination. He has a valid driving license with heavy duty endorsement. He had also registered his name in the employment exchange with Registration No. 6961/96. The Petitioner's name was sponsored for being considered for the post of a driver by a communication, dated 13.10.2009. He was directed to appear for an interview with all relevant documents including medical fitness certificate and a certificate relating to his eye sight on 29.10.2009 at the office of the third Respondent at Virudhunagar. He was also directed that he should get medical fitness certificate from one Dr. K. Vellaisamy having his clinic in the name and style as Jothi Clinic at Virudhunagar. The certificate for fitness of his eyesight was to be obtained from Arvind Eye Hospital, Madurai.

6. The Doctor recommended by the third Respondent examined the Petitioner and sent his blood samples to one JJ Blood Examination Centre located near Apsara Cinema theatre for a further test. The said centre collected the Petitioner's blood samples. He had also got his eye tested at the Arvind Eye Hospital, Madurai on 24.10.2009 and his eye sight was found to be normal. The JJ

Blood Testing Centre diagnosed the Petitioner as having HIV positive. The said test was conducted by the JJ Blood Examination Centre without information to the Petitioner and without getting his consent. No pretest counseling was given to him nor any post test counseling was done by the Centre. Thereafter, the Doctor K. Vellaisamy notified by the third Respondent informed him that he cannot give any fitness certificate as he was certified for HIV positive. Despite repeated requests, the said medical practitioner forwarded the certificate to the third Respondent.

7. When the Petitioner went for an interview on 29.10.2009, he was checked for all his physical fitness. Since the Petitioner did not produce his medical certificate (which was not given to him at that time by the Doctor), he was not given any appointment. Subsequently, the Petitioner learnt that he was denied employment on the ground that the Doctor did not certify him fit for duty and his blood sample tested to be HIV positive. He was also orally informed by the officials of the third Respondent that they will not be in a position to offer him employment as he was certified HIV positive. Thereafter, the Petitioner approached an NGO dealing with HIV/AIDS patients. They gave a letter to the District Collector on 02.11.2009. Subsequently, the said letter was forwarded to the third Respondent which resulted in the Petitioner receiving a communication, dated 5.11.2009. It was stated that since the Doctor found the Petitioner unfit for employment as he was tested HIV I and II positive, he was unfit to hold the post of driver. It was thereafter the Petitioner filed the writ petition challenging the said impugned order.

8. In the counter affidavit filed by the third Respondent, it was claimed that the nature of work allotted to drivers are very sensitive. While shortlisting the candidates, the writ Petitioner was not selected. With reference to the reason for rejection, in paragraphs 6 and 7, it was averred as follows:

6...But the doctor has issued a certificate that he was affected by HIV I positive and further suggested that he is UNFIT, with regard to the appointment of the driver, conductor the transport corporation is following the provisions of Common service rules. As per the Rule 11(2) the candidate should possess sound health, active habits and should free from any bodily defect or deformity. Therefore as per the above said provision the writ Petitioner is an unfit person for the post of driver.

7. I respectfully submit that the post of driver is very sensitive in nature and further the driver would be responsible for more than 60 passengers in the bus. Therefore he ought to have been physically fit while driving the bus. It is not the stand of the transport corporation that on the sole ground that the Petitioner is the HIV patient, he was not selected for the post of driver, but apart from that he was not at all attended in the road test and other tests conducted by the selection committee. The Petitioner is well clever and he hide himself in the name of HIV patient and seeking for an appointment.

Apart from that it was also claimed that he has no fundamental right guaranteed under Article 16 of the Constitution for being selected as a driver.

9. In the file produced reliance was placed upon a Government Order in G.O.Ms. No. 57, Transport Department, dated 21.7.2005. In the said order, the Government while lifting the ban for recruitment for drivers and conductors in the transport corporation and permitted to recruit about 2000 drivers and 700 conductors, gave criteria to be satisfied for such recruitment. The conditions laid down therein are as follows:

i)Driving Test for the post of Drivers;

ii)Efficiency Test (Issuing tickets in line) for the post of Conductor;

iii)Physical fitness including Eye test, Hearing Test and Tolerance Test;

iv)They should be non-alcoholic and without any bad habits;

v)Before appointing, their antecedent report should be obtained to ensure that they are fully suitable for the post;

vi)They will be appointed on Daily paid category as per existing practice in the Corporation.

10. Besides this G.O., Rule 11(2) of the Common Service Rules framed for the transport corporation was also pressed into service, wherein it was stated that the candidate should possess sound health, active habits and should free from any bodily defect or deformity. Therefore,

according to the contesting Respondent, the Petitioner in view of his being tested HIV positive is unfit to discharge the duties as a driver.

11. In W.P. (MD) No. 12474 of 2010, the Petitioner was an Ex-serviceman and had served in the Army for eight years. He had also registered his name in the employment exchange for being considered for the post of Driver. His name was sponsored for being considered in the Respondent transport corporation. He was called for an interview on 9.2.2009. Subsequently, it was found that he was not selected as his blood samples showed that he was having HIV positive. Therefore, he had come up with the writ petition.

12. In the counter affidavit filed in that writ petition by the General Manager of the Tamil Nadu State Transport Corporation (Madurai) Limited, Virudhunagar Region, it was stated that when he had appeared for interview, he was sent to the Medical Board for medical test. But, the Doctor had issued a certificate that he was tested for HIV I positive, but HIV II negative. He was found unfit to serve the corporation. In paragraphs 6 and 7 of the counter affidavit, it was averred as follows:

...As far as the writ Petitioner is concerned he was appeared for interview and he was sent to medical board for medical test. But the doctor has issued a certificate that he was affected by HTV I positive and HTV n negative and further suggested that he is UNFIT. With regard to the appointment of the driver and conductor the transport corporation is following the Common service rules. As per the Rule 11(2) the candidate should possess sound health, active habits, and should free from any bodily defect or deformity. Therefore as per the above said provision the writ Petitioner is an unfit person for the post of driver.

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test and other tests conducted by the selection committee. The Petitioner is well clever and he hide himself in the name of HIV patient and seeking for an appointment.

13. It is rather unfortunate that in a sensitive matter of this nature, the Respondent should come up with the counters as if the Petitioners were cleverly hiding themselves with the fact. But the original files produced show that the very same Doctor had certified the Petitioner unfit as his blood samples found to be having HIV I positive, but HIV II negative. But, in the order dated 3.11.2009, the only ground on which he was not appointed as driver was his alleged medical unfitness.

14. Whether a person whose blood samples were tested for HIV positive and found to have afflicted by AIDS (as it is referred to in general parlance), can be denied consideration for public employment and the condition of his physical health was unfit for such employment is a short question that has to be decided in these two writ petitions.

15. The issues raised in these writ petitions have been answered by very many decisions of the Courts all over the World including our Supreme Court and High Courts. Hence it is necessary to refer to some of them which will have a bearing on this issue.

16. Whether a diseased person handicapped by a contagious disease if he is otherwise qualified can be sent out of employment on the ground that his contagious disease may pose serious health hazard to others came to be considered by the Supreme Court of United States in *School Board of Nassau County, Florida* and *Craig Marsh* individually and as *Superintendent of Schools of Nassau County, Florida v. Gene H. Arline* reported in [480 U.S. 273, 94 L.Ed 2d 307 : (1987)107 S.Ct. 1123]. In paragraph 2, the Court observed as follows:

“[2] Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitude or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about

disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief. The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology--precisely the type of injury Congress sought to prevent. We conclude that the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504."

17. Subsequently, a case involving in a school teacher having afflicted with AIDS came to be considered by the United States Court of Appeals in *Vincent L. Chalk v. United States District Court Central District of California* reported in [(1988)840 F.2d 701]. It related to a person afflicted with AIDS but qualified to hold the post. The issue was whether he could be disqualified on ground of having HIV positive. In the course of the judgment, the Court in pages 705 and 706 observed as follows:

In its opinion, the Court addressed the question which is of central importance to this case: under what circumstances may a person handicapped with a contagious disease be "otherwise qualified" within the meaning of Section 504? Relying on its earlier opinion in *Southeastern Community College V. Davis* [442 U.S. 397, 99 S.Ct. 2361, (1979)60 L.Ed. 980], the Court said:

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. 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." *Arline*, 107 S.Ct.1131 n. 17 (citations omitted).

In applying this standard to the facts before it, the Court recognized 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".

Transmission of HIV is known to occur in three ways : (1)through intimate sexual contact with an infected person; (2)through invasive exposure to contaminated blood or certain other bodily fluids, or (3)through perinatal exposure (i.e., from mother to infant). Although HIV has been isolated in several body fluids, epidemiologic evidence has implicated only blood, semen, vaginal secretions, and possibly breast milk in transmission. Extensive and numerous studies have consistently found no apparent risk of HIV infection to individuals exposed through close, non-sexual contact with AIDS patients. 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 become 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.”

18. The Constitutional Court of South Africa in *Jacques Chart Hoffmann v. South African Airways* in [Case CCT 17/00] had an occasion to deal with the question of disqualification of a person from being disqualified for employment solely on the ground that he tested to be HIV positive. The Court while granting relief in paragraphs 50 to 53 had observed as follows:

“[50]An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who has suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.

[51] The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligation.⁴² South Africa has ratified a range of antidiscrimination Conventions, including the African Charter on Human and Peoples' Rights.⁴³ In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination. Apart from these Conventions, it is noteworthy that item

4 of the SADC Code of Conduct on HIV/AIDS and Employment,⁴⁴ formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status "should not be a factor in job status, promotion or transfer." It also discourages pre-employment testing for HTV and requires that there should be no compulsory workplace testing for HIV.

[52] Where a person has been wrongfully denied employment, the fullest redress obtainable is in-statement.⁴⁵ Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution.

[53] In these circumstances, instatement should be denied only in circumstances where considerations of fairness and justice, for example, dictate otherwise. There may well be other considerations too that make instatement inappropriate, such as where it would not be practical to give effect to it.”

19. A similar question came to be considered by a division bench of the Bombay High Court in *MX of Bombay Indian Inhabitant v. ZY and Anr* [AIR 1997 Bom 406]. The Bombay High Court after reviewing all the cases, in paragraphs 46 to 50 had observed as follows:

“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 no evidence to suggest that neurological or neuropsychiatric disorders occur relatively early in the course of HTV

infection. There is, therefore, no reason to exclude asymptomatic HTV seropositive individuals from certain job assignments in accordance with the recommendations formulated by the WHO, BLO 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 measures 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 HTV 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 HTV 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 HTV 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 persons qualified in the field show that, firstly, that except through sexual intercourse and blood transfusion, there is no risk of transmission of HIV. Secondly, during asymptomatic period, the person may continue to be healthy and capable of performing the job requirements for a number of years which may range upto 18 years.

51. Thereafter, a division bench of the Andhra Pradesh High Court vide its judgment in *Mr. X Indian Inhabitant v. Chairman State Level Police Recruitment Board and Ors.* [2006 (2) ALD 513] had to deal with the vires of the Order 70(3) of the A.P. Revised Police Manual which directed the candidates selected provisionally as stipendiary cadet trainees by direct recruitment invariably to undergo a medical examination for the HIV test and to produce the certificate and the candidates having HIV positive will not be able to be appointed. While striking down the said rule, in paragraphs 43 to 46, it was observed as follows:

“43. At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the right or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim, (Jacques Chart Hoffmann (supra 3)).

44. On medical evidence, available as at present, it is clear that not all persons living with HIV are prone to contracting infectious diseases - it is only those persons whose infection 'has reached the stage of immune suppression, and whose CD4 count has dropped below 350 cells per microlitre of blood. The conduct of the Respondents towards those police officers, who are already in its employ is irreconcilable with the stated purpose of its executive instructions. It is not the case of the Respondents that it tests those already employed in the police establishment for HIV/AIDS. They may continue to work despite the infection, and regardless of the stage of the infection. Yet they may pose the same health, safety and operational hazards as prospective police officers. Apart from this, the practice also pays no attention to the window period. If a person happens to undergo a blood test during the window period, he would test negative and can thus secure employment. But if the same person undergoes the test outside of this period, he or she will test positive and not be employed.

45. Order 70(3) of the A.P. Revised Police Manual undoubtedly discriminates, those persons who have tested HIV positive seeking appointment in the police force vis-a-vis those tested HIV positive after appointment in the police establishment and those tested during the window period, and falls foul of the equality clause enshrined in Articles 14 and 16 of the Constitution of India. If all HIV positive patients are to constitute a class, there cannot be a further classification between those who are already employed, those who were tested during the window period and after appointment were found to be HIV positive and those who after being tested HIV positive seek appointment in services under the State as they satisfy the prescribed physical and other standards.

46. The fact that some people found to be HIV positive may, under certain circumstances, be unsuitable for employment in the police force does not justify the exclusion from employment of all people who are living with HIV. Were this to be the case, people who are HIV positive would never have the opportunity to have their medical condition evaluated in the light of current medical knowledge for a determination to be made as to whether they are suitable for employment in the police force. On the contrary, they would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions. This is manifestly unfair. The constitutional right of the Petitioner not to be unfairly

discriminated against cannot be determined by illinformed public perception regarding persons with HIV. Prejudice can never justify unfair discrimination. People who are living with HP/must be treated with compassion and understanding. They must not be condemned to "economic death" by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high. Not all people who are living with HIV are unsuitable for employment. It is only those whose CD4+ count has dropped below a certain level who may become unsuitable for employment. Having regard to all these considerations, denial of employment to the Petitioner, who had fulfilled the prescribed physical and other standards, only because he was tested HIV positive impaired his dignity and constituted unfair discrimination. (Jacques Chart Hoffmann (3 supra)). Since Order 70(3) is patently arbitrary, irrational and discriminatory. It is ultra vires Articles 14 and 16 of the Constitution of India. As a result no person can be denied employment solely on the ground that he has tested HIV positive.”

(Emphasis added)

52. The Union of India had evolved a National Policy on HIV/AIDS and the World of Work released by the Ministry of Labour and Employment. The said policy came to be evolved after taking into account various international standards. The guiding principles governing employer is set out in paragraph 3.4 of the National policy. It is relevant to extract the paragraphs regarding non discrimination, no screening for purpose of employment and confidentiality which may have relevant for the present case on hand, which reads as follows:

“3.4 Guiding Principles

The policy adopts the key principles of the ILO Code of Practice on HIV/AIDS and the World of Work that is in line with the Government of India National HIV/AIDS policy. The ten principles are:

...

II Non-discrimination

There should be no discrimination or stigmatization of workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS inhibits efforts aimed at promoting HIV/AIDS prevention.

VI No Screening for purpose of Employment

HTV/AIDS screening should not be required of job applicants or persons in employment or for purposes of exclusion from employment or worker benefits. In order to assess the impact of HIV, employers may wish to do anonymous, unlinked HTV prevalence studies in their workplace. These studies may occur provided it is undertaken in accordance with the ethical principles of scientific research, professional ethics and the protection of individual and confidentiality. Where such research is done, workers should be consulted and informed that it is occurring. Testing will not be considered anonymous if there is a reasonable possibility that a person's HTV status can be deduced from the result.

VII Confidentiality

There is no justification for asking job applicants or workers to disclose HTV-related personal information. Nor should co-workers be obliged to reveal personal information about fellow workers.

Personal data covered by medical confidentiality should be stored only by personnel bound by rules on medical secrecy and should be maintained apart from all other personal data.

In case of medical examination, the employer should be informed only of the conclusion relevant to the particular employment decision. The conclusions should contain no information of a medical nature. They might as appropriate, indicate fitness for the proposed assignment or specify the kinds of jobs and the conditions of work which are medically contra-indicated, either temporarily or permanently.”

53. If it is seen in the light of this, then the action of the Respondent State owned Transport Corporation in driving the Petitioners to test for HTV itself was totally repugnant to the National

Policy. Their further attempt to deny them employment after having found HIV positive and holding them as unfit for employment is again not only unwarranted and also contrary to the dictum laid down by various courts and the policy evolved by the Union of India. The test result produced does not show that their CD4 count had dropped a particular level as found by the Andhra Pradesh High Court in the case referred to above. There is no indication that this was done by the specialised laboratory which had the facility to find out the fitness of a person being employed. It is only a general practitioner who had certified their unfitness to work solely on the ground that in the first case, the Petitioner was tested for HIV positive I and II and in the second case, HIV positive for 1. The CD 4 count was not furnished in the laboratory report referred to by the medical practitioner.

54. In this context, it is necessary to refer to a judgment of the Supreme Court in *Mr. 'X' v. Hospital 'Z'* [1998 (8) SCC 296], wherein the Supreme Court after referring to various international decisions (some of them have been referred to above), held that such persons who are afflicted with AIDS have right to avocation and that Government jobs and services cannot be denied to them. Hence it is necessary to refer to paragraph 45 of the said judgment which reads as follows:

“45. "AIDS" is the product of undisciplined sexual impulse. This impulse, being a notorious human failing if not disciplined, can afflict and overtake anyone howsoever high or, for that matter, how low he may be in the social strata. The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respect as human beings. Their society cannot, and should not be avoided, which otherwise, would have a bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. See : *School Board of Nassau Country Florida v. Airline" Chalk v. USDC CD of Cal; Shuttleworth v. Broward Cry.; Raytheon v. Fair Employment and Housing Commission Estate of Chadbourne*. But "sex" with them or me possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object.”

(Emphasis added)

55. A survey of the above decisions both national and international and also the National policy on HIV/AIDS regarding employment opportunity clearly show that the course adopted by the contesting Respondent transport Corporation in denying employment to the Petitioners are not based on any scientific basis. The certificates relied on by the Respondent corporation does not help the case of the Respondent. On the other hand, it is only a pedestrian understanding of AIDS and HIV. The Respondents in their counter affidavit had only expressed layman apprehension with reference to the disease and not shown a scientific approach consistent with the constitutional principles laid down by the Courts. The Respondents were clearly not adhering to the national policy on HIV and AIDS as set out above. Not only they were wrong in sending them to get tested for AIDS, but also only on the basis of the medical practitioner's report without there being any specific finding that their counts in the blood samples will totally disqualify them for holding the post of drivers cannot be supported. Being engaged in a public service, they are likely to come into contact with passengers/traveling public cannot by itself disqualify the persons having tested HIV positive. On the other hand, there must be specific finding that persons having the disease with so contagious and that he had become unemployable. But, there is no test for CD 4 count dropping below 350 cells per microlitre of blood which alone can be the scientific test for negating such candidate from employment and not every case of being tested for HTV positive.

56. In the light of the above, this Court has no hesitation to allow both the writ petitions. Accordingly, both writ petitions will stand allowed. The impugned order will stand set aside. The Respondent State owned transport Corporation is directed to employ the Petitioners as drivers as there is no other disqualification expressed by them in the records and the disqualification is solely emanated from the medical certificate given by one medical practitioner. If Respondent Corporation still has an apprehension that the two Petitioners are tested to be HIV positive, they can send the Petitioners for the test before their confirmation to find out whether the CD 4 count had dropped below 350 cells per microlitre of blood. This is the standard test adopted even by the Indian Army. Such standards have been approved in the judgments of the Andhra Pradesh High Court and the Bombay High Court referred to above. This order shall be implemented by the contesting Tamil Nadu State Transport Corporation within a period of eight weeks from the

date of receipt of copy of this order. However, there will be no order as to costs. Consequently, connected miscellaneous petition stands closed.