

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

**Transferred Application No. 67 of 2010
(Writ Petition No. 96 (S/S) of 2006)**

Thursday the 2nd day of November, 2010

“Hon’ble Mr. Justice A.N. Varma, Member (J)
Hon’ble Lt. Gen. R.K. Chhabra, Member (A)”

Jagdish Singh Mahara (Ex. Painter No. 13621198P of 3 PARA, c/o 56 APO),
Village Baligarh, Post Legem, Tehsil Didihat, District Pithoragarh (Uttaranchal).

Applicant

By Legal Practitioner Shri Gopal Datt Joshi, Advocate.

Versus

1. Union of India through Secretary, Ministry of Defence, South Block, New Delhi-110001.
2. The Additional Director General Pers Service, Adjutant General’s Branch, DHQ PO New Delhi-110011.
3. The Commandant, MH Pune (Maharashtra).
4. OIC Records, Parachute Regiment, Bangalore, Pin 560006.
5. OC 3 PARA, c/o 56 APO.
6. Director General, Armed Forces Medical Services, Army Headquarters, New Delhi.

ORDER

“Hon’ble Lt Gen RK Chhabra”

1. This case has come before us by way of transfer under Section 34 of the Armed Forces Tribunal Act, 2007 from Uttaranchal High Court at Nainital.

2. The applicant was enrolled in the Indian Army on 29.02.1996 and was posted in 3rd Battalion, The Parachute Regiment (Special Forces) on 28.04.1997. He served with the Battalion in various duty stations including in Kargil during Operation VIJAY.

3. The applicant was granted two months annual leave from 10.02.2000. He developed chronic cough and mild chest pain during the said leave and was admitted in 161 Military Hospital (MH), Pithoragarh near his home station. He was finally referred to MH (Cardio Thoracic Centre (CTC)) at Pune and was under treatment there from 23.07.2000 to 19.09.2000. He was diagnosed as a case of “AIDS 042A (HIV Infection with Disseminated Tuberculosis Lymph Nodes + Pleural)” (Annexure 1) and placed in medical category P5 and recommended to be invalided out of service. He was invalided out of service with effect from 01.11.2000 and directed to be discharged DTH (Direct to home).

4. The applicant was informed on 05.11.2001 (Annexure 3) by Respondent No. 4 that his disability pension claim had been rejected by CDA(Pension) as his

1 on 08.06.2005 (Annexure 7). Not satisfied with the rejection of the second Appeal, the applicant served a legal notice dated 23.09.2005 on the Respondents Nos. 1 to 5 (Annexure 9). Respondent No. 4 replied to the legal notice on 11.11.2005 (Annexure 10) stating that the Applicant had contracted AIDS (HIV) infection due to his own negligence and he thus cannot be considered for disability pension.

5. The Applicant in the meanwhile reported for Monthly Medical Review at 161 MH, Pithoragarh from 12.12.2005 to 15.12.2005. A detailed medical examination of his ailment was carried out during the said period. The x-ray report was found to be normal and all other related parameters were found to be NAD. Accordingly, the applicant submitted another application on 27.12.2005 (Annexure 18), however, he did not receive any response from the Respondents. The Applicant, aggrieved by inaction of the Respondents filed Writ Petition No. 96 (S/S) of 2006. The Applicant has made following prayer:

(i) *“To issue a Writ Order in the nature of certiorari to quash the impugned IMB invaliding out the petitioner out of the Army Service due to HIV/AIDS wef 23 October 2000 along with direction in the nature of Mandamus directing the Respondents to re-instate the petitioner into Army service with full arrears of pay and allowances and consequential service benefits from the date he was wrongly*

earliest in view of the related blood tests and X-Ray reports on record as carried out by 161 MH, Pithoragarh from 12.12.2005 to 15.12.2005 under the monthly medical review (OPD) under the disease in respect of the petitioner, have been found NAD/Normal.

- (ii) To pass such further or other reliefs to the petitioner as the Court considers for ends of justice.*
- (iii) To allow this Writ Petition and award the cost of it in favour of the Petitioner.”*

6. We have heard Shri Gopal Datt Joshi Learned Counsel for the applicant as also Col. (Retd.) R.N. Singh Senior Central Government Counsel for Respondents.

7. Learned Counsel for the Applicant vehemently argued that MH(CTC), Pune has made a manifest error of judgment in declaring the Applicant as a case of AIDS-042A (HIV Infection with Disseminated Tuberculosis Lymph Nodes+ Pleural) and based on the said recommendation, Respondent No. 5 has illegally and unlawfully discharged the Applicant from the service without giving him any opportunity of hearing.

8. Learned Counsel for the Applicant informed us that the applicant submitted Amendment Application No. 1642 of 2007 before Uttarakhand High Court at Nainital which was allowed by Hon'ble Single Judge on 28.06.2007. The Learned Counsel drew our attention to the letter dated 05.03.2007 addressed to Respondent

This report is based on medical evaluation of the applicant in RML Hospital, New Delhi on 11-01-2007. The extracts from the said letter are reproduced below:

“I am forwarding you a representation from Mr. Jagdish Singh Mahara resident of Village:Baligarh, Post:Legem, The Didihat Distt. Pithoragarh (UA). He has been dismissed from his service in Army in October 2003 because he was suffering from AIDS. He was found to be HIV positive (2000) during his treatment for tuberculosis and was subsequently treated by Army hospital and later dismissed from army services because he was having AIDS.

During recent evaluation of patient at RML Hospital his CD 4 count was found to be 291 (11-01-07) which does not place him in category of AIDS but in category of HIV only. He at present does not have any other opportunistic Infection and is otherwise healthy. Based on this he has submitted a representation challenging his dismissal from ARMY.

As HIV infection is not a criteria for dismissal from service, his petition may kindly be reviewed by your organization, keeping in view the national policy of not discriminating people infected with HIV AIDS.”

9. The Learned Counsel vehemently argued that when National AIDS Control Organization which is a national level policy making authority had given a clean chit to the applicant, there is no justification for Respondent No. 6 to remain silent

disease. He relied upon the judgement of the Divisional Bench of the Bombay High Court in the case of MX of Bombay Indian Inhabitant : Petitioner v. M/s ZY and another : Respondents reported in AIR 1997 Bombay 406. Para 53 of the said judgment is reproduced as under:

“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 to ensure the capacity of persons to perform normal

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.”

11. He also relied on a judgment of Hon'ble Single Judge of Gujarat High Court in the case No. SCA/18783/2006 of Nikum Ramesh Indian Inhabitant v. Union of India THRO & 4 (not reported) wherein relying on the judgment of the Divisional Bench of the Bombay High Court in the case of MX (Supra) the Court directed the Director General of Border Security Force, New Delhi to reinstate the BSF personnel who was said to be HIV infected and had been dismissed from BSF service earlier on this count.

12. The Learned Counsel for the Applicant concluded his submissions by stating that since it was established beyond doubt that the Applicant suffered from HIV and not AIDS and that the former was not a criteria for dismissal, the applicant should be re-instated in the service in view of the national policy of not discriminating people infected with HIV AIDS.

13. In opposition Learned Counsel for the respondents argued that primarily the said disability was due to his own negligence and was, therefore neither attributable to nor aggravated by the military service. Therefore, the applicant was not entitled for disability pension as per paragraph 173 of Pension Regulations 1961 (Part I).

(HIV Infection with Disseminated Tuberculosis (Pleura+LymphNodes)”. After investigating the patient thoroughly, they recommended that the patient is not fit to be retained in service and recommended him to be invalided out in low medical category S1H1A1P5E1 vide Army Order 150/75 and other existing instructions.

15. In paragraph 36 of the counter affidavit the respondents have denied contents of paragraph 24 of the writ petition and reiterated that 161 MH clearly mentioned that the applicant failed to report for his monthly medical check ups regularly and that he had gone there in December 2005 after a gap of 3 months. By not mentioning about the discontinuation of the monthly check-ups, the applicant was trying to mislead the Court by giving false facts. It has been averred that any improvement in the periodic check up is no indication to the main diagnosis ie AIDS.

16. Having considered the rival contentions of the parties at length, there is broadly no dispute with regard to initial unfolding of events and subsequent aspects relating to applicant developing chest pain, dry cough and breathlessness during leave in January-March 2000. There are a few issues with regard to date of admission and discharge in various hospitals but none that would have an over bearing impact on the issue at hand and could be ignored in the interest of overall justice.

17. It also needs to be highlighted that albeit service in Operation VIJAY

fact that the applicant belongs to Uttarakhand which is primarily a hilly area and as such his deployment in a high altitude would not have a profound effect on his medical condition.

18. The aspect germane to the issue at hand lies in the report of the Ministry of Health and Family Welfare, Government of India which is a nodal agency for AIDS in the country ie National AIDS Control Organization. The letter highlights the national policy towards AIDS/HIV patients. We have also taken into account the international opinion on the subject of AIDS and the workplace as revealed from various recommendations in the international conventions co-sponsored by UNESCO, WHO, ILO, the Council of Europe and the European Communities. Even in India, as quoted in the judgment of the Divisional Bench of the Bombay High Court in the case of MX (Supra), “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.....”

the national mainstream and it cannot divorce itself from the National AIDS Control policy laid down by Ministry of Health and Family Welfare, Government of India and as such the Respondents need to comply by the said policy.

20. We feel that if the national policy contemplates rehabilitating personnel afflicted by HIV, the Applicant must be given a fair chance in the spirit of such policy and the Armed Forces cannot be straight jacketed in the interpretation of rules and regulations which are at variance with the National AIDS Control policy.

21. We in the circumstances allow the Transferred Application and direct the competent authorities to review the medical categorization of the Applicant in light of the Ministry of Health and Family Welfare, Government of India (National AIDS Control Organization) report dated 05.02.2007 (Annexure No. 1 to the Amendment Application) within a period of three months from date a certified copy of this order is served. If after re-assessment, the Applicant is found to be in an acceptable medical category and other eligibility criteria, he should be re-instated in service. If, however, the Applicant cannot be re-instated because of age or other related factors, all consequential benefits, thereof should be admitted in his favour.

22. The Invaliding Medical Board proceedings of dated 03.10.2000 are set aside.

23. No order however as to costs.