

(2015) 01 RAJ CK 0075
In the Rajasthan High Court
Case No : Civil Writ Petition No. 14252/2013

Desh Deepak Dhamija

APPELLANT

Vs

The Union Bank of India

RESPONDENT

Date of Decision : 14-01-2015

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16(1), 21, 226

Citation : (2015) 2 CDR 780 : (2015) 2 RLW 1134

Hon'ble Judges : Nirmaljit Kaur, J.

Bench : Single Bench

Advocate : Vikas Balia, for the Appellant; N.K. Rastogi and Rameshwar Chouhan, Advocates for the Respondent

Final Decision : Allowed

Judgement

Nirmaljit Kaur, J.—The petitioner is presently a patient of the chronic kidney disease and is on Continuous Ambulatory Peritoneal Dialysis (for brevity herein after referred to CAPD).

2. The petitioner through the present petition is assailing the validity and propriety of the Medical Examination report dated 07.11.2013 and a letter dated 07.11.2013; vide which the petitioner was not allowed to join the services in the respondent bank as Probationary Officer. It is submitted that the impugned Medical report was prepared for a pre-recruitment Medical Examination which was conducted by the Respondent Bank, whereby the petitioner was declared as "unfit at present" to join the duties as Probationary Officer.

3. Thus, the question that arises to be considered by this Court is as to whether a person who is otherwise fully qualified for a post can be denied employment on the ground of his medical condition.

4. The petitioner has completed his academic qualification and possesses the degrees in B.C.A. and M.C.A. (Hons.) with specialization in Computer Applications securing 75.22% and 72% respectively completed in the year 2010

and 2013. Finding himself fit for carrying on the normal work routine, he applied for the Common written examination for recruitment of probationary officers/management trainees in public sector banks. The petitioner cleared the written examination and the interview conducted in pursuance of the recruitment process for the post of the Probationary Officer. After qualifying the written examination and interview, the petitioner vide appointment letter dated 23.3.2013 was appointed as the Probationary Officer in the respondent bank. The petitioner requested the respondent bank to extend the time of joining as he was trying to get his kidney transplant. Time to join duty was granted by a period of six months but due to certain circumstances, the transplantation was delayed and the same could not be carried out. The petitioner is presently required to wait for another date of transplantation. Actually, the delay was due to the non-availability of the donor. His mother has already given one kidney to her daughter i.e. the sister of the petitioner. His father has different blood group and because of other minute factors, he is not eligible donor under the Organs Act. In the absence of any eligible blood relative donor, the only option is to wait for the availability at the registered centre. The petitioner has availed this option by getting himself registered at MIOT Hospital, Chennai in June, 2013 itself.

5. The petitioner accordingly informed the respondent bank vide his letter dated 30.10.2013 that he was trying his level best to get the kidney transplant done; although, until the transplant took place, the petitioner is on CAPD. It was informed by him that the petitioner is fit to carry out the normal banking duties while he is on CAPD. Along with the said letter dated 30.10.2013, the petitioner enclosed his fitness certificates issued from,-

(a) Medical Superintendent, Nehru Hospital PGI Chandigarh,

(b) Dr. Mayank Jain, Nephrologist, Goyal Hospital, Jodhpur,

(c) Dr. Rajan Ravichandran Nephrologists (Director, Madras Institute of Nephrology), MIOT Hospitals, Chennai.

6. Copy of all the medical certificates issued by the above-named doctors are collectively placed by the petitioner on record as Annexure-9.

7. Thereafter, the respondent bank referred the petitioner to the pre-recruitment medical examination but was declared as medically unfit by the respondent bank's approved doctor who opined that petitioner at present is unfit to join the duties. On the basis of the said report, the respondent bank informed the petitioner that he has been declared as unfit to join the respondent bank and denied the appointment to him.

8. Learned counsel for the parties were heard at length.

9. As per the reference letter dated 6.11.2013, the bank was required to conduct all the pathological tests. No tests as listed were carried out by the approved doctor of the respondent bank and he was declared medically unfit. Be that as it may, there is nothing in reply of the respondents to show that the said doctors

were expert to opine on the disease whereas the certificates placed on record by the petitioner with respect to his being fit to perform normal banking duties have been issued by the doctors from the (a) Medical Superintendent, Nehru Hospital PGI Chandigarh, (b) Dr. Mayank Jain, Nephrologist, Goyal Hospital, Jodhpur and (c) Dr. Rajan Ravichandran, MIOT Hospitals, Chennai. The petitioner has explained his medical condition in para 5 of the rejoinder as under:-

It is submitted that three CAPD cycles, in no way, interfere in the bank working. It is reiterated that the dialysis can be done by the petitioner at work place by putting a bag of dialysate (about two quarts) into his peritoneal cavity through the catheter. The dialysate stays there for about eight to ten hours before it is drained back into the bag and thrown away, which is called an exchange. It is submitted that while the dialysate is in peritoneal cavity, one can go about his usual activities at work, at school or at home. The petitioner was given a form which was to be given at the time of joining provided declaration that he has not suffered from the diseases specifically mentioned in the form. The specific diseases which were mentioned in the form included 1. Infectious Skin Diseases, 2. Psoriasis Follicle, 3. Venereal Diseases, 4. Tuberculosis. 5. Trachoma, 6. Epilepsy and Convulsions, due to any cause. Except above mentioned diseases, no other diseases were specifically mentioned in the said form which makes candidate ineligible for the job. 10. It is known fact that the duty as Probationary Officer is a clerical and desk work. Dr. Vivek Kumar, Assistant Professor, Department of Nephrology, AKU Ward, Chandigarh certified that the petitioner is on CAPD involving three cycles of dialysis in a day. Therefore, he is fit to execute normal banking duties for 8 to 10 hours in a day. He further opined that the petitioner being on CAPD will not incapacitate him in any way from discharging his banking duties. The certificate that petitioner can do normal routine work has also been issued by Dr. Rajan Ravichandran who is the Director, MIOT Institute of Nephrology, Chennai. A similar certificate has also been issued by Dr. Mayank Jain, Goyal Hospital and Research Centre, Jodhpur stating that the petitioner is fit to execute normal banking duties.

11. There is another way to look at the same. The petitioner's sister is presently working as computer teacher in the "Sri Aurobindo Centre of New Education, Jodhpur". She is stated to be leading a normal life. She is also stated to be suffering from this chronic ailment. She has undergone kidney transplantation. The certificate that she is employed in the said institute since 2.4.2011 has also been placed on record. Not only that, the petitioner has also completed his education and obtained 75.22% and 72% marks in B.C.A. and M.C.A. showing that the said ailment never came in his way for achieving the basic qualification required for the post and thereafter successfully cleared the examination in flying colours inspite of the problem.

12. The word "fitness" cannot be vaguely interpreted. Relevance has to be placed on the nature of the work and therefore it cannot be seen in the same terms if the nature of work is different i.e. the work which requires physical

work. Work which requires mental work and less physical work, requires different criteria to be seen. In the present case, the petitioner is not unfit but is suffering from chronic ailment. The interpretation of the term is thus required to be interpreted in the light of the work. The fact that his own sister is leading a normal life as a Computer teacher shows that the patients suffering from such chronic ailment can lead a normal routine life and can work efficiently.

13. It is not disputed by the respondents that the petitioner is suffering from CFR since 2006. If that is so, the petitioner has not only managed to achieve the brilliant results in his basic qualification but has also cleared the Probationary Officer Test both in written and the interview which shows that he is fit to carry out his normal routine work.

14. Learned counsel for the respondents have relied on the judgment rendered by the Apex Court in the case of U.P. State Road Transport Corporation and another Vs. Mohd. Ismail and others, to contend that a direction by the Court to offer alternative job to the retrenched driver before dispensing with his services is beyond jurisdiction of the Court. The same was a case of driver who was found unsuitable on account of his poor eye-sight. In that case, it was observed that the driver who is found medically unfit to drive the vehicle on the public road specially on account of his poor eyesight cannot be permitted to continue as a driver because that would endanger the life of the pedestrian and all others and they were retrenched after following due procedure of law by offering them retrenchment compensation.

15. India is a signatory to the "Convention on the Rights of Persons with Disabilities and Optional Protocol". India signed the Convention on 30th March, 2007. Article 27(1) of the Convention which reads:-

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

a. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

b. Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

c. Ensure that persons with disabilities are able to exercise their labour and trade

union rights on an equal basis with others;

d. Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

e. Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

f. Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

g. Employ persons with disabilities in the public sector;

h. Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

i. Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

j. Promote the acquisition by persons with disabilities of work experience in the open labour market;

k. Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

16. Further, Definition of "reasonable accommodation" is given in Article (2) as under,-

Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms:

17. The Division Bench of Bombay High Court in the case of Ranjit Kumar Rajak Vs. State Bank of India, recognised the reasonable accommodation at the work place in India. In the said case, the petitioner had undergone a renal transplantation in the year 2004. He applied for the post of Probationary Officer in the RBI. He was rejected on the ground of medically unfit for the post as in the present case. The petitioner Ranjit in the said case approached the Bombay High Court with certificates showing himself to be otherwise medically fit. The bank rejected the case on the ground that the rules requiring the bank to reimburse the medical expenses incurred by the officers of the bank and since he required for regular checkup, the same would be a burden on the bank. After discussing the various other judicial pronouncements, Article 21 and U.N.

Protocol, it was held:-

24. The issue is of other medical hardships other than visual and orthopedic for which the person with Disabilities Act provides for. Will it then be possible to contend that as the legislature has provided for reasonable accommodation under the Disabilities Act considering the employers undue hardship like financial burden, nature of job, the legislature knowingly has not provided for other medical disabilities. When the person with Disabilities Act was enacted the 2007 UN Protocol was nonexistent. It is in that context we have to consider these other medical disabilities. For persons with HIV, the Supreme Court has provided for reasonable accommodation. Therefore, in the case of other medical disabilities when a petitioner contends that the principles of "reasonable accommodation" be applied as otherwise he is fit to be employed, it will be for the employer to place material before this Court to show the undue hardship that will be occasioned. In the absence of any statutory provision for determining the undue hardship burden, once we hold that Article 21 is attracted then in the absence of legislation, it is open to the Court to lay down some guidelines in exercise of the powers of the Court under Article 226. In the absence of establishing undue hardship a direction can be issued to accommodate such a person.

25. We have earlier set out the definition of "reasonable accommodation" from statutes in other legislations, in other jurisdictions as also the principles that the Courts have applied and the definition in the U.N. Protocol. Those will be illustrative but not exhaustive, to consider "reasonable accommodation" in our jurisdiction. The most important would be (a) the financial burden on the employer; (a) the morale of the other work force.

26. The right of an employer which is State or instrumentality within the meaning of Article 12 of the Constitution of India does not give to such employer unfettered freedom as to who he chooses as his employee. That would be subject to Part III of the Constitution of India read with the Directive Principles of State Policy, more particularly Article 39(a), Article 41 and the Fundamental Duties along with international conventions on "right to employment. A person who suffers from an ailment which medical treatment can cure and is otherwise fit to discharge the duties and responsibilities of the post to which he applies, cannot be denied the right to lead a productive life, to maintain himself and his family with dignity and strive towards excellence as enshrined under Article 51A(g). The Constitution has enjoined on the State under Article 41 within the limits of its economic capacity and development to make provision for right to work and under Article 39(c) to direct its policy, so that citizens, men and women have the right to an adequate means to livelihood. A policy which unreasonably deprives a person of his right to work, (within the State's economic capacity) which is now judicially recognised as a part of right to life, would apart from being violative of Article 21, would also be violative of Articles 14 and 16(1). The consequences of upholding such a policy, if any, would be that persons who at one point of time

suffered from an ailment will be denied employment in State institutions. If such a citizen is not entitled to be considered fit for consideration in public employment his chance of employment in the private sector would be nil.

Do we as a State condemn all such citizens to be dependent on their families who may or may not be able to support them. Do we strip them of their dignity to life by denying them a chance to be considered for employment to live a full life. The theory of reasonable accommodation even in the absence of municipal law must, therefore, flow from our constitutional principle of the right to life and to live it with dignity.

18. The facts of aforesaid case are almost identical as in the present case except that the petitioner in the said case had already undergone renal transplantation.

19. In another judgment rendered by the Division Bench of Delhi High Court in the case of Faizan Siddiqui Vs. Sashastra Seema Bal, . The Court was pleased to allow the petition with a direction to the respondent to recruit the petitioner on the post of Constable who was stated to be suffering from "congenital anomaly and pseudohermaphroditism" and was held medically unfit by observing in para 89 that:-

Medical standards needed for the performance of specific jobs need to be rationally read and interpreted. Reasonable medical standards help carrying out the required job functions with ease. Insisting on or interpreting a medical condition or standard in a manner that has no relationship with the level of medical fitness required to perform the stated job description is really not necessary and may even be discriminatory. 20. The Hon"ble Supreme Court in the case of Mr. "X" Vs. Hospital "Z", (Appeal No. 4641 of 1998) decided on 21.09.1998 while dealing with case of a person suffering from HIV(+) held in no uncertain terms that the patients suffering from the dreadful disease "AIDS" deserve full sympathy and went on to observe in the following terms:-

The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respects as human beings. Their society cannot, and should not be avoided, which otherwise, would have 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. 21. In fact, the respondents, after coming to know that the petitioner was to undergo kidney transplantation, at one point of time, granted him six months time to join. It is only when the transplantation was deferred and that the respondents changed their mind, whereas, as per the certificate issued by Dr. Vivek Kumar, Assistant Professor, Department of Nephrology AKU Ward, Chandigarh, the petitioner is on CAPD involving three cycles of dialysis in a day. He is fit to execute normal banking dues for 8 to 10 hours in a day. He has opined that the petitioner being on CAPD will not incapacitate him in any way from discharging his banking duties.

22. Thus, denial of the employment to a person suffering from renal disease

specially when a person on account of 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 justified. The physical disability as mentioned in the "The persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" although does not include the chronic disease, cannot be treated as prohibited or unlawful. It cannot be read to say that a person suffering from chronic disease like the renal failure cannot be granted job. In the absence of any law, the action of State must be guided by the Directive Principles which governs the legislative function of the State. It is incumbent upon the State to safeguard the constitutional mandate and must ensure fairness and equality along with right to work and livelihood granted under Article 21 of the Constitution subject to the test laid down in Article 21 of the Constitution.

23. In view of the above, this Court deems it proper to allow the petition. The respondent bank shall allow the petitioner to join the services as Probationary Officer forthwith.