
(2008) 09 AP CK 0115

In the Andhra Pradesh High Court

Case No : Writ Petition No. 31439 of 1998

Lt.Cdr. K.N. Reddy

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 1 ALD 46 : (2009) 1 ALT 653

Hon'ble Judges : Ramesh Ranganathan, J

Bench : Single Bench

Advocate : S. Krishna, for the Appellant; A. Rajasekhar Reddy, A.S.G., for the Respondent

Final Decision : Allowed

Judgement

Ramesh Ranganathan, J.—Yet another case where a person infected with HIV complains of inherent prejudice against him, in matters of promotion to higher echelons of service, though he was found to be no less meritorious than those who had been promoted. As is evident from the facts stated hereinafter, the prejudice, against those unfortunately infected with this dreaded disease, is prevalent even among the educated sections of society. This prejudice is more often than not subconscious, the fear of the unknown. While the fear which existed earlier, of the disease spreading by mere proximity, is slowly giving way, the deep and underlying prejudice against the HIV infected continues to thrive, even in the general perception of persons holding high office, regarding their inability to discharge the onerous duties which senior officers of the Armed forces are required to perform. This underlying prejudice is, more often, not explicit and can only be inferred from surrounding circumstances.

2. The petitioner joined the Navy as a Commissioned Officer on 16.8.1981. He was promoted as Lieutenant on 16.10.1984. He was shifted from the electrical branch to the executive branch (provost cadre) in the year 1986 and was, thereafter, promoted as Lieutenant Commander on 16.10.1992. The petitioner

claims to have contracted HIV in the year 1989 when he underwent blood transfusion in a civil hospital after a road accident. Later, when he volunteered to donate blood at the Navy Hospital in Mumbai, in November, 1995, his blood was screened and the test showed that he was "HIV positive". The petitioner was eligible for promotion to the rank of Commander in the year 1997. In order to select candidates, for being conferred the said rank, a promotion board, (called "Promotion Board No. 3/97"), was constituted in May, 1997.

3. On coming to know later, of his non-selection, the petitioner addressed letter dated 29.12.1997 to the 4th respondent bringing to his notice the policy guidelines of the Navy dated 28.10.1997 whereunder sailors who were tested HIV positive were disentitled for promotion and for further re-engagement. The petitioner sought clarification as to whether, in terms of the said policy directive dated 28.10.1997, his promotional prospects would also be adversely affected. He candidly admitted to have been categorized as HIV positive by the National Aids Research Institute in its proceedings dated 25.9.1997. He also informed the 4th respondent that he was labeled "immune surveillance" and placed in a lower medical category S2A2 (permanent) by the medical board with effect from 26.11.1997. The petitioner requested the 4th respondent to furnish the exact policy guidelines on this aspect so as to obviate ambiguity regarding his promotional prospects. In reply thereto, the 4th respondent, in his letter dated 2.1.1998, informed the petitioner that, as far as the promotional policy dated 28.10.1997 was concerned, it remained the same for officers and it was more than likely that he would lose out. The petitioner was advised to accordingly plan his future.

4. The petitioner, thereafter, filed a statutory complaint wherein he detailed his excellent career record and his achievements. He requested that the reasons for his being rejected by the Promotion Board be intimated to him. He also stated that, in case he had been rejected on any ground other than merit, he may be considered for promotion on the basis of the available records. The petitioner was informed by the 2nd respondent, vide proceedings dated 24.3.1998, that his representation was thoroughly examined with a view to ensure that ends of justice were not denied to him, that an in-depth review of his performance and profile, and other related aspects, revealed that he was not select listed purely on account of inter-se merit and limited number of vacancies and that no injustice had been done to him. Aggrieved thereby, the present writ petition. The petitioner specifically averred, in paragraph 6 of his affidavit, that, on the eve of the sitting of the Promotion Board No. 3/97, the 2nd respondent issued letter dated 9.5.1997 to the Commanding Officer asking for the results of the Western Blot Test in connection with the petitioner being detected as HIV positive and the reference therein to the HIV return of November 1995 sent to the 2nd respondent on 11.9.1995. The petitioner asserts that more than a year and half after he was tested HIV positive in November 1995, the 2nd respondent had called for the results of the blood test in May, 1997 which itself showed that persons inimical to him had influenced the selection process.

5. In their counter affidavit dated 9.3.1999 the respondents stated that the petitioner's non-selection was purely merit based and, though he had been empanelled, there were others still higher in the merit list, that the petitioner had missed his selection due to inter-se merit and limited number of vacancies and that there were no other reasons for his non-selection.

6. Sri S. Krishna, Learned Counsel for the Petitioner, would emphasize the underlying prejudice against persons suffering from HIV. Learned Counsel would point out that the very fact that a very senior officer of the rank of Director (Personnel) had specifically informed the petitioner that the promotion policy which debarred sailors from promotion, on their being tested HIV positive, also applied to officers and that it was more than likely that he would lose out, was proof that the petitioner being denied promotion, to the rank of Commander, was not on grounds of merit and ability but on his being tested HIV positive. Learned Counsel would also point out, rightly so, that, while reasons have been furnished for non-selection of the two persons at rank 38 and 61, no reasons are mentioned in the additional counter affidavit as to why the petitioner was not selected though he was higher in rank than the two promotees ranked at SI. Nos. 73 and 78 respectively. Learned Counsel would submit that, unlike these two promotees, the petitioner, who belongs to the provost cadre of the executive branch, is not required to graduate from the staff college to be entitled for promotion.

7. This Court, in its order dated 6.2.2008, directed the Central Government Standing Counsel to produce the records of the promotion board constituted in the year 1997 for considering candidates for promotion to the rank of Commander. Pursuant thereto, the Assistant Solicitor General produced a merit list wherein the petitioner was shown at rank/SI. No. 66 in the merit list and, while he was shown therein as having been rejected, two others lower than him in the merit list were promoted as Commanders. Learned Assistant Solicitor General sought time and, subsequently, an additional counter affidavit has been filed to which the petitioner has filed an additional reply affidavit.

8. The merit list produced before this Court belied the specific averment in the counter affidavit dated 09.03.1999 that it was only those who stood higher in the merit list than the petitioner who were selected as, and conferred the rank of, Commander. In the additional counter affidavit, it is stated that the 4th respondent, who was then a Commodore, was never in a position to influence the Promotion Board, that he was not even the Director of Personnel when the petitioner was considered for promotion in the year 1997 and that his observations were only to help the petitioner to plan his future. With regard to the promotion policy governing ranks in the Indian Navy, reference is made to the Navy Order (Special) 5 of 2001. The said order made in the year 2001 was obviously not in existence when selections were made in the year 1997.

9. It is useful to extract Paragraph 11 of the additional counter affidavit, (which refers to the promotion of two officers who rank at 73 and 78 respectively, much

below the petitioner's higher rank of 66), in its entirety:

...As submitted above, the board, in addition to the ACRs, also considers the overall profile and other criteria as brought out in the approach paper as mentioned in para 9 above. It could be seen from the Promotion Board proceeding of PB 3/97 that there are two officers placed at 38 and 61 in the rank average, above the rank average of the petitioner who were not selected for consideration such as failure in courses, withdrawal from submarine cadre, failure to pass Command Exam etc. thereby affecting their employability and future promotion prospects. Further the officers lower in the rank average at 73 and 78 were promoted to have equitable distribution of sub-specialization and also due to the fact that the officer had graduated from the Staff College. The board unanimously recommended the selection of these two officers and the same was duly approved by the Chief of Naval Staff.

10. It is evident from the afore-extracted averments that while reasons been furnished both for non-selection of candidates who were ranked at SI. Nos. 38 and 61, and the promotees ranked at 73 and 78, no reasons have been furnished for the petitioner's non-selection though he stood higher at rank No. 66.

11. The scope of judicial review in matters of promotion is limited and this Court, in proceedings under Article 226 of the Constitution of India, would not convert itself into a court of appeal and sit in judgment over the decisions of the selection committee. But that does not also mean that this Court's power of judicial review is completely excluded in such matters. This Court would be justified in examining whether selection has been made in accordance with the prescribed norms and whether non-selection of a particular candidate is for extraneous reasons. It is not even the case of the respondents, at least in their counter affidavits, that a person suffering from HIV is disentitled for promotion and to be conferred the rank of Commander. While the earlier counter-affidavit spoke of inter-se merit and existence of vacancies being the sole criteria for selection/non-selection, the additional counter affidavit refers to parameters other than those referred to in the counter affidavit filed earlier.

12. It is with a view to ascertain what were the parameters that were applicable for selection to the rank of Commander, in the year 1997, and whether the parameters had been uniformly applied by the Selection Board to all eligible candidates, that the said records were called for. The Learned Assistant Solicitor General took time and, despite repeated adjournments, has not placed the records before this Court. He would frankly submit that, despite repeated reminders on his part, there was no response forthcoming from the respondents.

13. The chain of events, commencing from calling for the medical test of the petitioner in May 1997 just prior to commencement of the selection process, though he was medically examined a year and half prior thereto, the letter of the 4th respondent dated 2.1.1998 informing the petitioner of his bleak chances of promotion, the inconsistencies in the first counter-affidavit filed in March 1999

and the subsequent additional counter affidavit, are all circumstances to be borne in mind while examining the petitioner's contention that his non-selection was solely on account of his suffering from HIV. Failure of the respondents to inform this Court as to what were the parameters prescribed for selection of eligible candidates to the rank of Commander in the year 1997, together with the absence of any reason for non-selection of the petitioner as compared to the reasons furnished in respect of non-selection of candidates higher in rank than the petitioner at rank No. 38 and 61, and selection of persons lower in rank at 73 and 78, lends credence not only to the petitioner's contention that his exclusion was because he was infected with HIV, but also his submission that, as he belonged to the provost cadre of the executive branch, he was not required to graduate from the staff college to be entitled for selection to the rank of Commander, stands un rebutted. It may also necessitate an adverse inference being drawn by this Court to hold that the petitioner, being denied selection to the rank of Commander, was not on account of lack of merit and ability but for the extraneous reasons of his having been infected with HIV.

14. While Sri S. Krishna, Learned Counsel for the petitioner, would request this Court to issue a mandamus for conferment on the petitioner the rank of a Commander, this Court would not, ordinarily, direct the respondents to straightaway promote an eligible candidate. As rejection of the petitioner's case earlier does appear to have been influenced by his suffering from the HIV disease, the only direction that can be given to the respondents is to reconsider his case for promotion to the rank of Commander in the year 1997 uninfluenced by the unfortunate circumstance of his having contracted the HIV disease. Since the petitioner has been agitating his grievance for the past nearly a decade it is but appropriate that the respondents consider his case, as expeditiously as possible, in any event, not later than four months from the date of receipt of a copy of this order.

15. The writ petition is allowed. However, in the circumstances, without costs.