
(2018) 12 UK CK 0059
In the Uttarakhand High Court
Case No : Special Appeal No. 911 Of 2018

Pancham Singh

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 14-12-2018

Acts Referred:

Human Immunodeficiency Virus And Acquired Immune Deficiency Syndrome
(Prevention And Control) Act, 2017 — Section 3, 50(1)
Shashastra Seema Bal Combatized Sub-Inspector (General Duty) Group B Non
Gazetted Posts Recruitment Rules, 2009 — Rule 8, 11

Citation : (2018) 12 UK CK 0059

Hon'ble Judges : Ramesh Ranganathan, CJ; R.C. Khulbe, J

Bench : Division Bench

Advocate : Vinay Kumar

Final Decision : Disposed Off

Judgement

Ramesh Ranganathan, CJ

1. Heard Mr. Vinay Kumar, learned counsel for the petitioner and Mr. Pankaj Chaturvedi, learned Standing Counsel for the Union of India. With their consent, the appeal is disposed of at the admission stage.

2. The jurisdiction of this Court is invoked by the appellant-writ petitioner seeking a writ of certiorari to quash the communication dated 24.04.2017 of the SSB Headquarters, New Delhi whereby the petitioner's claim for promotion to the post of Sub-Inspector (GD) had been rejected; and for a mandamus to reject the decision of the Medical Board of SSB dated 03.02.2015, whereby the petitioner was placed in the category of P2(P) as no guidelines were issued by the respondents to deal with the categorization of persons who had tested HIV Positive; and a mandamus directing the respondents to promote the petitioner to the post of Sub-Inspector (GD) pursuant to the promotion order dated 31.03.2016, by treating the petitioner to be suitable for promotion.

3. It is the petitioner's case that, after a regular selection process by the respondents, he was selected and appointed on 24.09.1988 to the post of Constable General Duty (GD). He was, thereafter, promoted as Lance Nayak, and subsequently as a Nayak. On 30.06.2012 he was promoted to the post of Assistant Sub-Inspector (GD), and was working in the 57th Battalion of SSB, Amritpur, Nainital. For promotion from the post of Assistant Sub-Inspector (GD) to the post of Sub-Inspector (GD), the candidate is required to qualify in a course consisting of physical and written examinations. The petitioner was selected in the month of January, 2013 to undergo training for being considered for promotion to the post of Sub-Inspector. Training, for the post of Sub-Inspector, was held at the Armed Training Centre (ATC) at Saran, Himachal Pradesh. The petitioner completed his training, and was diagnosed to be suffering from Human Immuno-deficiency Virus (HIV) positive. The petitioner, on being found to be affected by the HIV Syndrome, intimated the officials concerned of his condition; and he is now undergoing treatment at Composite Hospital, SSB Gorakhpur.

4. When the petitioner appeared before the Medical Board on 3.02.2015, he was found to be an Immune Deficiency Sero Positive case, since September 2013. He is, as at present, taking Anti-Retroviral Therapy (ART) from BRD Medical College, Gorakhpur. On the basis of the observations of the Medical Board, the petitioner was going for regular CD4 Count, and the CD4 Count of the petitioner was 493; and the Medical Board recommended that he be placed in Medical Category P2 (P); and had directed that the said Medical Category would remain in force for two years.

5. The petitioner submitted a representation to the Inspector General, SSB Headquarters, New Delhi on 15.11.2016, but to no avail. The Medical Board is also said to have pointed out that, in terms of the Guidelines in the Medical Manual, unless the petitioner achieved SHAPE-1 category he would not be considered for promotion. On 7.02.2017 the Composite Hospital, SSB Gorakhpur issued a discharge Certificate which shows that the petitioner has been diagnosed as HIV Positive, the CD4 Count of the petitioner was 589, and he was advised to continue ART, and go for a regular ART course.

6. Thereafter, an order was issued on 10.03.2017 furnishing a list of persons whose names were approved by the Departmental Promotion Committee for promotion to the post of Sub-Inspector (GD) w.e.f. 01.04.2017. Another list was issued of Assistant Sub-Inspectors (GD), whose names were approved for promotion to the post of Sub-Inspector (GD) subject to their regaining Medical Category SHAPE-1 by 31.03.2017. The petitioner's name figured at Serial No. 17 in the 2nd list. Thereafter, the Assistant Director, Personnel, Directorate of SSB, New Delhi issued communication dated 24.04.2017 informing the petitioner that the Review Medical Examination Board had recommended that the petitioner had been placed in SHAPE-2 category on account of P2 in the year 2015 and 2017; the standard Rules for combatised persons was SHAPE-2; and the petitioner

would only be promoted, if he attained SHAPE-1.

7. The petitioner would contend that, in view of the provisions of the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (the "2017 Act"), which was notified in the Gazette of India on 20.04.2017, he is entitled for relaxation in terms of physical fitness, more so as he has been effectively discharging his duties at the Nepal Border where he is presently working as an Assistant Sub-Inspector.

8. In the order under appeal, the learned Single Judge observed that Rule 8 of the Shashastra Seema Bal Combatized Sub-Inspector (General Duty) Group B Non Gazetted Posts Recruitment Rules, 2009 provides for medical fitness; and thereunder only persons, who are in medical category SHAPE-1, are eligible to be appointed under the provisions of the Rules. After referring to Section 3 of the 2017 Act, the learned Single Judge observed that the petitioner's medical fitness category was SHAPE-2; the Court would not give a concession to the petitioner not to fulfill the requirements of the medical category Rules; and Section 3 of the 2017 Act had no application. The writ petition was dismissed.

9. Section 3 of the 2017 Act stipulates that:-

"no person shall be discriminated against the protected person on any ground including any of the following namely:

(b) the unfair treatment, or in relation to, employment or occupation"

10. The question of the person being unfairly treated, merely because of his disorder, would arise only if a candidate was not promoted merely on his being found to be HIV positive. It is not in dispute that all Assistant Sub-Inspectors, who were promoted as Sub-Inspectors, had qualified in the medical fitness test SHAPE-1; and no Assistant Sub-Inspector, under SHAPE-2 medical fitness category, was promoted as a Sub-Inspector.

11. It is not even the petitioner's case that any Assistant Sub-Inspector, who fulfilled only SHAPE-2 medical fitness category, had been promoted as Sub-Inspector (GD). The Rules require a high degree of physical fitness in SHAPE-1, for being promoted as Sub-Inspector (GD) in the paramilitary force. These Rules have been applied uniformly. It cannot, therefore, be said that the petitioner has been discriminated against, only because he tested HIV positive. The plea of discrimination must, therefore, fail.

12. While we see no reason to take a view different from that of learned Single Judge, or to interfere with the order under appeal, Shri Vinay Kumar, learned counsel for the petitioner, would refer to Rule 11 of the Shashastra Seema Bal Combatized Sub-Inspector (General Duty) Group B Non Gazetted Posts Recruitment Rules, 2009, which relates to the "Power to relax", and stipulates that:-

"Where the Central Government is of the opinion that it is necessary or expedient

so to do, it may, by order and for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons."

13. While the Central Government has, undoubtedly, the power to relax the recruitment rules with respect to any category or class of the persons, such a power can be exercised only by the Government, and not by this Court. Shri Vinay Kumar, learned counsel for the petitioner, would also draw our attention to Section 50(1) of the 2017 Act whereunder, if any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as may appear to be necessary for removing the difficulty. The proviso, thereunder, prohibits any order to be made under Section 50(1), after expiry of a period of two years from the date of commencement of this Act. As the Act came into force on 21.04.2017, the power to remove difficulties can be exercised by the Central Government on or before 21.04.2019.

14. Shri Vinay Kumar, Learned counsel for the petitioner, would submit that, while the petitioner has achieved SHAPE-1 physical fitness with ART, the Medical Board recommendation, for SHAPE-1 physical fitness without ART, is impossible to comply as the petitioner must continue Anti-Retroviral Therapy (ART) for his survival. As the petitioner claims to have achieved SHAPE-1 medical fitness with ART, we consider it appropriate to direct the Government of India- respondent no.1 to examine the petitioner's case, and to consider whether the power to remove difficulties, under Section 50(1) of the 2017 Act, and the power to relax the rigor of the 2009 Rules under Rule 11 of 2009 Rules, can be exercised with respect to the category of persons, to which the present petitioner belongs, i.e. Assistant Sub-Inspector suffering from HIV. As the power to remove difficulties, under Section 50 (1) of the 2017 Act, can only be exercised within two years from the date on which 2017 Act came into force, i.e. on or before 24.04.2019, the first respondent shall consider whether or not the 2009 Rules should be relaxed, and power under Section 50(1) of the 2017 Act, should be exercised to remove the difficulties in effecting promotion of Assistant Sub-Inspectors, who have tested HIV-Positive, to the post of Sub-Inspectors (GD). This exercise shall be undertaken, and a decision shall be taken with utmost expedition and, in any event, not later than 31.03.2019.

15. The appeal stands disposed of accordingly. No costs.