
(2009) 05 BOM CK 0055
In the Bombay High Court
Case No : Writ Petition No. 576 of 2008

Ranjit Kumar Rajak

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 08-05-2009

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 16(1), 16(4)
State Bank of India (Officers Service) Rules, 1992 — Rule 14(1), 20(3), 24(2)

Citation : (2009) 5 BomCR 227

Hon'ble Judges : R.S. Mohite, J; Ferdino I. Rebello, J

Bench : Division Bench

Advocate : Mihir Desai, for the Appellant; A.G. Damle and Sangeeta Patil, for the Respondent

Final Decision : Allowed

Judgement

F.I. Rebello, J.—Rule. By consent heard forthwith.

Can a person who is fully qualified for a post because of his past or present medical condition which otherwise does not interfere with his fitness to dispense the duties of his post be denied employment because of the financial burden that would be cast on the employer? The medical condition: Renal Transplant in 2004. Clause 14(1) of the State Bank of India Officers Service Rules reads as under:

14. (1) All appointments in, and promotions to, the officers' grades shall be made by the competent authority in accordance with the policy or guidelines, if any, laid down in this behalf by the Central Board or the Executive Committee.

Note: 1. Subject to such norms as may be prescribed by the Bank, such appointments and promotions will be subject to medical fitness and sound constitution of the person concerned to be certified by one or more qualified medical practitioners approved by the Bank.

2. The petitioner had applied for the post of Probationary Officer with Respondent State Bank of India. In the advertisement under General Instructions there was

the following instruction:

(k) Appointment of selected candidates is subject to his/her being declared medically fit by Medical Officer(s) appointed/approved by the Bank.

The Bank by the same advertisement had also provided for vacancies for physically handicapped(both Orthopaedical/Visual).

3. The petitioner was informed by communication of 20th January, 2007 that he had been found suitable to be considered for taking Phase II of the selection process. By communication of 11th June, 2007 he was informed that he was selected as a Probationary Officer for 2007 batch. Petitioner was sent for medical examination as per the offer of the appointment. This flows from the communication addressed by the Deputy General Manager to the Senior Medical Officer, State Bank of India, New Delhi. Subsequent to the medical examination the petitioner was informed by communication of 8th August, 2007 that following scrutiny of medical report (s) it has been decided by the appropriate Authority that he was not eligible for the post of Probationary Officer in the bank.

4. It is the case of the petitioner that this is not for the first time that he has been denied employment on the basis of his renal transplant. The petitioner had a renal transplant in 2004. On 27th January, 2007 I.D.B.I., also a Public Sector Bank withdrew the conditional appointment and declared the petitioner medically unfit for appointment as Assistant Manager, Grade "A" even though he was selected for the same after successfully completing the written examination and oral interview. At the time of filing the petition he was working as a Probationary Officer in another public sector bank, New Delhi and as of 8th January, 2008 had completed an year of service. Probationary officers across banks, it is stated, perform similar tasks. This includes clerical and supervisory job like opening, managing and running transactions on savings and current bank accounts along with long term deposits and managing and handling of bills and cash transactions.

According to the petitioner his first choice of employment is with the respondent due to better prospects of pay scales, career growth and more frequent opportunities of promotion, experience in domestic and international banking and an opportunity to work in different fields in the banking sector.

5. Dr. B. Subba Rao of Apollo Hospital had issued to him a medical certificate dated 8th January, 2008 to the following effect:

He has been doing well since transplantation and has been undergoing periodic surveillance cystoscopy of bladder. He is clinically fit to work and perform any task that is appropriate to his qualification.

The petitioner has relied on medical reports to confirm his fitness and good health to work in the said post. Petitioner contends that it is clear that denial of employment by the respondent is on account of medical history of renal transplant, though his present medical profile does not interfere with his job responsibilities. The action of the respondent in refusing employment it is

submitted is irrational, unfair and discriminatory as it is based on medical history of renal transplant that he underwent long before his search for the current job.

6. To complete the narration, in the affidavit in reply filed on behalf of the respondent are annexed the Guidelines dated 24th July, 1979. The Guidelines provide that "Wherever considered necessary, Medical Examiners should take specialist's opinion before finalising the reports. They should always consider whether the candidate is fit for continuous service in the bank for a long period. Cases such as Kidney Ailments, Congenital Heart Diseases, Rheumatic Heart, Malignant Hypertension, Diabetes, Juvenile or otherwise and positive cases should not be missed.

The Guidelines also set out that while declaring the candidate unfit for service, the medical examiner should clearly state the reasons for arriving at a conclusion. In cases where the Medical Examiner considers that a minor disability disqualifying a candidate for Banks service can be cured by treatment (Surgical/Medical) within a reasonable period of time say 3 to 6 months a statement to that effect should be recorded in the report. The Medical Examiner despite the specific opinion if has difficulty in coming to the conclusion about the fitness or otherwise, he may refer such cases to a Senior Bank Medical Officer.

7. Considering these guidelines, by order dated October 8, 2008 the Respondents were directed to get the petitioner examined by an Urologist and thereafter to take a decision on the said report and file the same before the Court. Before us is placed a communication dated 14th November, 2008 enclosing the Medical Report dated 29th October, 2008 and the comment of Senior Urologist of the Indraprastha Apollo Hospital as also the medical report dated 27th October, 1998 of Dr. Gaurav Diagnostic Centre. On the said report the Medical Officer has endorsed the following comments:

He is unfit for the reasons stated in enclosed sheet and also as per Bank's policies.

The reasons given are as under:

1. A patient of kidney transplant is in continuous need of quality medical care.
2. A transplant patient needs treatment with immunosuppressive drugs on regular basis.
3. The incidence of tumors in patients on immunosuppressive drugs is approx. 100 times greater than that in the general population. The risk is increased in proportion to the total immunosuppressive load administered and time elapsed since transplantation.
4. There is increased risk of opportunistic infections with immunosuppressive drugs.
5. While 1year transplant survival is excellent, most recipients experience progressive decline in kidney function over time thereafter.

The medical report of Indraprastha Apollo Hospitals by a Doctor holding M.S. (Surgeon), M.Ch. reads as under:

- (a) Renal functions are within abnormal limits.
- (b) Patient is under immunosuppressant .He is at a lightly increased risk of infection.
- (c) Likely medical expenses Rs. Thirteen Thousand per month.
- (d) Also Dietary restriction except low salt low protein diet. (e) Patient can undertake field work and traveling.

8. It is the case of the petitioner that the act of the respondent in refusing him employment is on the basis of an irrational standard of medical fitness and have consequently violated his fundamental rights under Article 14, 16(1) and 21. Denial of employment and a trade to earn livelihood is merely on the basis of history of renal transplant and the monthly cost of medicine and despite his present good health and success at all the other stages of the application process, is an arbitrary, irrational and unjust action on the part of the Respondent within the meaning of Article 14 and 16(1) of the Constitution. It is submitted that Article 16(1) also espouses no arbitrary treatment, akin to Article 14 within the sphere of public sector employment. The petitioner has placed reliance in the case of *MX of Bombay Indian Inhabitant Vs. M/s. ZY* and another, . as also other judgments. It is submitted that the Rule which provides that a 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 work place. A person who, 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 justifiably denied employment or discontinued from employment of having an ailment. Such an approach would be arbitrary and unreasonable. There is no rational connection between the medical history of renal transplant and work of a bank officer. Classifying the candidates on the basis of medical history of renal transplant does not create an intelligible differentia. Renal failure was an ailment the petitioner suffered from in the past and does not continue to suffer any more. Currently he is medically fit. Therefore, primarily the very act of separating people like the petitioner, who may had renal failure, which is a curable disease as a class by themselves does not pass the constitutional muster of an intelligible differentia. The fact that the petitioner has been working with another bank for more than an year and medically fit to perform duties would indicate that such classification is unreasonable. The employment of the petitioner postulates no perceivable rational threat against the broader purpose and objective of the respondent to run a stable, competent and efficient work force.

9. The right to livelihood it is submitted is an integral part of the right to life. The petitioner cannot be deprived of his right to livelihood without following due procedure. Denial of appointment though duly qualified and medically fit is a curtailment of the right to livelihood within the constitutional scheme of Article 21. Such denial of employment opportunity at an upcoming stage in his career, despite appropriate qualifications, is a huge set back in his career advancement, growth and the eventual pursuit of his happiness. The action of the respondent denying appointment to the petitioner is an act inspired by an irrational and prejudicial response to medical condition of the petitioner. The right to life also include the right to be able to access available opportunities.

10. The respondent has filed its reply. A preliminary objection has been raised that there is no privity of contract between the petitioner and the respondent bank. No constitutional or contractual right, if any, in favour of the petitioner has been violated as the petitioner has no vested right for appointment in the bank. The petition, therefore, filed is not maintainable under Articles 226 and 227 of the Constitution of India. The petitioner had applied as general category candidate and in terms of medical fitness standards was found medically unfit. The advertisement required that the appointment is subject to medical fitness in terms of the rules. Respondent bank has every right to prescribe medical standards of fitness before recruitment of general category candidates in permanent employment of the bank. Since the petitioner could not satisfy those standards it is irrelevant whether or not the petitioner is able to discharge the duties and functions of Probationary Officer in the Respondent Bank.

The petitioner it is set out would require continuous medications and periodical check up throughout his life. The cost of which will have to be borne by the bank, if he is given appointment. An officer of the bank can be posted/transferable anywhere in India including rural branches. The petitioner, if appointed will request for posting at place where the medical and check up facilities are available. Such a request cannot be acceded to as a probationary officer is required to work anywhere in India including at Rural branches. Reliance is placed on the judgment of the Supreme Court in Indian Council of Agricultural Research and Another Vs. Smt. Shashi Gupta, to contend that once the Medical Board and the Appellate Medical Board found the respondent medically unfit for the post of Scientist Grade S the Courts or Tribunals have no jurisdiction whatsoever to go over the medical opinion and direct appointment to the service.

The Court further observed that it is the inherent right of an employer to be satisfied about the medical fitness of a person before offering employment to him/her.

11. An additional affidavit has been filed by Kiran Devidas Shah, Chief Manager (I.R.) State Bank of India, Local Head Office, Mumbai, wherein the duties of Probationary Officer are set out.

12. The pleadings, record and the medical report submitted in terms of our

directions dated October 8, 2008 would clearly indicate that the petitioner can undertake field work or travel and the renal transplant is no disability. The petitioner, therefore, cannot be said to be a person unfit to discharge the duties as a probationary officer. Compared to a person otherwise physically fit, a person under immunosuppressant is at a slightly increased risk of infection. Such a patient as per the report of Indraprastha Apollo Hospitals will have to spend atleast Rs. 13,000/per month towards medical expenses. In terms of the State Bank of India Officers Service Rules 24(2) the amount of medical, surgical and hospital expenses as are actually and necessarily incurred by an officer in respect of any injury, disease or illness suffered by him are to be reimbursed in full by the Bank . Under Rule 14(1) appointments are subject to medical fitness and sound constitution. Under Rule 20(3) the service of an officer can be terminated without notice on his being certified by the Bank's Medical Officer (s) to be permanently incapacitated for further continuous service in the bank.

13. The issue for consideration is whether inspite of the medical report of an expert in terms of the guidelines for medical examination which shows that the petitioner is fit for duty, is the action of the respondent in denying appointment to the petitioner irrational, unreasonable and arbitrary being violative of Article 14 and 16(1) and denies the petitioner an opportunity to earn a livelihood and/or to affects his right to life under Article 21 of the Constitution of India.

14. 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. The convention was ratified on 1st October, 2007. The relevant portion of Article 27 under the heading Work and Employment reads as under:

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. State 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) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...
- (h) ...

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

Article 1, sets out the purpose of the Convention and reads as under:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2 contains the definition of reasonable accommodation and reads 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.

15. The Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities of United Nations General Assembly, Seventh Session, New York, 16th January, 3 February, 2006, has considered the Concept of Reasonable Accommodation in Selected National Disability Legislations. The paper in the context of reasonable accommodation to persons with disabilities provides information on the concept of disproportionate burden, a qualifier that often accompanies the provision of reasonable accommodation. The paper notes that concept of reasonable accommodation was originally employed with reference to grounds of religious practice under the United States Civil Right Act of 1968; which required employers to reasonably accommodate religious practice or observance which accommodation would cause hardship. It was first applied in the disability context, by the United States Rehabilitation Act, 1978. After viewing Legislation, the paper notes the scope of reasonable accommodation is statutorily limited to the employment and housing contexts and/or provision of public goods and service. The concept of disproportionate burden tends to rest on two common denominators (1) an insistence on "reasonableness in the circumstances:, and (2) an underlying proportionality test that balances the rights of and burdens and benefits to, all persons affected by the proposed accommodation or adjustment. A common denominator as well is that all examples of national legislation, together with their accompanying interpretations, place the burden of proof with respect to "unjustifiable hardship" (or its terminological equivalent) on the claimed provider of reasonable accommodation (e.g. The employer or the landlord). While it is the claimant's burden-the responsibility of the person with disabilities who asserts his/her right to an accommodation to prove that the sought accommodation is

"reasonable" (which the defendant the party against which the action is brought - can rebut based on the totality of the circumstances), it is the claimed provider's burden to prove that "ad justifiable hardship" will arise if the accommodation or adjustment is provided. In this way, "reasonableness" and "unjustifiable burden." while largely identical in scope, are often interpreted in various national legislations as a means of differentiating a plaintiff's case from the defendant's legitimate defense.

With reference to Canada the Paper Notes that the legal responsibility to make accommodation for a person with disability does not stop when minor hardships are encountered and the Canadian courts have mentioned many factors relevant to an assessment of whether hardship is "undue" in a work setting, including:

Financial cost

disruption of a collective agreement;

the morale of other employees;

interchangeability of the workforce and facilities;

the size of the employer's operation (because this may relate to the employer's ability to bear the cost and adapt the workplace);

safety.

16. There is no Municipal Law enacted in India based on this Convention. India has, however, enacted the Persons with Disabilities Act, 1995. This Act, however, does not cover employment for persons with medical disabilities. Disabilities Act to that extent is not an exhaustive Legislation.

17. The principal aim of Articles 14 and 16 is equality and equality of opportunity. Provisions like Clause (iv) of Article 16 is the means of achieving that object. Article 16 provides for two types of reservations. Article 16(4) provides for reservation in favour of Scheduled Castes, Scheduled Tribes and other backward class, while Article 16(1) includes reservation in favour of physically handicapped. See *Indra Sawhney and Ors. v. Union of India* 1992 Supp. (3) SCC 217. The law is now well settled that though United Nation Convention may not have been enacted into the Municipal Law, as long as the convention is not in conflict with the Municipal Law and can be read into Article 21 it is enforceable. Therefore, in the absence of any conflict it is possible to read the test of reasonable accommodation in employment contracts. In *Mr. X v. Hospital Z* (1998) 8 SCC 29 the issue was whether Government service can be denied to persons suffering from "AIDS". The Court held that Government jobs or service cannot be denied to them as laid down in some American decisions. (See *School Board of Nassau County, Florida v. Airlena* 107 S Ct. 1123, *Chalk v. USDC* CD of Cal(9th Circuit 1988) 84028 2d. 701 and some other authorities. The reasons being the Court held that they are entitled to all respect as human beings. They have to have an avocation. The law as to enforcement of U.N. Convention as

settled, can be deduced from Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, , Vishaka and others Vs. State of Rajasthan and Others, , T.N. Godavarman Thirumalpad (through K.M. Chinnappa) Vs. Union of India (UOI) and Others, .

18. In *Kesavananda Bharati v. State of Kerala* 1974 S.C. 225, the Supreme Court had observed that in view of Article 51 of the directive principles, the Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."

In *Additional District Magistrate, Jabalpur Vs. Shivakant Shukla*, the Court had observed that :

If, however, two constructions of the municipal law are possible, the Courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations. Every statute, according to this rule, is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations, or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.

19. The right to work and livelihood have been read into Article 21. However, at the same time the Court has noted the constraints arising out of or connected with the availability of State resources. The Supreme Court in *The Dharwad Distt. P.W.D. Literate Daily Wages Employees Association and others, etc. Vs. State of Karnataka and others etc.*, was pleased to note that and observe this aspect in a case where the petitioners were seeking absorption and/or regularisation of their services. The Court observed as under:

At the same time, we cannot overlook the constraints arising out of or connected with availability of State resources. Keeping both in view and reposing our trust in the relevant instrumentalities of the State that may be connected with the implementation of the scheme to act with a sense of fairness, anxiety to meet the demands of the human require, merits and also anxious to fulfill the constitutional obligations of the State.

The Court then went on to further observe that:

Therefore, unduly burdening the State for implementing the constitutional obligation forthwith would create problems which the State may not be able to stand.

20. In the absence of Municipal law, the protocol can be read into Article 21 as it does not in any way conflict with our Municipal law as the State shall secure that men and women have the right to adequate means of livelihood within its economic capacity. A duty is, therefore, cast on the State to provide reasonable accommodation in the matter of employment subject to the burden of hardship

test being satisfied. In the absence of a statutory definition of reasonable accommodation, the reasonable accommodation as set out in the protocol in the first instance can be considered. It will have to have a nexus with the financial burden on the institution and/or undertaking which will have to bear the burden and further the extent to which reasonable accommodation can be provided for.

21. In Americans with Disabilities Act, 1990 under sub Chapter I title 1 (Employment) Reasonable accommodation has been defined as under:

(9) Reasonable accommodation. The term "reasonable accommodation" may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include-

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities; and the type of operation or operations of the covered entity, including the composition, structure, and function of the workforce of such entity; the geographic separateness, administrative, or financial relationship of the facility or facilities in question to the covered entity.

22. Reasonable accommodation if read into Article 21, based on the U.N. Protocol, would not be in conflict with Municipal law. On the contrary it would give added life and dimension to the ever expanding concept of life and its true enjoyment. Is it open to a State and its agencies or authorities to contend that persons with disabilities like in the case of the petitioner, who otherwise are fit to discharge the functions of the post to which they applied on account of the medical disability which once they suffered from and no longer subsists, such persons have no right to employment. In our opinion a reading of Article 21 in this context would be defeating the very constitutional obligation of right to life. The State and its instrumentalities must act in a manner in which every citizen has a right to be considered for employment within its normal scope of functions as an employer. The right to select its employees would be the right of the employer. At the same time the terms for employment, must meet the test of

Articles 14, 16 and 21. It will, therefore, be no longer open to the State merely on account of past or present medical problems if otherwise, a person is fit to work and can be reasonably accommodated and does not cause undue hardship, to deprive a person otherwise qualified and successful, to right to employment. The right to life would include the right to livelihood and, therefore, the right to work. This right is, however, subject to State's economic capacity. The right to accommodation is already a part of our law having been enunciated in *Anand Bihari and others Vs. Rajasthan State Road Transport Corporation, Jaipur and another*, . In that case a bus driver who on account of defective eye sight suffered in the course of employment, directions were issue that he be suitably accommodated by the employer with any other job. The Court then directed the Corporation that in addition to the retirement benefits, to offer any alternative job which may be available and is eligible to perform.

23. Let us examine some judgments in the matter of reasonable accommodation in our jurisdiction. We have already noted *Mr. XY v. Hospital Z* (supra) In *MX of Bombay Indian Inhabitant Vs. M/s. ZY and another*, the issue was regularisation of a casual labourer who was HIV positive. It was contended on behalf of the respondent authorities that when a person has HIV infection it is almost certain in those circumstances that his health will deteriorate to deteriorate in health progressively and the progress of the disease being inexorable and without any remedy, the employer will be justified in not employing a person who almost certainly cannot be fit to perform the duties during the entire span from appointment till superannuation. The Court should not disturb the policy decision of the employer not to recruit such a person. This Court answered the issue as under:

Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, may of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution. The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case. If it means putting certain economic burden on the State or the public Corporations or the society, they must bear the same in the larger public interest. The Court then observed as under:" Therefore, in every such case, the test of medical fitness prior to employment or even during employment has necessarily to be correlated with the person's ability to perform the normal job requirements and any risk of health hazard he may pose to others at the work place.

In *X of Mumbai Indian Inhabitant v. State Bank of India*, an unreported judgment dated 16/12/2004 in Writ Petition No. 1856 of 2002 also the application for appointment was rejected on the ground that he was HIV positive and placing reliance on *MX of Bombay Indian Inhabitant* (supra) the Court directed that the petitioner there to be examined by Panel of Doctors as to whether the petitioner

was fit to work and his ability to perform the duties and satisfy the job requirement as also whether he poses any risk in health hazard to others at the work place.

In *M. Dinesan Vs. State Bank of India, Bhubaneswar, Orissa*, the petitioner was found unfit not because the defect in eye sight which was likely to interfere in the efficient discharge of the duties of a Law Officer, but because of the policy of the bank not to employ persons with only one eye. The Court held that the policy of the bank that all one eyed persons are disqualified for employment and to supervisory cadres (by direct recruitment) irrespective of the fact that they may be medically and physically fit to discharge efficiently the functions attached to the post, renders the policy and guideline arbitrary, capricious and unreasonable. The Court noted that the statutes have been enacted to provide equal opportunities to disabled and handicapped and to have a policy which treats a physical defect nor having any effect on efficient functioning as a disability and bar for employment is a retrograde step, not expected of an Authority required to act reasonably.

24. The judgments in various international jurisdictions have also been placed for our consideration. All those judgments are based on statute legislation and considered the test of reasonable accommodation with that of undue hardship defence in the context of calculation of the financial or administrative costs of the accommodation at issue relative to the entity's overall operations. The Courts have taken the view that when the administration or financial costs are negligible the defence of undue hardship must be rejected. See *United States of America v. The City and County of Denver, Denver Police Department and the Civil Service Commission for the City and County of Denver C.A. Nos. 96K370 & 93K2263* in *United States District Court for the District of Colorado*.

25. Thus from a conspectus of legislation and judgments it is clear that reasonable accommodation forms a part of our Municipal law though there is no enacted legislation. The State including instrumentalities of the State, therefore, must confirm to this principle either at the stage of employment or in the course of employment. Most, in the case of course of employment if an employee suffers a medical problem, including kidney failure and consequent renal transplant bear the cost. This is a case of accommodation in service as long as the employee is fit to work and not totally incapacitated. The Disabilities. Act also provides for accommodation in such cases. It is no longer, therefore, open to an employer falling within the expression "State" to lay down the policy for recruitment, which discriminates against those who are medically disabled, merely because of the cost involved, irrespective of whether such a person is otherwise fit to perform and discharge the duties of the post and such costs do not impose undue hardship. The right of the employer to select a person to discharge the function of a post cannot be gone into by this Court as it would be in the matter of policy decision. It will, however, be open to this Court to examine conditions unconnected with the performance of the duties of the posts for recruitment to

the post as they would be constitutionally impermissible. In a case of where a person is physically or visually handicapped the Municipal law has made reasonable accommodation. 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.

26. 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.

27. 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.

28. Coming to the facts of the present case the petitioner has come to this Court and contended that his employment postulates no perceivable rational threat against the broader purpose and objective of the Respondent to run a stable, competent and efficient work force. The petitioner, from the record and the medical report, is not unfit to discharge the duties of the post. He can, in terms of the expert opinion which is now on record, do field work and also travel. The petitioner in fact at the time of filing the petition is working in a similar post in another banking institution. In so far as his work is concerned, the expert medical opinion does not treat him as not being capable of doing the job. The report of the medical officer based on which the respondents are seeking to deny him employment is contrary to the report of the expert. The only perceivable reason, therefore, and as now can be ascertained, from the affidavit filed by the respondent through Kiran Devidas Shah, Chief Manager (I.R.) State Bank of India, Local Head Office, Mumbai, is that the cost of medication will have to be borne by the bank. In the affidavit it is further set out that it is irrelevant whether or not the petitioner is able to discharge the duties and functions of the Probationary Officer in the respondent bank. In our opinion such a stand is unreasonable and a clear infraction of Articles 14 and 21 of the Constitution of India. When the bank prescribes the medical fitness for recruitment of probationary officers those standards have to be in the context of discharging the duties and functions. The clause in the advertisement and in the conditions of service will have to be read in that context. It must be the ability of the candidate to perform the duties of the post. The experience, medical fitness must be so read subject to the undue hardship. The ratio of ICAR v. Smt. Shashi (supra), in this context will be clearly distinguishable. They cannot be extraneous. The petitioner can work at rural branches and the petitioner can travel to rural branches. The petitioner in other words is fit to be employed.

29. Therefore, the only issue is whether the respondents have placed any material on record to show that the burden cast on them for the medical expenses which they are likely to incur and which in the present case have been quantified at about Rs. 13,000/per month presently, can be said to cause undue hardship to the respondents. The respondents have not placed any material on the facts of the case that such burden would cause undue hardship in the context of the size of the organisation, the financial implications on the organisation and/

or on the morale of other employees and the like. In the absence of placing such material the defence of undue hardship which is bearing the medical costs in a case of reasonable accommodation on the facts of the case will have to be rejected.

30. Under the circumstances, in our opinion, this petition has to be allowed and consequently we make the Rule absolute in terms of prayer clauses (a), (b), (d). Rule made absolute also partly in terms of prayer (e). The petitioner would be offered employment and allowed to join within sixty days from today after complying with other requirements, if any.