

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI.

T.A. No. 251 of 2009

[Arising out of WP(C)No. 11790/2004 of Delhi High Court]

Ex. Cpl. Anil Kumar Sharma ...Petitioner

Versus

Union of India & Ors. ...Respondents

For the Petitioner : Sh. Jawahar Raja, Advocate

For the Respondent: Sh. Gaurav Liberhan, Advocate.

C O R A M:

HON'BLE MR. JUSTICE A.K.MATHUR, CHAIRPERSON

HON'BLE LT.GEN. S.S.DHILLON, ADMINISTRATIVE MEMBER

JUDGMENT

1. Petitioner by this Writ Petition has prayed that by writ of mandamus or direction, respondents may be directed to

reinstate the petitioner in his post with full back wages with allowances and other benefits. Petitioner also prayed that he may be extended medical treatment and further prayed for compensation of Rs.10,00,000/-.

2. Brief facts which are necessary for disposal of this petition are that petitioner was enrolled as an Airman in the Indian Air Force as a combatant and petitioner joined the service in the year 1992 and served till 1999 when his services were illegally and arbitrarily terminated.
3. On or around 22nd September, 1992 petitioner had a complaint of some sexually transmitted infection for which he was admitted to the Military Hospital, Belgaum. After two days, petitioner was transferred to the Command Hospital, Pune, where he underwent a number of tests, including HIV test. The test report was negative.

4. Petitioner should have been given pre-test counseling before he was tested for HIV. The petitioner has neither given pre-test counseling nor was his permission ever sought for testing his blood for HIV. Petitioner was treated successfully for the infection and was discharged from the Command Hospital on 29th October, 1992. Petitioner was kept under medical surveillance and, thereafter, two follow-up tests done in February, 1993 and in June, 1993 and both reports were negative for HIV.
5. On or about 18th August, 1993 petitioner underwent and completed a course of instruction in the trade of General Clerk Duties for 52 weeks. Petitioner was finally attested and posted to Electronic Training Institute, Jallahalli, East Bangalore.
6. Petitioner got married, with due permission, on 2nd February, 1994. On 28th April, 1994 petitioner was admitted to the

Command Hospital (Air Force), Bangalore because of a swelling on the neck as petitioner was found to have a lymph node.

7. Thereafter, petitioner's test report came to be positive. Thereafter, petitioner was referred to Command Hospital, Pune, for further diagnosis and treatment. He underwent another test at the Command Hospital, Pune, in which his HIV positive result was confirmed. Petitioner was counseled and was advised to undergo a review after one year.
8. On 30th August, 1995 petitioner was called for medical review and a number of tests were undertaken and petitioner was found to be fit and petitioner was discharged on 8th September, 1995. He was also advised to have a further review of his physical condition in February, 1996 at Command Hospital.

9. In 1996 petitioner was again called for annual review and he was recommended to be placed in category BEE (P) and for review after one year. Meanwhile, petitioner was promoted to the rank of Leading Aircraftsman with effect from 1st June, 1997. The petitioner was again sent for annual medical review. Meanwhile, he was further promoted to the rank of Corporal with effect from 7th June, 1997.
10. Then, again in 1998 Medical Board observed that there is *no history of unsafe sex and no history of blood transfusion* and was allowed to continue in LMC BEE (P) subject to approval by the higher medical authorities. After one year, he was again asked to go for medical review to Pune in October, 1999 and he was admitted to Command Hospital, Pune on 28th October, 1999 for the said purpose. The Command Hospital, Pune, transferred the petitioner to Military Hospital, Cardio-Tuberculosis Centre (MH CTC), Pune, for further evaluation by a Chest Physician.

11. Petitioner was admitted to the MHCTC, Pune, where he was subjected to further medical observation and tests. The Petitioner was suspected to have T.B.
12. Without being confirmed that whether petitioner is actually suffering from T.B., petitioner was put on Anti Tuberculosis Treatment (hereinafter referred to as ATT), before the MTB Report (confirming TB was) received. The sputum report of the petitioner was normal.
13. Lt. Col. K.E. Rajan, classified specialist Med. & Chest Diseases of Military Hospital (CTC) Pune, on 18th November, 1999 recorded that '*for recategorisation at CH (SC) Pune, in October, 1999, he has been detected to have radiographic shadow LUZ. He is asymptomatic. lymphadenopathy or clubbing vital parameters normal, lungs clear clinically.*'

14. It was further recorded that *he is a case of HIV infection with Pulmonary Tuberculosis. He fulfils the AIDS defining criteria, therefore, he is unfit to retention in service. Recommended to be invalided out of service in the medical category EEE.*
15. Then, the petitioner was brought before the Medical Board, based on the findings of Lt. Col. K.E. Rajan, for boarding out under the provisions of Air Force Rules, on ground of having been medically unfit for further retention in service.
16. According to the criteria laid down by the IAF, as petitioner was HIV positive and had pulmonary tuberculosis, therefore, he fulfils the criteria of AIDS. Petitioner was boarded out from service. On 31st January, 2000 petitioner put in a request for special investigation pursuant to which x-ray was taken again. Lt. Col. Kamal Pathak, Classified Specialist, Radiologist, opined that:

- “ - Soft tissues & bones are normal*
- Trachea central. Both hila and cl. angles are normal*
- Cardiac silhouette is normal. Ct. ratio 12.5 : 29.8*
- Lung fields are clear “*

17. Therefore, it was contended by the petitioner that he had no Pulmonary Tuberculosis and he did not fall in category of AIDS with T.B. However, the petitioner, on this criteria was discharged from service. Then, petitioner claimed for his pension, but, he was refused vide communication dated 1st November, 2001. Petitioner preferred an appeal against PCDA (P), Allahabad for rejecting his claim. Then, Petitioner on 10th September, 2002 made a representation to the National Human Rights Commission. Petitioner was not informed about his appeal, but, his request for pension was rejected. Therefore, petitioner filed a Writ Petition No. 7004 of 2002 at Delhi High Court and prayed that respondents

may be directed to dispose of his appeal against the rejection of disability pension.

18. On 1st November, 2002 Hon'ble High Court was pleased to dispose of the petition directing the competent authority to examine and consider the petitioner's appeal against the rejection of disability pension within two months. The Appellate Committee dismissed the appeal of the petitioner holding that the disability is neither attributable to nor aggravated by the Air Force Service. Hence, petitioner filed this present petition before High Court again and the same has been transferred to us on formation of this Tribunal.
19. The grievance of the petitioner is that he has been wrongly invalidated out of service on the ground that he had HIV and Pulmonary Tuberculosis. It was also contended by the petitioner that he doesn't have AIDS and he has been wrongfully invalidated out of service. It is submitted that the

petitioner was wrongly diagnosed with Pulmonary Tuberculosis. Petitioner also submitted that he doesn't fall in the definition of AIDS as defined by WHO. Merely having HIV with Pulmonary Tuberculosis doesn't mean having AIDS

20. Thereafter, petitioner filed an amended petition praying for setting aside the order of discharge as well as reinstatement with full back wages, allowances, benefits and to provide all medical treatment to the petitioner and his family including OI and ART and Rs.10,00,000/- (Rupees ten lakhs) as compensation also declare the letter/circular No. 44073/MSAC/1(98)/ DGAFMS/DG-IC dated 2nd February, 1998 (annexed as Annexure P-13) be quashed as it is violative of Articles 14, 16 and 21 of the Constitution of India.
21. A written was filed by respondent. Respondents in their written submitted that petitioner was informed about the result of Appellate Committee rejecting his claim for disability

pension vide their letter dated 20th February, 2003. It is submitted that petitioner filed a Writ Petition No. 301 of 2003 praying for quashing the order of the Appellate Committee. The Court was pleased to grant relief to the petitioner to withdraw the said Writ Petition so as to take recourse to the second appeal. But he has filed this petition without waiting for the result.

22. It was also pointed out by the respondents that Petitioner had developed Pulmonary Tuberculosis, which is an indicator/symptom of being HIV positive. The Invalidment Medical Board held on 31st December, 1999 invalidated out the petitioner from service by the impugned order dated 1st February, 2000 under the provisions of Rule 15 (2) (c) of Air Force Rules, 1969 and found him medically unfit for further retention in IAF.

23. It was further pointed out by the respondents that as per guidelines mentioned in the circular dated 5th February, 1993 HIV positive cases with Pulmonary Tuberculosis were to be boarded out of service. Therefore, in pursuance of the aforesaid policy, the petitioner was boarded out.
24. Learned counsel for the petitioner submitted that the decision taken by the Committee was absolutely erroneous. Petitioner was not suffering from the T.B. at all. Though Lt. Col. K.E. Rajan do suspect some spots in the chest and he was advised to go for further x-ray with the competent radiologist and the same was sent to CTC, Pune and Lt. Col. Kamal Pathak opined that petitioner's lung fields are clear.
25. Therefore this was not a case of HIT combined with the Pulmonary Tuberculosis and authorities had gone totally wrong in combining T.B. with HIV and boarded out the

petitioner. We called the doctor from the forces to throw some light on the subject that whether the report given by Lt. Col. Pathak, which clearly says that the petitioner's *lung fields are clear* what does it mean? Doctor after going through the record informed us that the report given by the Radiologist does suggest that petitioner's lungs were clear, therefore, he was not suffering from T.B.

26. Since that being the position, therefore, it appears that the Medical Board has gone wrong in considering that petitioner was HIV with Pulmonary Tuberculosis and they have wrongly boarded out the petitioner. Since the petitioner was not found to be suffering from the T.B., as it appears that his discharge from the service was wrongly advised by the Medical Board.
27. We also gone through the report of the Medical Board on the basis of which the incumbent was discharged. The reason

given in the Medical Board was that (i) *Pulmonary Tuberculosis (R.L.P.S.L.) (011)*; and (ii) *HIV Infection (042)*, and, therefore, they discharged petitioner with 100% disability.

28. In view of the fact that we have found that expert radiologist has clearly opined that lung fields are clear, thereby incumbent was not suffering from T.B. On the basis of the earlier communication and policy decision that in case the incumbent has HIV with Pulmonary Tuberculosis he could have invalidated out from service with category EEE. This appears to be erroneous on the face of it. Since, as it appears that the incumbent's lungs were not infected and he was not suffering from T.B., the order of discharge seems to have been passed on erroneous assessment.
29. Therefore, we set aside the order of discharge and directed that the petitioner may be reinstated and he shall be given all

consequential benefits with full back wages and medical treatment, which is warranted in the present case. Petitioner shall be entitled to interest @ 12% on the arrears of the salary. Petition is allowed. No order as to costs.

[Justice A.K. Mathur]
Chairperson

[Lt. Genl. SS Dhillon]
Member (A)

New Delhi
February 18, 2010