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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Date of Decision: 02.03.2020**
% **W.P.(C) 13807/2019 and C.M. No. 55473/2019**

UDBHAV KUMAR JAIN

..... Petitioner

Through: Mr. Harpreet Singh, Mr. Gagan Kumar Singhal, Ms. Suhani Mathur and Mr. Atul Sharma, Advocates with petitioner in person.

versus

HIGH COURT OF DELHI AND ANR.

..... Respondents

Through: Mr. Sanjoy Ghose, Mr. Rhishabh Jetley and Mr. Naman Jain, Advocates for respondent No.1/ DHC.
Ms. Avnish Ahlawat and Mr. Nitesh Kumar Singh, Advocates for respondent No.2/ GNCTD.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

VIPIN SANGHI, J. (ORAL)

1. We have heard learned counsels for the parties at length and proceed to dispose of the present writ petition.
2. The petitioner has preferred the present writ petition to seek a direction to the respondents to appoint him as a Judicial Officer to the Delhi Judicial Service against the vacancy for which he was declared "selected" vide public notice dated 21.05.2019, with all consequential benefits. He also seeks a direction to the respondents to produce the medical examination record of the petitioner, conducted by Aruna Asaf Ali Government Hospital, Delhi (AAAG Hospital) and Lok Nayak Hospital (LN Hospital).

3. The background facts are that respondent No. 1, i.e. High Court of Delhi invited applications vide notice dated 13.11.2018 for filling up of 50 vacancies in the Delhi Judicial Services (DJS). There was a corrigendum issued on 19.11.2018 in relation to the number of vacancies. The same was revised upwardly to 147. In relation to the General Category, 112 seats were notified and the others were for reserved categories such as SC and ST. The petitioner filled his on-line application as a General Category candidate. The preliminary examination for the said recruitment process was held on 13.01.2019. The petitioner was shortlisted when the results were declared on 02.02.2019. Thereafter, he appeared for the main examination conducted on 09.02.2019 and 10.02.2019. Vide notice issued on 30.04.2019, he was declared qualified – having secured 447 marks out of 850 marks. The petitioner was called for viva-voce examination to be held on 14.05.2019 before an interview panel of three Hon'ble Judges of this Court. On 21.05.2019, vide a public notice, this Court released the list of selected candidates in order of merit on the basis of their performance in the written examination and viva-voce. The petitioner was placed at serial No. 50 with a total score of 563 marks out of 1000 marks along with 125 other selected candidates. The petitioner accepted the offer of appointment made to him. Thereafter, the petitioner was called for medical examination. He presented himself for medical examination at AAAG Hospital, Delhi on 17.07.2019. The petitioner's case was referred to the Nephrologist at LN Hospital to seek his opinion regarding the petitioner's fitness and for detailed examination post renal transplant. The petitioner has disclosed that he had undergone renal transplant, which was successfully conducted on 11.05.2015 and since then, the petitioner has been regularly following up with his doctor, namely,

Dr. (Prof.) Ashwani Gupta, Vice Chairman, Nephrology, Sir Ganga Ram Hospital and he is regularly receiving medications for the same. In pursuance of the reference made to the Nephrologist at LN Hospital, he was called for medical examination on 05.08.2019. It appears that the petitioner was not aware of the report prepared by the Nephrologist when he filed the petition. Since the petitioner did not receive any definite news with regard to his appointment, he made a representation and the same was followed up by a reminder. In this background, he has preferred this petition.

4. The case of the petitioner is that despite his renal transplant—conducted way back in 2015, he is leading a normal life and is taking the prescribed medications therefor. The petitioner submits that the said transplant could not be claimed to be a reason to medically disqualify him, since the said transplant and the petitioner's present medical condition has absolutely no bearing on the discharge of the duties and responsibilities that the petitioner would be required to perform as a Judicial Officer.

5. The writ petition was taken up by this Court on 24.12.2019. This Court had then directed that the filling up of existing vacancies, if any, in relation to the examination in question would be subject to further orders in the writ petition. On 24.01.2020, this Court noticed the fact that the petitioner was firstly medically examined on 17.07.2019 along with other candidates and thereafter, on 05.08.2019, on the reference made by the AAAG Hospital. It appears that in the order dated 24.01.2020, it was incorrectly noticed that the said medical examination was on the directions of the Committee of this Court. It also appears that this Court also required the medical re-examination of the petitioner on 24.10.2019. However, this

Court was informed, that the petitioner had not been called for medical re-examination in pursuance of the directions issued by the Committee of this Court. Consequently, we directed respondent No. 2 to produce the medical examination reports of the petitioner and to ensure that the petitioner is medically examined in terms of the directions of the Committee of this Court issued on 24.10.2019.

6. Today, learned counsel for the respondent No. 1 has tendered in Court a note along with a compilation of documents. The same shows that the petitioner was medically re-examined on 07.02.2020 at Dr. RML Hospital, New Delhi in the department of Nephrology. The medical examination report prepared by Dr. RML Hospital, Department of Nephrology reads as under:

“MEDICAL EXAMINATION REPORT

A meeting has been conducted on this day in Room No: - 8 in Addl. MS. Dr. Punam Kapur's chamber. All proposed members Dr. Himansu Sekhar Mahapatra, Prof & Head (Nephrology), Dr. Lalit Pursnani, Associate Professor (Nephrology), Dr. MuthukumarB., Assistant Professor (Nephrology) attended it. Candidate for examination Mr. Udbhav Kumar Jain was present.

Mr. Udbhav Kumar Jain is a case of Post Renal Transplant (D.O.T.x – 11th May, 2015, unrelated donor, basic disease – unidentified, hypertensive since 2011). Now, he is taking three antihypertensive medication, anti diabetic drug along with all three immunosuppressive medications (Tacrolimus, Mycophenolate & steroid).

He is having stable renal function for last 5 years. Last S. Creatinine is 1.1 mg%, blood sugar controlled. According to Govt. of India Rules, being renal transplant candidate &

hypertensive, he is labeled as “UNFIT” for above said post.”
(emphasis supplied)

7. This report was forwarded to AAAG Hospital, which in turn, prepared its own medical report declaring the petitioner to be *“Unfit on account of Renal Transplant as declared by board of Nephrologist at Dr. RML Hospital and Copy Enclosed”*.

8. Rule 30 of the Delhi Judicial Service Rule, 1970 prescribes that a candidate shall upon selection undergo a test for medical fitness before appointment. The said rule reads as follows:

“30. Candidates, other than those appointed at the initial recruitment, shall on selection undergo a test for medical fitness before appointment and shall pass during the period of probation such departmental examinations as may be prescribed”

9. Rule 33 of the said rules provides for residuary matters and the same reads as follows:

*“33. **RESIDUARY MATTERS:** In respect of all such matters regarding the conditions of service for which no provision or insufficient provision has been made in these rules, the rules or orders, for the time being in force, and applicable to Government Servants holding corresponding posts in connection with the affairs of the Union of India shall regulate the conditions of such service.”*

10. Clause 17 of Appendix III of the Civil Services Examination, (CSE) Rules regarding *“Regulations relating to the physical examination of candidates”*, inter alia, provides that all candidates having transplanted organs should be declared “unfit”, except corneal transplant. It is on the

basis of the said rule, that the petitioner has been declared medically “unfit” by Dr. RML Hospital and that report has been adopted by AAAG Hospital in its certificate dated 07.02.2020. Pertinently, neither of these reports state that the reasons for unfitness of the petitioner is that he would not be in a position to discharge the nature of duties that he would be expected to perform as a Judicial Officer, on account of the fact that he has undergone renal transplant in the year 2015.

11. Learned counsel for the petitioner points out that the aforesaid Clause 17 of Appendix III of the CSE Rules was framed way back in the year 1964, when medical science had not progressed enough to permit organ transplant – with as much success and certainty, as has been achieved with progress in medical research & development over the decades. Mr. Singh submits that the aforesaid clause is *archaic* and divorced from the realities of life. He submits that the Parliament has enacted the Transplantation of Human Organs Act, 1994 to regulate organ transplant in the wake of organ transplant becoming medically feasible. Mr. Singh submits that the petitioner – even as per the medical report prepared by Dr. RML Hospital, is having “*stable renal function for the last five years. The last S Creatinine is 1.1 mg % mark blood sugar is controlled*”. Despite the medical parameters of the petitioner having been found to be within normal limits, he has been declared medically ‘unfit’ only, on account of the fact that he has undergone organ transplant.

12. Mr. Singh has placed reliance on the decision of this Court in ***Faizan Siddiqui Vs. Sashastra Seema Bal***, 2011 (124) DRJ 542 (DB). In this case, the petitioner – a female candidate who had applied for employment with

the SSB, was declared medically unfit on account of her suffering from “*complete Androgen Insensitivity Syndrome*” for which she had undergone treatment called ‘*Gonadectomy*’. This Court held the said declaration of unfitness to be bad, since the medical condition of the petitioner in that case had no relevance to the nature of functions and duties that she was required to perform upon her appointment as a Constable (GD). This Court had, *inter alia*, observed in this decision as follows:

“88. The standards prescribed by the respondents clearly prescribe that any present medical defect or malformation that can reasonably impair the carrying out of the stated job description is certainly valid, but anything more is clearly discriminatory and unreasonable.

89. 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.

90. The record placed before this court also shows that the respondents have noted that one of the reason for rejecting the petitioner's candidature was that the persons diagnosed with CAIS cannot bear children naturally which “may lead to adjustment problems in latter life”.

91. A reason for exclusion from service must bear a connection with the prime consideration of fitness for the service. Infertility is certainly not a listed ground for rejection of an individual's candidature from the service. No such condition has been stipulated for men or women candidates. The respondents rightly do not suggest that CAIS related infertility status plays any part in determination of the person's fitness or capacity for performing the assigned duties with the SSB. That this fact and

issue is irrelevant is apparent from the reality that the respondents also do not raise this question when male candidates are be examined for fitness to join the service. In this background, it has to be held that infertility or inability to bear children normally plays no role at all in determining fitness for service.

92. The petitioner places reliance on several certificates of merit secured by her in sports competitions in which she had participated while at the Suman Singh Inter College at Allahabad in the year 2003. This was barely one year after the said surgery.

93. In fact, it is an admitted position that the petitioner has successfully completed the physical efficiency test. The record produced by the respondents before us contains the marks secured by the candidates. This record discloses that even in the physical efficiency test, written test and interview conducted as part of the recruitment procedure, the petitioner was placed at the top in the merit list which was drawn up by the respondents.

94. **The medical examinations of the petitioner by the two boards conducted by the respondents or even the highest authority which have examined the same, do not state that the petitioner was physically unfit for performance of any of the duties which may be assigned to a mahila personnel in the SSB.** The respondents also do not rely on any scientific findings which even remotely suggest that a person who was affected with Complete Androgen Insensitivity Syndrome ("CAIS" hereafter) has to be unfit to perform the typical duties which would be assigned to the mahila personnel in this force. Dr. K. Bhushan rests his conclusions on the baseless presumption that the petitioner would be rendered unfit in the future.

95. The respondents thus clearly do not conclude that persons effected with CAIS are unable to perform the typical duties entrusted to mahila SSB personnel which would have been the relevant consideration for rejecting the petitioner's

candidature. The conclusions of the respondents therefore do not satisfy the test of any nexus let alone a rational nexus to the objective sought to be achieved.

96. There is no material at all to arrive at a conclusion that such condition would have rendered the petitioner incapable of performing the assigned duties.”(emphasis supplied)

13. Mr. Singh has also placed reliance on the decision of the Bombay High Court in ***Ranjit Kumar Rajak Vs. State Bank of India***, 2009 SCC OnLine Bom 732 : (2009) 5 Bom CR 227. In this case as well, the petitioner had been declared medically ‘unfit’ to be appointed as a Probationary Officer in the respondent bank on account of his having undergone renal transplant. The Bombay High Court posed the question which arose for its consideration in the following words:

“2. 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.””

14. The Division Bench went on to observe as follows:

“39. 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 51-A(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. (emphasis supplied)

40. 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.

41. 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.” (emphasis supplied)

15. The submission of Mr. Singh is that, in the present case, the nature of job that the petitioner would be expected to perform upon his appointment as a Judicial Officer, would require him to function at the place of his posting in a Court/ office environment which does not entail excessive physical exercise.

16. He has also placed reliance on the decision of a learned Single Judge of Rajasthan High Court in ***Desh Deepak Dhamija Vs. Union Bank of India & Ors.***, 2015 (2) RLW 1134 (Raj), which was affirmed by the Division Bench in ***Union Bank of India & Ors. Vs. Desh Deepak Dhamija***, 2016 SCC OnLine Raj 4704. In this case too, the candidate had been declared unfit on the ground that he is a patient of chronic kidney disease and was on CAPD. The said candidate was required to undergo dialysis thrice a day. The Court came to the conclusion that despite that being the position, he was fit to execute normal banking duties for 8-10 hours a day. Consequently, he was declared to be medically fit since his medical condition was not found to interfere with his normal functioning as a Probationary Officer upon his appointment.

17. Mr. Singh has also placed reliance on the literature downloaded from the Internet to submit that after a kidney transplant the patient can lead a normal life. The relevant extract from the said download reads as follows:

“How soon will I be mobile after a transplant?”

It is important to get mobile as soon as possible after a transplant in order to reduce the risk of thrombosis in the veins in your legs. So the nursing staff will usually get you out of bed the day after the transplant, even if it is just sitting in a chair.

Once the drain, catheter and intravenous drips, have been removed - generally within five days of your transplant - you should be walking around the ward comfortably.

*In general, it is important for you to keep fit and healthy, and exercise is an essential component of your recovery. This exercise could merely be walking outside rather than any planned fitness activity. **Exercise will aid your recovery as well as maintaining your health, and there is no reason why you could not get back to normal activity by six weeks after transplantation, provided your post-transplant recovery has not been difficult. In the long-term, even strenuous exercise should not cause you any harm.** However contact sports such as rugby would best be avoided since there is more risk of injury to the transplanted kidney than to your own kidneys due to its position.* (emphasis supplied)

When can I return to work?

*The whole purpose of transplantation is to allow you to lead a normal life, which includes the ability to work and earn a living. The precise time at which you can return to (or search for) work depends on the type of job you have, the length of time you are in hospital or receive anti-rejection treatment and how well you have coped with transplantation and its aftermath. **If you have a desk job which does not involve heavy physical work, then you can return to work within six weeks to two months following transplantation.** If you have a physical job, then you may need three months before returning to work. If you have a physically demanding job, employers will often be sympathetic and ease you back in with a less demanding job initially.*” (emphasis supplied)

18. On the other hand, the submission of learned counsel for the respondent is that since Rule 33 of the Delhi Judicial Service Rules specifically provides that in relation to the residuary matters, the rules of the Union of India would be attracted, and since there is no specific rule relating

to medical fitness of the candidates who apply for DJS, the respondent is bound to follow the rules contained in Clause 17 of Appendix III of the CSE Rules. He further submits that the respondent is guided by the medical certificates issued by the Competent Authorities, which in the present case, were the Dr. RML Hospital and the AAAG Hospital.

19. Having heard learned counsel for the parties and perused the record, we are inclined to allow the petition. It is evident that the petitioner – who underwent renal transplant in the year 2015, has remained stable and normal for the last five years. The petitioner has also placed on record the certificate issued by his treating doctor, namely Dr. Ashwini Gupta, Senior Nephrologist, Department of Nephrology, Sir Ganga Ram Hospital, which certifies that the petitioner had undergone kidney transplant on 11.05.2015 and since then, he has been on regular follow-up with him and is maintaining normal renal function. It is also certified that he can perform normal duties and he has been advised medicines during his lifetime. Even the medical certificates issued by Dr. RML Hospital and AAAG Hospital have not stated that the petitioner is medically ‘unfit’ on account of him not being able to discharge the duties of a Judicial Officer due to his medical condition. It is clear to us that Clause 17 of Appendix III of the CSE Rules, which, inter alia, provides that all candidates having transplanted organs should be declared ‘unfit’ except corneal transplant, is an archaic rule, which cannot stand in the wake of medical advancements which have taken place over the decades and since the said rule was framed in the year 1964. The same is extremely widely worded and proceeds on the assumption that persons who undergo any organ transplant (except corneal transplant) cannot

lead a stable, fruitful and healthy normal life. This assumption can no longer be justified in the light of the medical advancements made over the decades. As rightly observed by the Bombay High Court in ***Ranjit Kumar Rajak*** (supra), right to life and liberty of a person cannot be denied or depleted only on account of his medical condition, when such medical condition is not such as to interfere with his normal functioning on the post for which he has offered his candidature, and he has been found to be otherwise competent for selection.

20. Keeping in view the ratio laid down by the several decisions relied upon by the petitioner and taken note of hereinabove, and in view of the medical literature produced by the petitioner, we allow the present petition. We, accordingly, direct the respondents to not to reject petitioner's candidature only on account of his being declared medically 'unfit' by the communications taken note of hereinabove issued by the AAAG Hospital and LN Hospital. Upon his appointment, the petitioner would retain his notional seniority along with his other batchmates. He would be deemed to have joined his post along with his other batchmates, though he would not be entitled to any back wages.

VIPIN SANGHI, J.

SANJEEV NARULA, J.

MARCH 02, 2020

B.S. Rohella