

X vs Union Of India & Ors. on 28 March, 2025

Author: Navin Chawla

Bench: Navin Chawla

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 13.01.
Pronounced on: 28.03.2

+ W.P.(C) 4736/2023 & CM APPL. 29170/2024
HOSHIAR SINGH

.....Petitioner
Through: Mr.Abhay Kr.Bhargava,
Mr.Satyarth Sinha, Advs.

versus

UNION OF INDIA & ORS.
Through:

.....Respon
Mr. Ajay Jain, SPC with M
M. N. Mishra, Mr. Manoj K
Gautam and Mr. Harshit Ba
Advs.

+ W.P.(C) 13547/2023
X

.....Peti
Through: Ms.Ankita Gautam, Mr.Hars
Gautam, Advs.

versus

UNION OF INDIA & ORS.
Through:

.....Respond
Mr. Kavindra Gill, SPC fo
UOI

+ W.P.(C) 4556/2023
SACHIN

.....P
Through: Mr.Abhay Kr. Bhargava &
Mr.Satyarth Sinha, Advs.

versus

UNION OF INDIA & ORS.
Through:

.....Respon
Mr.Vivekanand Mi

Signature Not Verified

Digitally Signed W.P.(C). 4736/2023 & Connected matters

By:RENUKA NEGI

Signing Date:28.03.2025

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SPC/UOI.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

HON'BLE MS. JUSTICE SHALINDER KAUR

JUDGMENT

1. These petitions have been filed by the respective petitioners, challenging the Impugned Orders by which the petitioners, as far as the W.P.(C) 4736/2023 and W.P.(C) 13547/2023 are concerned, have been denied promotion, while in W.P.(C) 4556/2023, the petitioner's appointment has not been confirmed and has been cancelled.

2. Since all the three petitions are based on common submissions by the learned counsels for the parties, and raise similar questions of law, they are being disposed of by way of this common judgment.

3. In W.P.(C) 4556/2023, however, certain additional issues also arise, which shall be dealt with separately in this judgment. W.P.(C) 4736/2023

4. As far as W.P.(C) 4736/2023 is concerned, the brief background of facts in which the present petition arises is that the petitioner was enrolled in the Border Security Force („BSF) as a Constable (RO) on 28.08.1989. He underwent Basic Training at STC BSF Jodhpur (Rajasthan) with effect from 03.10.1989 to 23.12.1989, however, he failed to clear the ORL Grade-III Course and was subsequently remustered/appointed in the Communication Setup with effect from 19.10.1990. After passing the ORL Grade-III Course (Serial No.03) with a „C' grading from STS BSF Bangalore, he was remustered as NK (RO) with effect from 16.08.1991. The rank of NK (RO) was later merged with the rank of HC (RO) with effect from 10.10.1997. The petitioner also qualified the following essential career courses while being in the SHAPE-I Medical Category: -

Srl.No.	Name of course	Grading	Year
1.	ORL Gde-III Course Srl. No.03	„C' grading	1991
2.	ORL Gde-II No.210 with	Srl „CZ' grading	2005
3.	Map Reading Std 1st	„Pass'	2004

5. The petitioner was also granted the following financial upgradations in the higher pay grade admissible to him under the ACP and the MACP Schemes: -

(i) 1st Financial up gradation under ACP Scheme w.e.f. 27.03.2005 in the pay scale of Rs.4000-100-6000/- i.e. pay of ASI (RO).

(ii) 2nd Financial up gradation under MACP Scheme w.e.f. 16.08.2011 in the pay scale of Rs.9300-34800/- plus Grade pay Rs.4200/- i.e. pay of SI(RO).

(iii) 3rd Financial up gradation under MACP Scheme w.e.f. 16.08.2021 in the Pay Matrix Level -7 i.e. Pay Level of INSPR (RO).

6. The petitioner, while being posted at the SHQ BSF Cooch Behar, was referred to SSKM Hospital, Kolkata, where he was diagnosed with "Mediastinal Tuberculosis with Acquired Immunodeficiency Syndrome („AIDS) and oral candidiasis" and was advised to continue Antiretroviral Therapy („ART) and regular follow-ups. On 05.02.2007 and 06.02.2007, the petitioner's sputum sample for the Acid Fast Bacillus („AFB) test was found to be negative for three consecutive samples. He remained under regular review at the ART Centre at his respective place of posting and had no complaints of fever, diarrhoea, oral candidiasis or loss of weight. However, on 01.04.2016, during a routine investigation by the Medical Board, the Fasting Blood Sugar („FBS) of the petitioner was found to be 136 mg/dl, and he was diagnosed with Diabetes Mellitus („DM) Type-II. The HbA1C test was conducted on 05.08.2021, and recorded a result of 5.5%, with no symptoms of diminished vision or other organ damage.

7. The petitioner was initially placed by the Chief Medical Officer, Ftr HQ BSF Hospital, Kadamtala under a Temporary Low Medical Category of S1H1A1P3(T-48) E1, with effect from 21.12.2005, as a case of suffering from "Human Immunodeficiency Virus Infection"

(in short, „HIV). During the Review Medical Board, the petitioner was placed under a Permanent Low Medical category of S1H1A1P3(P)E1 with effect from 26.04.2007 for a period of 96 weeks. The petitioner was again categorized as S1H1A1P3(P) E1 with effect from 25.03.2010 for another 96 weeks as a case of "Retroviral Disease". In the next Review Medical Board, the petitioner was placed under a temporary Low Medical category of S1H1A1P2(T-48)E1 for a period of 48 weeks. He was later placed under permanent Low Medical Category of SIH1A1P2E1 with effect from 01.04.2014 for a period of 96 weeks, after being diagnosed with "the effects of retroviral disease (AIDS)". His medical categorization was further extended for a period of two years with effect from 04.04.2016 due to his condition of "Retro Viral Disease (AIDS), Mediastinal Tuberculosis with Oral Candidiasis with DM-II with Dyslipidemia", which was continued by another period of two years from 14.09.2018 as a case of suffering from "Immuno Compromised State (On ART) with Diabetics Mellitus Type-II".

8. In the Review Medical Board held on 09.11.2021, the petitioner was diagnosed as "Immuno Compromised state (On ART)" and controlled case of "Diabetic Mellitus Type-II" and placed under Permanent Low Medical Category of S1H1A1P2E1 for "Immuno Compromised state (On ART)" with effect from 09.11.2021 for two years, and S1H1A1P1(O-24)E1 for Diabetic Mellitus Type-II with effect from 09.11.2021 for a period of six months.

9. In the Departmental Promotion Committee („DPC) held on 09.12.2022, the petitioner was declared „unfit for promotion from the post of HC(RO) to the post of ASI(RO) due to the petitioner being in Permanent Low Medical Category of S1H1A1P2E1 for "Immuno Compromised State (On ART)". Aggrieved of the same, the petitioner filed a Writ Petition, being W.P.(C) 1405/2023, before this Court.

10. By its Judgment dated 03.02.2023, this Court directed the respondents to consider the said Writ Petition as a representation of the petitioner and decide the same within a period of four weeks. The Court also granted to the petitioner, liberty to challenge the decision of the respondents, if he was aggrieved of the same.

11. The respondents rejected the representation of the petitioner vide an Order dated 28.08.2023, observing that the petitioner, being in the low Medical Category, S1H1A1P2E1 and not in SHAPE-1 Medical Category as required, was not entitled to any relaxation and was found „unfit for promotion as he could not perform duties at difficult and solitary locations where ART facilities are not available.

12. Aggrieved by the above order, the petitioner has filed the present petition.

W.P.(C) 13547/2023

13. In W.P.(C) 13547/2023, the petitioner was enlisted in the Central Reserve Police Force („CRPF) on 07.10.2005 as a Constable (CT/Bug). He successfully completed the Head Constable Promotional Course Sl. No. 37 at CTC, CRPF, Gwalior (Madhya Pradesh), and was declared passed with an "AX" grading. His name was brought on the approved list for promotion from the post of Constable to the post of Head Constable, however, could not be promoted due to the Permanent Nature of the Low Medical Category. The details of his medical examination are as under: -

S/No. Date of Examination Final Categorization

1. 08/01/2022 SHAPE-II (T-24) Due to Retrovires (+) on ART since 2017.

2. 19/07/2022 SHAPE-II P(2) (RME)

3. 10/01/2023 SHAPE-II P2(P) due to PLWHA.

14. Aggrieved by the same, the petitioner has filed the present petition.

W.P.(C) 4556/2023

15. As far as the W.P.(C) 4556/2023 is concerned, the petitioner, by an Order dated 20.09.2022 therein was offered appointment to the post of Constable (GD) in the Border Security Force („BSF). The appointment order stated that the petitioner has been temporarily enrolled as a Constable (GD) and that his appointment was provisional, subject to, inter alia, a probation period

of two years, which could be extended by the Appointing Authority for such period or periods not exceeding one year, with reasons to be recorded in writing. It was further stipulated that during the period of probation, if the Appointing Authority considers that the petitioner is not likely to become an efficient member of the Force due to any reason, his services could be terminated without assigning any reason or without any advance notice.

16. On 26.10.2022, the petitioner, along with the other newly enrolled Recruit Constables (GD), was sent to STC BSF Bangalore for undergoing basic recruitment training. While undergoing the training, the petitioner was diagnosed as HIV positive and he was declared medically „unfit for the basic training by the Medical Officer at STC BSF, Bangalore.

17. On 09.01.2023, the petitioner was examined by a Review Medical Board at the Composite Hospital, BSF, Jodhpur, where he was found to be suffering from PLHA (People Living with HIV AIDS). He was declared „unfit for retention in the BSF in view of the requirement of antiretroviral medications on a lifelong basis. It was stated that due to his said condition, the petitioner is unlikely to become an efficient member of the Force.

18. Based on the above, a Show Cause Notice dated 06.02.2023 was issued to the petitioner, asking him to show cause as to why he should not be removed from the BSF under Section 11(2) of the Border Security Force Act, 1968 (hereinafter referred to as, „BSF Act), read with Rule 13 of the Border Security Force Rules, 1969 (hereinafter referred to as, „BSF Rules), and Part II, Condition No.2 of the Enrollment Form. The petitioner replied to the same vide a letter dated 09.03.2023.

19. The respondents, relying upon the "Circular-cum-SOP regarding relegation and weeding out of recruits" dated 28.01.2003 (hereinafter referred to as, „SOP), vide the Impugned Order dated 31.03.2023, removed the petitioner from service with effect from 31.03.2023 under Section 11(2) of the BSF Act read with Rule 13 of the BSF Rules, and Condition No.2, Part II of the Enrollment Form, stating that the petitioner had not completed the basic training in two years of service in the Force.

20. Aggrieved by the above, the petitioner has filed the present petition.

SUBMISSIONS OF THE LEARNED COUNSELS FOR THE PETITIONERS:

21. The learned counsels for the petitioners have contended that merely because the petitioners have been found to be HIV positive, the same cannot be a ground for denying promotion to them or removing the petitioners from service. They have placed reliance on the judgment of the High Court of Punjab & Haryana in Bishamber Dutt v. Union of India & Ors., 2010 SCC OnLine P&H 11474; the High Court of Allahabad in Shailesh Kumar Shukla v. Union of India & Ors., 2023 SCC OnLine All 429; and the order dated 14.12.2018 passed by the High Court of Uttarakhand in Special Appeal No.911/2018 titled Pancham Singh v. Union of India & Ors.

22. They further submit that the denial of promotion/appointment to the petitioners solely on the ground of their HIV positive status is also violative of the provisions of the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control),

Act, 2017 (hereinafter referred to as, „HIV Act). SUBMISSIONS OF THE LEARNED COUNSELS FOR THE RESPONDENTS:

23. On the other hand, the learned counsels for the respondents submit that as far as W.P.(C) 4736/2023 and W.P.(C) 13547/2023 are concerned, the petitioners were not found in SHAPE-I Medical Category. Placing reliance on paragraph 4.13 of the Standing Order No.04/2008, they submit that for promotion, it is an essential condition that all combatised personnel must be in SHAPE-I Medical Category. They submit as the petitioners in W.P.(C) 4736/2023 and W.P.(C) 13547/2023 were not in SHAPE-I Medical Category, they were rightly denied promotion.

24. As far as the petitioner in W.P.(C) 4556/2023 is concerned, the learned counsel submits that the petitioner therein had been appointed only on probation, and it was a condition of appointment that in case the Appointing Authority finds that the petitioner is not likely to become an efficient member of the Force due to any reason, his services can be terminated without assigning any reason or without providing any advance notice. He submits that the respondents, exercising their power under Rule 10(2) of the BSF Rules, removed the petitioner from service as the Medical Board had opined that due to his medical condition, the petitioner was permanently „unfit for retention in the BSF and unlikely to become an efficient member of the Force as he required Antiretroviral Therapy on a lifelong basis. Reliance in this regard has also been placed on the SOP dated 20.01.2003.

25. The learned counsels for the respondents have also placed reliance on the judgments of the Supreme Court in Air Commodore Naveen Jain v. Union of India & Ors., 2019 SCC OnLine SC 1284; Tinku v. State of Haryana & Ors., 2024 SCC OnLine SC 3292; and Union of India v. Devendra Kumar Pant & Ors., 2009 SCC OnLine SC 1273, to submit that a policy decision of the Government cannot be interfered with.

26. They further submit that the judgments relied upon by the learned counsels for the petitioners, being not binding on this Court, should not be relied upon to give relief to the petitioners.
ANALYSIS AND FINDINGS:

27. We have considered the submissions made by the learned counsels for the parties.

28. From the above narration of facts, what would be evident is that the petitioners in W.P.(C) 4736/2023 and W.P.(C) 13547/2023 have been denied promotion as they were found to be suffering from HIV, because of which they were not placed in SHAPE-I Medical Category. On the other hand, the petitioner in W.P.(C) 4556/2023 has been denied appointment to the post of Constable (GD) as he was again found to be suffering from HIV and, therefore, has not been placed in SHAPE-I Medical Category.

29. Before we consider the Standing Order and the SOP on the basis of which the petitioners have been denied promotion/appointment, it would be relevant to note the provision of the HIV Act.

30. The HIV Act has been promulgated to provide for the prevention and control of the spread of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) and for

the protection of the human rights of persons affected by the said virus and syndrome and for matters connected therewith or incidental thereto. It has been promulgated as India is a signatory to the Declaration of the Committee on Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (2001).

31. Section 3 of the HIV Act provides that no person shall discriminate against a „Protected Person on any ground, including the denial of, or termination from, employment or occupation, unless the conditions stipulated therein are met.

32. Section 3 of the HIV Act is quoted herein below:

3. No person shall discriminate against the protected person on any ground including any of the following, namely:--

(a) the denial of, or termination from, employment or occupation, unless, in the case of termination, the person, who is otherwise qualified, is furnished with--

(i) a copy of the written assessment of a qualified and independent healthcare provider competent to do so that such protected person poses a significant risk of transmission of HIV to other person in the workplace, or is unfit to perform the duties of the job; and

(ii) a copy of a written statement by the employer stating the nature and extent of administrative or financial hardship for not providing him reasonable accommodation;

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

(c) the denial or discontinuation of, or, unfair treatment in, healthcare services;

(d) the denial or discontinuation of, or unfair treatment in, educational, establishments and services thereof;

(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public, whether or not for a fee, including shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads, burial grounds or funeral ceremonies and places of public resort;

(f) the denial, or, discontinuation of, or unfair treatment with regard to, the right of movement;

(g) the denial or discontinuation of, or, unfair treatment with regard to, the right to reside, purchase, rent, or otherwise occupy, any property;

(h) the denial or discontinuation of, or, unfair treatment in, the opportunity to stand for, or, hold public or private office;

(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a person may be;

(j) the denial of, or unfair treatment in, the provision of insurance unless supported by actuarial studies;

(k) the isolation or segregation of a protected person;

(l) HIV testing as a pre-requisite for obtaining employment, or accessing healthcare services or education or, for the continuation of the same or, for accessing or using any other service or facility:

Provided that, in case of failure to furnish the written assessment under subclause (i) of clause (a), it shall be presumed that there is no significant-risk and that the person is fit to perform the duties of the job, as the case may be, and in case of the failure to furnish the written statement under sub-clause (ii) of that clause, it shall be presumed that there is no such undue administrative or financial hardship.

33. The term „Protected Person” is defined in Section 2(s) of the HIV Act as under: -

2. In this Act, unless the context otherwise requires:

xxx

(s) „protected person” means a person who is--

(i) HIV-Positive; or

(ii) ordinarily living, residing or cohabiting with a person who is HIV-positive person;
or

(iii) ordinarily lived, resided or cohabited with a person who was HIV- positive.

34. The term „Discrimination” is defined in Section 2(d) of the HIV Act as under:

2. In this Act, unless the context otherwise requires:

xxx

(d) **Discrimination** means any act or omission which directly or indirectly, expressly or by effect, immediately or over a period of time,--

(i) imposes any burden, obligation, liability, disability or disadvantage on any person or category of persons, based on one or more HIV-related grounds; or

(ii) denies or withholds any benefit, opportunity or advantage from any person or category of persons, based on one or more HIV-related grounds, and the expression **Discriminate** to be construed accordingly.

Explanation 1.--For the purposes of this clause, HIV-related grounds include--

(i) being an HIV-positive person;

(ii) ordinarily living, residing or cohabiting with a person who is HIV-positive person;(iii) ordinarily lived, resided or cohabited with a person who was HIV-positive.

Explanation 2.--For the removal of doubts, it is hereby clarified that adoption of medically advised safeguards and precautions to minimise the risk of infection shall not amount to discrimination.

35. A combined reading of the above provisions would show that in terms of Section 3 of the HIV Act, protection is granted to a person, who is found to be HIV-positive, from being discriminated against in matters of employment, that is, from being subjected to any disability or disadvantage, denial of, or termination from employment or occupation, based on one or more HIV-related grounds. For purposes of termination from employment, the employer must obtain a written assessment of a qualified and independent healthcare provider that such protected person „posses a significant risk of transmission of HIV to other person in the workplace, or is unfit to perform the duties of the job and certify „the nature and extent of administrative or financial hardship for not providing him reasonable accommodation'.

36. The term „Reasonable Accommodation is defined in Section 2(t) of the HIV Act as under:-

2. In this Act, unless the context otherwise requires:

xxx

(t) **Reasonable accommodation** means minor adjustments to a job or work that enables an HIV-positive person who is otherwise qualified to enjoy equal benefits or to perform the essential functions of the job or work, as the case may be.

37. Therefore, the employer must also show the administrative or financial hardship for not providing a protected person with some minor adjustments to a job or work so as to enable such person to enjoy equal benefits or to perform essential functions of the job.

38. The respondents, in their Medical Classification for HIV- positive personnel, have categorised HIV/ AIDS cases as under: -

□(i) HIV/AIDS CASES Individuals who are only HIV positive but asymptomatic will be categorized P2 & required to be observed periodically. Those who are HIV positive and symptomatic with or without opportunistic infection (AIDS disease), shall be assessed on their physical/ medical condition and placed in P3 permanent if ambulatory to facilitate continued ART, provided that they are fully co-operative with management plan. If the disability percentage goes beyond 50%, individual will be placed in P5.

Vide MHA UO letter No.1/45024/1/2008-Pers.II dated 29th Oct 2008 and circulated by Med Dte BSF vide letter No. 13/69/08-Med/BSF/10330-700 dated 6th Nov 2008 the following conditions of HIV will be categorized as mentioned against each :-

Condition	Category	Employability Restriction
HIV positive, P-1 Asymptomatic, Not on ART, CD4, CD8 counts normal, other parameters like viral load Norm		Fit for all duties anywhere
Chapter-2 HIV positive, P-2 Weight Loss more than 10%, CD4 count > 200/ microliter, CD8 counts within normal range, TLC > 1200/cmm, Minor muco-		Fit for all duties anywhere except at difficult and solitary locations, preferably where ART facilities are available.
cutaneous manifestations; on or not on ART HIV positive, P-3 Weight Loss more than 10%, CD4 count < 200/ microliter, viral		Fit for sedentary duties only and only at locations, where advanced medical facilities

load more than 50,000 copies, Unexplained chronic Diarrhoea / fever more than one month; Opportunistic infections (1) Pulmonary TB (2) Oral Thrush (3) Herpes Zoster more than 1 month (4) Leukoplakia etc; on ART	are available
Hospitalization/on P-4 leave due to HIV related diseases/ AIDS	Temporary unfit for Force duties
Unsatisfactory response to ART, CD4 count less than 200 cells/microliter, HIV wasting syndrome, Disabling Neurological/ Psychiatric problems, Disseminated Tuberculosis, Poor physical endurance, Malignancies	P-5 Permanently Unfit for any type of service, invalidation

associated with
AIDS, Functional
disability more
than 20

39. For the purposes of denying promotion, the respondents have placed reliance on paragraph 4.13 of the Standing Order No.04/2008 dated 15.12.2008, which reads as

follows: -

¶4.13 Mandatory for the purpose of promotion Medical Category SHAPE-I will be an essential condition for promotion of all combatised personnel in all groups/ranks/cadres in the CPMFs. In case of those whose illness is of permanent nature and who are not SHAPE-I, they will be considered for promotion by DPC but will be declared unfit for promotion, even if they are otherwise fit for promotion. In case of those personnel, whose illness is of temporary nature, after considering their cases for promotion along with others, if they are otherwise fit, the DPC will grade them as 'Fit for promotion' subject to attaining SHAPE-I medical category. As and when they regain the SHAPE-I medical category, they will be promoted as per recommendations of DPC. But they will not be entitled to back wages. However they will retain their seniority.

40. A reading of the above would show that for the promotion of all "Combatised Personnel" in all groups/ranks/cadres in the Central Armed Police Forces, the Medical Category of SHAPE-I is essential.

The respondents have contended that as the petitioners in W.P.(C) 4736/2023 and W.P.(C) 13547/2023 were not in SHAPE-I medical category, they could not have been granted promotion in view of the above stipulation.

41. The High Court of Allahabad, in Shailesh Kumar Shukla (supra), considered the same plea of the respondents and the provisions of the Standing Order, and held as under: -

¶55. Perusal of the Annual Medical Examination dated 17.05.2013 reveals that the grading of the medical condition of the appellant was S-I, H-I, A-I, P-2, E-I, which reflects that the appellant was found to lack only 'P' factor relating to physical capacity. However, 'P-2' as contained in Clause 22.4 of Part-IV of the Standing Order No. 04/2008, which deals with procedure for medical categorization, corresponds to 'Fit for duties not requiring severe stress' in the tabular chart. The said categorization is extracted as follows:

Numerical Functional Employability Grading Capacity limitations P-2 Has moderated Fit for duties physical not requiring capacity and severe stress.

stamina.	May have
Suffered from	restrictions in
constitutional	employability
metabolic/infective disease	at high altitude
operative procedures,	(above 2,700
but now well	meters/9,000
stabilized.	feet in hilly
	terrain and
	extreme cold
	areas)

56. The aforesaid grading of medical

condition of the appellant indicates that although he has been placed in SHAPE-2, but he is physically fit for duty and the employability limitation indicates that he may have restriction in employability at high attitude.

57. This Court finds that CRPF was sensitive and alive to the fact that HIV positive recruits could not be treated differently from their other recruits, who did not suffer from this disability as far as promotion and other conditions of the service were concerned.

Clause 22.5 (g) of the Standing Order No. 04/2008 deals with the case of HIV/AIDS cases, which invariably says that "P2"

category of HIV Positive recruit would be fit for all duties anywhere except at difficult and solitary locations, preferably where ART facilities are available. Although, Clause 4.13 and Clause 22.5(g) are borne out of the same Standing Order, however they are at stark difference, as on the one hand the General Clause 4.13 prescribes a recruit to be in SHAPE-1, whereas the special provisions related to HIV positive says that a personnel having even SHAPE-2 medication conditions is fit for duties.

58. Further, this Court finds that the Director General CRPF has also issued a Standing Order No. 06/2006 on 03.09.2006, laying down the action plan on HIV/AIDS for awareness, prevention, detection, treatment and rehabilitation of the members of the force. Under the caption 'Management of HIV/AIDS cases' in the aforesaid Standing Order No. 06/2006, it has been specifically stated in Clause (b) that adequate policy should be made in consultation with the Government of India, so that there is no discrimination in posting/promotion and social activities of these HIV infected employees.

59. Further, it is decipherable from records that the medical category 'P-2' does not in any manner affect the promotional avenue of the person but only prescribes for employability limitations, keeping in mind that promotion is nothing but an incidence of employment. However, Clause 4.13 of the Standing order No. 04/2008 merely prioritizes by saying that medical category SHAPE-1 would be essential condition for promotion of all combatised personnel. The word 'Combatised Personnel' is of great significance as the word loosely means personnel who are involved in actual fighting duty, which generally involves handling and using weapons of various types and actual engagement with people causing unrest or disturbing public peace and tranquility. Whereas holders of non-combat posts are those that facilitate the work of the combatants, which include services like supply, administration, transport, general logistics, intelligence gathering etc. The said Clause 4.13 primarily relates to 'combatised' personnel and it cannot be construed to be applicable to all across the board, keeping in view of Clause 22.5 (g) of the

Standing Order No. 04/2008. Further, the said clause itself dilutes the requirement of SHAPE-1, wherein it mentions that in case of personnel whose illness is of permanent nature and who are not SHAPE-I, they will be declared unfit for promotion, even if, they otherwise attain SHAPE-I and most importantly it says, in case the illness is of temporary nature, DPC would grade them as fit for promotion subject to attaining SHAPE-1. Thus, a personnel can go off and come in combatised post as per his medical evaluation. However, in the view of this Court, the said clause does not relate to promotional avenue, especially when there is no similar embargo/restriction in the Act, 1949 or the Rules of 1995 for HIV positive personnel. To the similar effect is clause 11.5

(iii) and clause 11.6 (iii) of the Establishment Manual CRPF 1976, which contain the prescription of ineligibility of candidates not being in SHAPE-1, medical category for being promoted and Clause 3 (A) (e) and Clause 3 (B) (e) of Standing Order of 2015 dated 12.03.2015.

60. This Court cannot be oblivious to the fact that it is common knowledge that once a personnel moves higher up in hierarchy in the service, the requirement of his physical endurance relatively reduces and in that sense it could be well construed that the appellant who is presently performing and is found fit physically for the post of Constable can be always be found fit for a less physically enduring duties of Head Constable. The said analogy has been drawn keeping in mind the peculiar fact that in the AME of the appellant, only the physical endurance of the appellant has been categorized as 'P-2', whereas all other requirements in SHAPE have been given one (1) and most importantly the said medical conditions has been consistent as can be found from medical examination held on 30.01.2016, 13.04.2019 and 24.06.2021.

61. Further, this Court is of the view that protection against discrimination is a fundamental right guaranteed to Citizen of India. No one can be discriminated on the basis of his HIV/AIDS status in India. Even the CRPF Standing Orders issued from time to time reverberate their belief to provide equal status and opportunity to these affected personnel. HIV/AIDS patients have a right of equal treatment everywhere and they cannot be denied job opportunity or discriminated in employment matters on the ground of their HIV/AIDS status. Even in case of promotion, the said non-discrimination is echoed in Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act of 1995), which inter-alia states:

XXXXX

65. This Court is of the view that since a person, who is otherwise fit, could not be denied employment only on the ground that he or she is HIV positive and this principle also extends to grant of promotion. In any case, a person's HIV status cannot be a ground for denial of promotion in employment as it would be discriminatory and would violate the principles laid down in Articles 14 (right to equality), 16 (right to non-discrimination in state employment) and 21 (right to life) of the Constitution of India.

42. The High Court of Allahabad also placed reliance on the Judgment of the Punjab & Haryana High Court in Bishamber Dutt (supra), where again the petitioner therein had been denied promotion after being found HIV positive. It was held that the service and promotion is protected in cases where the ailment is asymptomatic.

43. The High Court of Uttarakhand in Pancham Singh (supra), while again dealing with a case where promotion had been denied to the petitioner therein as he was placed in the P2(P) Medical Category, directed the Government of India to exercise its power under Section 50(1) of the HIV Act and to consider if the same can be exercised to remove the difficulties in effecting the promotion to the Assistant Sub-

Inspectors, who have tested HIV positive, to the post of Sub-Inspector (GD). We quote from the Judgment as under: -

□4. Shri Vinay Kumar, Learned counsel for the petitioner, would submit that, while the petitioner has achieved SHAPE-I physical fitness with ART, the Medical Board recommendation, for SHAPE-I 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-I 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.

44. On the other hand, the respondents have placed reliance on the Judgment of the Supreme Court in Devender Kumar Pant (supra), wherein the Court, while considering the requirement of a medical condition for the post of Chief Research Assistant in the Research Design and Standard Organization (RDSO) and Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, held as under: -

□30. Sub-section (2) of Section 47 deals with non-discrimination in promotion and provides that:

□47. (2) No promotion shall be denied to a person merely on the ground of his disability. (emphasis supplied) This would mean that a person who is otherwise eligible for promotion shall not be denied promotion merely or only on the ground that he suffers from a disability. Thus Section 47(2) bars disability per se being made a disqualification for promotion. To give an example, a person working as a Lower Division Clerk (LDC) suffering from the disability of low vision, cannot be denied promotion to the post of Upper Division Clerk (UDC) merely because of his disability. This is because the efficiency with which he functioned as an LDC will be the same while functioning as a UDC also and the disability as such will not affect his functioning in a higher post. But the position is different if the disability would affect the discharge of functions or performance in a higher post or if the disability would pose a threat to the safety of the co-employees, members of the public or the employee himself, or to the assets and equipments of the employer. If promotion is denied on the ground that it will affect the safety, security and performance, then it is not denial of promotion merely on the ground of his disability, but is denial of promotion by reason of the disability plus something more, that is, adverse effect of the disability upon the employee's performance of the higher duties or functions attached to the promotional post.

31. It is significant that Section 47(2) does not provide that even if the disability comes in the way of performance of higher duties and functions associated with the promotional post, promotion shall not be denied. Section 47(2) bars promotion being denied to a person on the ground of disability, only if the disability does not affect his capacity to discharge the higher functions of a promotional post.

32. Where the employer stipulates minimum standards for promotion keeping in view the safety, security and efficiency, and if the employee is unable to meet the higher minimum standards on account of any disability or failure to possess the minimum standards, then Section 47(2) will not be attracted, nor can it be pressed into service for seeking promotion. In other words, where the disability is likely to affect the maintenance of safety and security norms, or efficiency, then the stipulation of standards for maintaining such safety, security and efficiency will not be considered as denying a person with disability, promotion, merely on the ground of his disability.

33. When invoking or applying the provisions of the Act, it is necessary to keep in view that the intention of the Act is to give a helping hand to persons with disability so that they can lead a self-reliant life with dignity and freedom. But the intention of the Act is not to jeopardise the safety and security of the public, co-employees, or the employee himself or the safety and security of the equipments or assets of the employer, nor to accept reduced standards of safety and efficiency merely because the employee suffers from a disability. In this case, Office Order No. 4/1990 makes it clear that the minimum medical standards have been fixed taking into account the requirements in the Medical Manual with reference to interest of public safety, interest of the employee himself and fellow employees and in the interest of the administration.

34. If any employee or a group of employees are of the view that a particular minimum medical standard prescribed does not serve the interest of public safety, interest of the employee and fellow employees or the interest of administration, but has been introduced only with the intention of keeping a person with disability from securing the promotional post, it is always open to him or them to give a representation to the employer to review/revise the minimum medical standards. On such representation the employer will refer the issue to a committee of experts to take an appropriate decision, if that was not already done. But once a decision regarding medical standards has been taken by the management bona fide and in the usual course of business on the report/recommendation of an expert committee, the same cannot be found fault with on the ground that it affects the right of a person with disability for promotion.

35. As noticed above, in this case the higher medical standard of B1 was prescribed not only for the post of Chief Research Assistant but for Senior Research Assistants and Junior Research Assistants. As the respondent with a B2 medical category clearance had already been appointed as Senior Research Assistant, he cannot be reduced from that rank merely on the ground that under the revised guidelines, the post requires a B1 medical standard clearance. But when the issue of promotion comes up, the requirement of B1 medical standard cannot be dispensed with.

36. It should be remembered that for Chief Research Assistant, the minimum medical standard was B1 even before the revision of standards whereby the medical standard for even Senior Research Assistant was revised from B2 to B1. The said standard having been fixed in the interest of the public safety, as also interest of the employee concerned, co-

employees and administration, the respondent cannot, by relying upon Section 47(2) of the Act, avoid subjecting himself to medical examination for ascertainment of B1 medical category fitness.

37. Prescription of a minimum medical standard for promotion should be considered as such, and should not be viewed as denial of a promotional opportunity to a person with disability. We may illustrate. When an advertisement for the post of a police inspector prescribes a minimum height or a minimum chest measurements or a minimum physical stamina, a person who lacks the same and therefore denied appointment, cannot contend that he is discriminated on the ground of physical disability. Firstly, being short or very thin or lacking stamina is not a physical disability but a physical characteristic. Therefore, in such a situation the question of applicability of the Act does not arise at all. If a person not having a colour perception is denied appointment to the post of a driver, he cannot complain that he is discriminated on the ground of his disability. Same would be the position where the colour perception is a required minimum standard for a particular post. A person not possessing it is not being denied appointment or promotion on the ground of disability. The denial is on the ground of non-fulfilment of a minimum required standard/qualification. Viewed accordingly, it will be seen that Section 47(2) is not attracted at all.

38. Therefore, we are of the view that Section 47(2) only provides that a person who is otherwise eligible for promotion shall not be denied promotion merely on the ground that he suffers from disability. The use of the words "merely on the ground" shows that the section does not provide that if the disability comes in the way of performing the higher duties and functions associated with the

promotional post, promotion shall not be denied. In other words promotion shall not be denied to a person on the ground of his disability only if the disability does not affect his capacity to discharge the higher functions of a promotional post.

45. The provision of the above Act also came up for consideration before the Supreme Court in *Ravinder Kumar Dhariwal & Anr. v. Union of India & Ors.*, (2023) 2 SCC 209. The Supreme Court highlighted that the principle of reasonable accommodation is one of the means for achieving substantive equality, pursuant to which a person with a disability must be reasonably accommodated based on their individual capacities. Reasonable accommodation should be provided to such persons to comply with the full scope of the equality provisions under the Constitution of India. It further held as under: -

¶25. On the basis of our discussion of the above-mentioned jurisdictions, the following conclusions emerge:

xxx 125.2. The duty of providing reasonable accommodation to persons with disabilities is sacrosanct. All possible alternatives must be considered before ordering dismissal from service. However, there are accepted defences to this principle. The well-recognised exception to this rule is that the duty to accommodate must not cause undue hardship or impose a disproportionate burden on the employer - the interpretation of these concepts may vary in each jurisdiction. In the US, the duty to accommodate is also to be balanced with ensuring the safety of the workplace (the direct risk defence) provided that the threat to safety is based on an objective assessment and not stereotypes. In Canada, the PART C minority concurring opinion in *Stewart* (supra) observed that accommodating a person with substance dependency would cause undue hardship to the employer in a safety-sensitive workplace. The Court of Justice of EU also recognised workplace safety as a legitimate occupational requirement for imposing certain occupational standards. However, it ruled that the standard should be proportionate to the objective of workplace safety that is sought to be achieved.

In this context, it will be useful to refer to the minority opinion in *Stewart* (supra) which emphasizes that the duty to accommodate is individualized. The employer must be sensitive to how the individual's capabilities can be accommodated. The Committee on the Rights of Persons with Disabilities in General Comment Six expressly notes that the duty to accommodate is an ¶individualised reactive duty and ¶requires the duty bearer to enter into dialogue with the individual with a disability . Thus, a blanket approach to disability-related conduct will not suffice to show that the employer has discharged its individualized duty to accommodate. It must show that it took the employee's individual differences and capabilities into account.

46. Applying the above precedents to the facts of the present cases, we find that the petitioners in W.P.(C) 4736/2023 and W.P.(C) 13547/2023 have been placed in the P2 Medical Category. The P2 Medical Category is one where the personnel are found to be „fit for all duties anywhere, except at remote and solitary locations, and preferably where ART facilities are available. Therefore, the

petitioners can perform all works and duties, with the only limitation being on their posting. Although, in terms of para 4.13 of the Office Memorandum dated 18.11.2008 (O.M.), the personnel are required to be in SHAPE-I Medical Category for promotion, the said provision has to be read in consonance with the HIV Act and its objectives. Section 3 of the HIV Act states that no person shall be discriminated against in matters of employment, which would, inter alia, result in the denial of a benefit, opportunity or advantage based on one or more HIV-related grounds. The exception is where the employer can certify the administrative or financial hardship for not providing such person reasonable accommodation in terms of other work.

47. To give effect to the objectives of the HIV Act and its prohibition against discrimination, Para 4.13 of the OM dated 18.11.2008 has to be read down as far as HIV-positive personnel are concerned, in a narrow sense, and an obligation is cast on the respondents to show that such person, on being granted promotion, would not be able to be accommodated in any other work. Once the medical condition of the HIV personnel is confined only to his/her placement for the performance of the duty, it should be considered as SHAPE-1 for the purposes of para 4.13 of the above O.M., and they cannot be denied promotion only because technically they are not in the SHAPE-1 Medical Category because of them suffering from HIV. To hold otherwise, will defeat the protection granted under the HIV Act. A narrow reading of Para 4.13 of the above O.M. is, therefore, required to make it withstand the challenge that it would otherwise face of being violative of Section 3 of the HIV Act and the Constitution of India.

48. The reliance of the learned counsels for the respondents on the Judgment of the Supreme Court in Tinku (supra) cannot be accepted. The Court therein has held that Article 14 of the Constitution of India cannot be invoked to perpetuate an irregularity or illegality committed in favour of any person, individual, or even a group of individuals, which is contrary to the policy and instructions applicable. The present is not such a case and the petitioners are not claiming any such relief.

49. Similarly, in Air Commodore Naveen Jain (supra), the Supreme Court was considering a challenge to the promotion policy dated 20.02.2008 of the Indian Air Force, not on the issues raised in the present petitions. The Court found that the said policy was neither discriminatory nor denying equal opportunities in terms of Article 14 or 16 of the Constitution of India. Therefore, the said judgment is not applicable to the facts of the present cases.

50. In view of the above, the petitioner in W.P.(C) 4736/2023 has been wrongly denied promotion from the post of HC(RO) to the post of ASI (RO). Similarly, the petitioner in W.P.(C) 13547/2023 has been wrongly denied promotion from the post of Constable to Head Constable. The petitioners would be reconsidered by a Review DPC, to be constituted by the respondents within a period of eight weeks from the date of this judgment, for their respective promotions. In case they are found „fit for promotion, consequential orders for the same shall be passed by the respondents within a period of twelve weeks. Additionally, in case the petitioners are found „fit for promotion, they would also be entitled to the notional seniority and other consequential benefits from the date that they were denied promotion, except for the differential in salary for the two posts.

51. The petitions, that is, W.P.(C) 4736/2023 and W.P.(C) 13547/2023, are, accordingly, disposed of in the above terms.

52. As far as W.P.(C) 4556/2023 is concerned, the petitioner therein could not complete the basic training for his appointment to the post of Constable (GD), as he was found to be suffering from HIV.

53. The respondents have placed reliance on his Appointment Order dated 20.09.2022, to contend that it had been stipulated therein that the petitioner has been appointed on probation for a period of two years, which could be extended for a further period not exceeding one year, and if the Appointing Authority considers that he is not likely to become an "efficient member of the Force, due to any reason" his service could be terminated without assigning any reason or without providing advance notice.

54. In the present case, however, only for the reason that the petitioner has been found to be HIV positive, he has been declared to be „unfit for retention in the BSF.

55. We have, hereinabove, considered various categorizations of the medical categories relating to HIV-positive personnel. We have also noticed that in spite of being HIV positive, such personnel can be deemed „fit for the performance of duties, in some cases at all places, while in some cases there may be restrictions for the place of their posting or the nature of the work/duties that they can perform. It is only the personnel who are placed in the P5 Medical Category, who are deemed permanently „unfit for any type of service and can be invalidated out from the service.

56. We have also held hereinabove that the respondents are under a legal obligation to provide reasonable accommodation to persons suffering from HIV.

57. Though we are cognizant of the fact that these medical standards may apply to personnel who have already been confirmed in service, keeping in view the mandate of Section 3 of the HIV Act, the same should equally apply to a person who has been given an Offer of Appointment, however, was detected as being HIV positive during his probation period. To terminate the service of such a personnel only on the ground of him being detected as HIV positive, would result in discrimination, which is prohibited under Section 3 of the HIV Act.

58. Accordingly, we set aside the Impugned Order dated 31.03.2023 issued by the respondents ordering the removal of the petitioner from services.

59. We direct that the medical condition of the petitioner shall be re-assessed by the respondents, keeping in view the above medical guidelines applicable to HIV-positive personnel, and a fresh determination shall be made regarding his retention/removal from service. This exercise must be completed by the respondents within a period of eight weeks from today. In case the petitioner is found „fit to be retained in service, considering the above parameters in mind, a consequential order for the same shall be passed by the respondents within a period of twelve weeks from today.

60. The petition is disposed of in the above terms.

61. There shall be no order as to costs.

NAVIN CHAWLA, J SHALINDER KAUR, J MARCH 28, 2025/Arya/DG Click here to check corrigendum, if any