

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.No.42705 of 2002

1. G.N.Thirumalaisamy (deceased)
 2. Kamalaveni
 3. Hemapriya
 4. Nirmalkumar
 5. Subbammal
- ... Petitioners

[P2 to P5 are substituted as LRs of the deceased P1, G.N.Thirumalaisamy, as per the order of this Court dated 06.06.2018 in WPMP.No.253 of 2013 in WP.No.42705 of 2002]

Vs.

1. The Executive Committee Chairman,
Tamilnadu Ware Housing Corporation,
No.2, Pragasam Road, T.Nagar,
Chennai 17.
 2. The Chairman / Managing Director,
Tamil Nadu Ware Housing Corporation,
No.2, Pragasam Road, T.Nagar,
Chennai 600 017.
- ... Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records of the 2nd respondent herein related to the impugned order passed in R.C.00815/03/E4, dated 18.12.2009 by the 2nd respondent confirming the order of dismissal passed by the said respondent in R.C.No.37561/86/k3-2, dated 14.12.90, which was confirmed on appeal by the 1st respondent herein R.C.No.k1/6301/91, dated 30.05.1991 and quash the same and direct the 2nd respondent herein to reinstate the petitioner into service with continuity of service, payment of all the benefits and backwages.

[prayer amended as per the order of this Court, dated 30.06.2017 in WPMP.No.109 of 2010 in WP.No.42705 of 2002]

For Petitioner : M/s.S.S.Vasudevan

For Respondents : Mr.S.A.Hafiz

O R D E R

This petition has been filed to quash the impugned orders of the respondents and to reinstate the petitioner into service with continuity of service and payment of all the benefits with backwages.

2. The brief facts that are necessary for disposal of the Writ Petition are as follows:

(i) The petitioner, who was employed as a Deputy Ware House Manager in the respondent Corporation was served with a charge memo dated 18.12.1986 on 5 charges relating to stock shortages. The petitioner herein had submitted his explanation to the charges. Subsequently, on 30.12.1986, the petitioner along with others, had given a letter before the respondents herein, undertaking that they are responsible to make good the shortages in the warehouse. On 27.12.1987, certain further shortages were found and a second charge memo came to be issued. The additional charges were denied by the first petitioner through his statement dated 23.03.1987.

(ii) Not being satisfied with the explanation to the charge memos, an enquiry came to be held against the petitioner. During the course of the enquiry, the Enquiry Officer found that the petitioner along with 9 others were responsible for the shortages and there was no evidence as to how the 10 persons were "individually" responsible. It was also observed in the Enquiry Report dated 30.04.1987 that the petitioner and other employees had accepted their responsibility to the shortages in view of their undertaking dated 30.12.1986. Since the individual liabilities could not be ascertained during the course of the enquiry, the Enquiry Officer thought it fit to refer the case to the Special Branch of the Police Department, for further investigation.

(iii) Notwithstanding the Enquiry Report, the second respondent herein had computed the tentative value of the loss due to the shortages and fix the responsibilities on the petitioner and 9 others for recovery through an order dated 30.07.1987. In reply to the proposed recovery, the petitioner gave a representation dated 26.10.1987, denying the charges levelled against him and sought for dropping the disciplinary proceedings.

(iv) However, the second respondent herein, without

reference to the petitioner's Appeal Petition dated 26.10.1987, had reviewed the Enquiry Officer's Report dated 30.04.1987 and while holding that the charges against the petitioner stands proved, had provisionally concluded that the petitioner should be dismissed from the services and therefore called for his explanations. By a reply dated 12.11.1990, the petitioner pointed out that the provisional conclusion was not justified and sought for dropping the proceedings. Rejecting the explanation given by the petitioner, the second respondent had passed the impugned order dated 14.12.1990, dismissing the petitioner from the services of the respondent's Corporation. The Appeal Petition filed by the petitioner against the order of dismissal, came to be confirmed by the Appellate Authority/first respondent through an order dated 30.05.1991.

(v) In the meantime, the petitioner, who initially came to be convicted in the criminal offence for the issues involved in the disciplinary proceedings, was subsequently acquitted by the Appellate Court, through a judgment dated 30.07.2001 passed in Crl.A.No.110 of 1999, by the learned II Additional Sessions Judge, Coimbatore. In view of the acquittal, the petitioner made another representation on 06.09.2001 which was kept pending. In these circumstances, the petitioner has filed the present Writ Petition, challenging the order of dismissal and confirmation of the same by the Appellate Authority.

3. Mr.Vasudevan, learned counsel for the petitioner submitted that since the second respondent herein had chosen to differ with the findings of the Enquiry Officer, he ought to have given due opportunity to the petitioner to putforth his objections and in the absence of the same, it would amount to violation of the principles of natural justice. On this ground, the Writ Petition is liable to be allowed.

4. It is further submitted that after the findings of the Enquiry Officer, the matter was taken up by the police and a charge sheet was laid. Though initially the petitioner was convicted by a Criminal Court in C.C.No.47 of 1993, by a judgment dated 30.03.1999, he came to be acquitted in the appeal in Criminal Appeal No.110 of 1999 before the Sessions Court, by a judgment dated 30.07.2001. In view of the acquittal, the petitioner had given a representation dated 06.09.2001 to the respondents herein, seeking for reinstatement. Since the representation was not considered expeditiously, he has filed the present Writ Petition. It is his submission that in view of the pendency of the criminal proceedings, he could not approach the Writ Court expeditiously.

5. Mr.S.A.Hafiz, learned Standing Counsel for the respondents, on the other hand, opposed such submissions, and

stated that the charges levelled against the petitioner herein are very serious and grave in nature. Owing to the occurrence, leading to the charges, the respondent Corporation had incurred a huge loss. He would also submit that though the Enquiry Officer had not given specific findings against the petitioner, he had clearly held that the charges against him were proved and it is on the basis of these findings that the second respondent herein had chosen to review the matter after giving due show cause notice. Since the explanation rendered by the petitioner herein was duly considered by the second respondent, there is no irregularity in the procedure adopted and as such, there is no violation of the principles of natural justice. He also submitted that since the petitioner had agreed in his letter dated 30.12.1986 that he was responsible, he cannot now retract from such a statement.

6. The learned Standing Counsel also referred to the laches on the part of the petitioner herein, in having approached this Court after a huge delay. Though the original dismissal order was passed in 1990, the Writ Petition came to be filed after a lapse of 12 years in the year 2002 and since there is no proper explanation in the affidavit filed in support of the Writ Petition for such delay, the Writ Petition is liable to be rejected on the ground of laches also. His last submission would be that this Court while exercising its power under Article 226 of the Constitution of India, should not interfere with the findings of the Enquiry Officer.

7. I have given careful consideration to the submissions made by the respective counsels.

8. Before venturing towards the grounds raised by both the counsels, it would be appropriate to mention herein that pending the Writ Petition, the petitioner had died and he is now represented by his legal heirs. As such, the question of reinstatement does not arise.

9. It is seen that when the petitioner herein was levelled with certain charges on 18.12.1986, he had given a letter dated 30.12.1986. This letter of undertaking had played a significant role before the Enquiry Officer as well as the subsequent appeals filed. The letter dated 30.12.1986 reads as follows:

"We, the undersigned hereby undertake that we are responsible to make good the total shortages of 475 bags (Four hundred and seventy five bags only) of Fertilizers and Cement and 335.800 MT (Three hundred and thirty give point eight zero zero MT only) of TNCSC paddy as mentioned above. Regarding excess bags shown above, they are due to improper stacking which the

present incumbent (Warehouse Manager In-charge) will assess the correct position at the time of release of these stocks and report in due course for which result also we are binding. In this connection we report that while the 100% physical verification of TNCEC paddy stocks in the presence of Manager (Quality Control), TNWC, Madras-17, done on 23.10.1986, there was a shortage of 334.70 MT under those stock, but the present shortage of the same TNCSC paddy is arrived at as 335.800 MT which is due to mode of weighment in the weigh bridge." [Emphasis supplied]

10. The effect of the aforesaid undertaking is that the petitioner along with others, had undertaken to make good the total shortages of 475 bags of fertilizers and cement and 335.800 MT of paddy and in no part of the letter, the petitioner had stated that he was responsible for the loss.

11. Before the Enquiry Officer, the petitioner along with others were examined. After extracting the submissions of the delinquents including that of the petitioner, the Enquiry Officer had placed reliance on the letter dated 30.12.1986 given by the petitioner and others and stated that the petitioner is not justified in now retracting from the undertaking and state that he was not responsible and that such a letter was given when he was in under tension and in a confused state of mind due to suspension. Stating so, the Enquiry Officer had placed reliance on the statement of one Rathinavelu, Warehouse Manager and held that the 10 persons named by him, including the petitioner herein, to be responsible for the shortages. However, the Enquiry Officer had opined that he was unable to fix individual responsibility on those 10 persons and therefore thought it fit to refer the matter to the Special Branch of the Police Department and lodge a Criminal Case for further investigation of the case. Thus, it is clear that the Enquiry Officer rendered his findings only on the basis of the undertaking letter given by the petitioner and others as well as the statement of the Warehouse Manager fixing the liability on 10 persons including the petitioner herein.

12. As observed earlier, the undertaking given by the petitioner was not to the effect that he was liable for the shortages and it was only for limited purpose that he will make good the loss that had occurred due to the shortages. A statement that the delinquent is "liable for the occurrence" and a statement that holds "himself responsible for compensating the loss" are two contrary aspects. When the petitioner herein had come up with an undertaking that he will make good the loss owing to the shortages, such an undertaking made by the petitioner, cannot be put against him to the effect that he

himself is liable for the charges. With this report in hand, the second respondent herein chose to review the report of the enquiry officer and provisionally concluded that his services are liable to be terminated.

13. Apparently, the conclusion arrived at by the second respondent herein was not on the basis of the conclusion arrived by the Enquiry Officer, but rather he had chosen to differ with the Enquiry Officer's opinion that the matter requires criminal investigation. When the second respondent had chosen to differ with the views of the Enquiry Officer, there was a duty cast on him to give due opportunity prior to rendering such a finding. While coming to such a conclusion, the only opportunity which the second respondent had given to the petitioner, was by calling for an explanation as to why the punishment of dismissal from service should not be imposed on him.

14. Insofar as the Enquiry Officer's report is concerned, he had rendered a finding to the effect that in view of the undertaking given by the petitioner herein, he is liable for the charges. Such a finding is apparently perverse and not based on the actual statement in the petitioner's undertaking dated 30.12.1986, as discussed in the earlier paragraphs. When the second respondent chose to differ with the findings of the Enquiry Officer that the matter requires criminal investigation for the purpose of fixing liability to every individual, he ought to have given due opportunity to the petitioner herein. It would be pertinent to point out here that when the Enquiry Officer had indicated that he was not in a position to fix the personal liability of each of the delinquent employee, he has thought it fit to refer the case to police for further investigation. The second respondent herein, by referring to certain explanations given by the petitioner on 10.01.1987 and 16.04.1987 had deferred from the Enquiry Officer's findings and provisionally concluded that the petitioner was liable to be removed from the services. The explanations of the petitioner, relied by the second respondent herein in this order dated 08.10.1990 is prior to the report of the Enquiry Officer. As a matter of fact, the petitioner had given another representation on 26.10.1987 after the report of the Enquiry Officer which was not referred to, in the order dated 08.10.1990. Hence, the second respondent had not only denied an opportunity to the petitioner while provisionally concluding that the petitioner is liable to be dismissed from the services and also had failed to consider the explanation dated 26.10.1987 given by the petitioner, pursuant to the Enquiry Officer's Report. Consequently, the order of dismissal dated 14.12.1990 is also illegal.

15. It is a trite Law that whenever the Appellate Authority intends to differ with the findings of the original conclusion arrived at and imposed with major punishment, sufficient opportunity should be granted to the delinquent. The learned counsel for the petitioner relied upon two decisions of the Hon'ble Apex Court reported in 2007 1 SCC 437, in the case of Mathura Prasad vs. Union of India and others, wherein, the Apex Court had held that if sufficient materials are not available on record, a direction for holding a further enquiry may be issued, so as to enable the Department to lead further evidence before him. For the said purpose also, reasons are required to be recorded by the Disciplinary Authority and an opportunity of hearing to the delinquent officer is required to be given. The relevant portion of the said decision reads as follows:-

"18. Even if the enquiry officer had, in his first report, proceeded on surmises and conjectures as was observed by the High Court, the disciplinary authority could disagree with the said finding but it was, therefor, required to record its reasons. No reason was recorded. Sub-rules (2) and (3) of Rule 10 aim at achieving the same purpose. If sufficient materials are not available on record, a direction for holding a further enquiry may be issued in terms of sub-rule (2) of Rule 10 so as to enable the department to lead further evidence before him. For the said purpose also, reasons are required to be recorded by the disciplinary authority. An opportunity of hearing to the delinquent officer is required to be given. However, in the event, the disciplinary authority comes to the conclusion that the conclusion arrived at by the enquiry officer on the basis of materials placed by the parties are incorrect, he may disagree with the said findings but even therefor, he is required to record reasons in support thereof. The requirement of sub-rule (2) or sub-rule (3) having not been complied with, the enquiry officer could not have arrived at a different finding. The High Court unfortunately did not consider this aspect of the matter."

16. On the same proposition, the decision reported in 2001 (3) CTC 765 (SC) (S.B.I. and others vs. Arvind K. Shukla) of the Apex Court, reads as follows:

"2. Mr Sundaravardan, the learned Senior Counsel appearing for the State Bank of India contended before us that in the case in hand, in fact, there has been no disagreement with the findings of the enquiring officer by the disciplinary authority, and on the other hand, the disciplinary authority on the accepted findings of

the enquiring officer had recorded his conclusion differently on the basis of the relevant provisions of the Rules, and therefore the question of giving an opportunity to the delinquent at that stage does not arise. To appreciate this contention, we have been taken through the findings of the enquiring officer and Charges 1(a) and 1(d) as well as the reasonings and ultimate conclusion of the disciplinary authority on these two charges. On examining the same, we are not persuaded to accept the submission of the learned counsel and in our view, the disciplinary authority has disagreed with the conclusion and findings arrived at by the enquiring officer. The next question therefore is, as has been formulated earlier, whether the disciplinary authority was required to record its tentative reasons for disagreement and give to the delinquent officer an opportunity to represent before it recorded its ultimate findings. This question is concluded by a three-Judge Bench decision of this Court in the case of Punjab National Bank and others v. Kunj Behari Misra, JT 1998 (5) 548 . The Bench in the aforesaid case relied upon the earlier decision in the Institute of Chartered Accountants' case, JT 1997 (6) 607 as well as Ram Kishan case JT 1995 (7) 43 and came to hold that the view expressed in S.S.Kaushal, 1995 (5) SLR 18 and M.C. Saxena Cases, JT 1998 (2) 103 do not lay down the correct law. Mr.Sundaravardan, however, brought to our notice yet another three-Judge Bench decision in the case of Union Bank of India v. Vishwa Mohan, JT 1998 (3) 118, and contended that a different view has been taken in the aforesaid cases. But on examining the aforesaid decision in Union Bank of India case, we find that the question which arose for consideration in the Punjab National Bank case was not really there before the Court and the Court was examining the question as to what would be the effect, if copy of the enquiry report is not furnished to the delinquent employee. The Court obviously relied upon the Constitution Bench decision of this Court in Managing Director, ECIL v. B. Karunakar, JT 1993 (6) 1. In the absence of any contrary decision of a three-Judge Bench decision on the question in issue, we are bound by the earlier judgment of this Court in Punjab National Bank case, necessarily, therefore we do not find any merit in this appeal, which stands dismissed."

Thus, in view of the aforesaid findings of the Hon'ble Apex Court as well as the above discussions of this Court, the second respondent herein had totally erred in unilaterally revisiting and reviewing the findings of the Enquiry Officer, without

affording a due opportunity to the petitioner to put forth his explanation. Denial of such opportunity would amount to violation of principles of natural justice, as enshrined in the Constitution of India. Consequently, the order of dismissal passed, based on such review is also illegal.

17. The learned Standing Counsel for the respondents raised a ground that the Writ Petition is liable to be rejected on the ground of laches. According to him, the charges were framed in the year 1986 and dismissal order was passed on 14.12.1990. The petitioner's appeal came to be rejected on 30.05.1991 and thereafter, the Writ Petition was filed in the year 2002, after a delay of 11 years. It is his submission that by that time the findings of the second respondent had become final and therefore the delay in approaching this Court, would be fatal.

18. The learned counsel for the petitioner, on the other hand submitted that, after the dismissal order dated 14.12.1990 came to be confirmed in appeal on 31.05.1991, Criminal Proceedings were initiated and by the judgment dated 30.03.1999 in C.C.No.47 of 1993, the petitioner was convicted for the offence charged against him. As against the same, he had filed Criminal Appeal No.110 of 1999 before the II Additional Sessions Judge, Coimbatore and by a judgment dated 30.07.2001, the petitioner was acquitted of the charges. Thereafter, he made representations to the respondents on 06.09.2001 and various other dates seeking for reinstatement. The second respondent neither replied to the representations nor reinstated him. Hence, he filed the Writ Petition.

19. The petitioner's explanation to the delay was due to the pendency of the Criminal Proceedings. It is seen that after the second respondent confirmed the dismissal on 30.05.1991, the Criminal Proceedings had commenced in the year 1993. Incidentally, the offence for which the petitioner was charged was for criminal conspiracy and breach of trust and not to the effect that the petitioner along with others criminally conspired and incurred loss to the Corporation. When the enquiry was conducted, the Enquiry Officer was of the clear view that the liability can be fixed on the individuals, only after a proper criminal investigation. Therefore, the Enquiry Officer did not come to a conclusion at that point of time and opined to continue the departmental enquiry in the form of criminal investigation. As discussed earlier, initially there was no finding by the enquiry officer, fixing the liability on each individual, including the petitioner herein. Pursuant to the Enquiry Officer's report with the observation that the matter has to be referred to the Criminal Court, the investigation had commenced and the petitioner was ultimately acquitted in the Criminal Appeal on 30.07.2001 by the Sessions Court. After the

acquittal, there does not seem to be an inordinate delay in approaching this Court, since the petitioner had been making representations, seeking reinstatement in view of his acquittal from the charges.

20. Moreover, it is also seen that when the present Writ Petition was pending, this Court had passed an interim direction dated 27.11.2009 to the respondents herein to pass orders on the petitioner's representation seeking for reinstatement and the second respondent had rejected the petitioner's request through his order dated 18.12.2009, which is also under challenge in the present Writ Petition. On a perusal of the order dated 18.12.2009 also, it is seen that only reason given therein is that the petitioner's dismissal order was not further questioned by him and thus it became final.

21. I am unable to endorse such a view, that the order of dismissal was not challenged before this Court. The rejection order dated 18.12.2009 was pursuant to the interim order of this Court to consider the petitioner's representation in view of his acquittal in the criminal case. In the enquiry, the petitioner's liability could not be fixed and a criminal complaint was suggested by the Enquiry Officer. Thus, the criminal proceedings came to be initiated and ultimately ended his acquittal on 30.07.2001. Thereafter, the representations made by the petitioner were kept pending, which prompted the petitioner to file the Writ Petition. As such, it cannot be said that the petitioner had approached this Court belatedly. On this reasoning, the ground raised by the learned Standing Counsel for the respondents requires to be rejected.

22. The learned Standing Counsel placed reliance on the decision of the Hon'ble Apex Court reported in 2006 2 SCC 255 in the case of T.N.C.S. Corpn. Ltd. and Others vs. K.Meerabai, wherein it was held that the acquittal of the delinquent employee and the departmental enquiry are distinct and it cannot be co-related. On the same proposition, the learned Standing Counsel also relied upon the decision of this Court reported in 2009 1 CTC 589 in the case of S.Vadivelu vs. The Secretary to Government Home (Police-2) Department and others and also 2009 1 MLJ 1071 in the case of V.R.Palanisamy vs. Director of Collegiate Education, Chennai and others.

23. There is no dispute about the proposition of law in those cases. It is not the case of the petitioner herein that he is liable to be reinstated, in view of the acquittal order. The main ground raised by the petitioner is to the effect that there is a violation of principles of natural justice and perversity in both the report of the Enquiry Officer, as well as the order passed by the Appellate Authority. Hence, the judgment cited by

the respondents may not hold good.

24. The learned Standing Counsel also relied on the decision reported in 2009 6 SCC 791, (Basanti Prasad vs. Chairman, Bihar School Examination Board and others) and submitted that the outcome of the departmental enquiry was not challenged in time, and as such, the Writ Petition requires to be dismissed on the ground of delay / laches.

25. This decision again would not come to the rescue of the respondents herein, since this Court has already held that from the facts of this case, that the criminal case was a continuation of the earlier departmental enquiry since it came to be initiated based on the finding of the Enquiry Officer without reaching any definite conclusion during the course of enquiry. Since the criminal case continued after such finding and ended in acquittal in the year 2001, the Writ Petition which was filed in 2002 after several representations being made by the petitioner, will not be barred on the ground of laches.

26. For all the foregoing reasons, I am of the view that the Writ Petitioners are entitled to succeed. The impugned orders are quashed and the Writ Petition stands allowed. No costs.

27. Since the petitioner expired during the pendency of the Writ Petition and his legal heirs have been brought on record, the respondents shall forthwith disburse the DCRG and other benefits to which the first petitioner, viz., G.N.Thirumalaisamy would be entitled, as if he was reinstated from the original date of dismissal, as expeditiously as possible and in any event, within a period of three months from the date of receipt of a copy of this order.

Sd/-

सत्यमेव जयते Assistant Registrar (CCC)

//True copy//

Sub Assistant Registrar

pvs

To

1. The Executive Committee Chairman,
Tamilnadu Ware Housing Corporation,
No.2, Pragasm Road, T.Nagar,
Chennai 17.

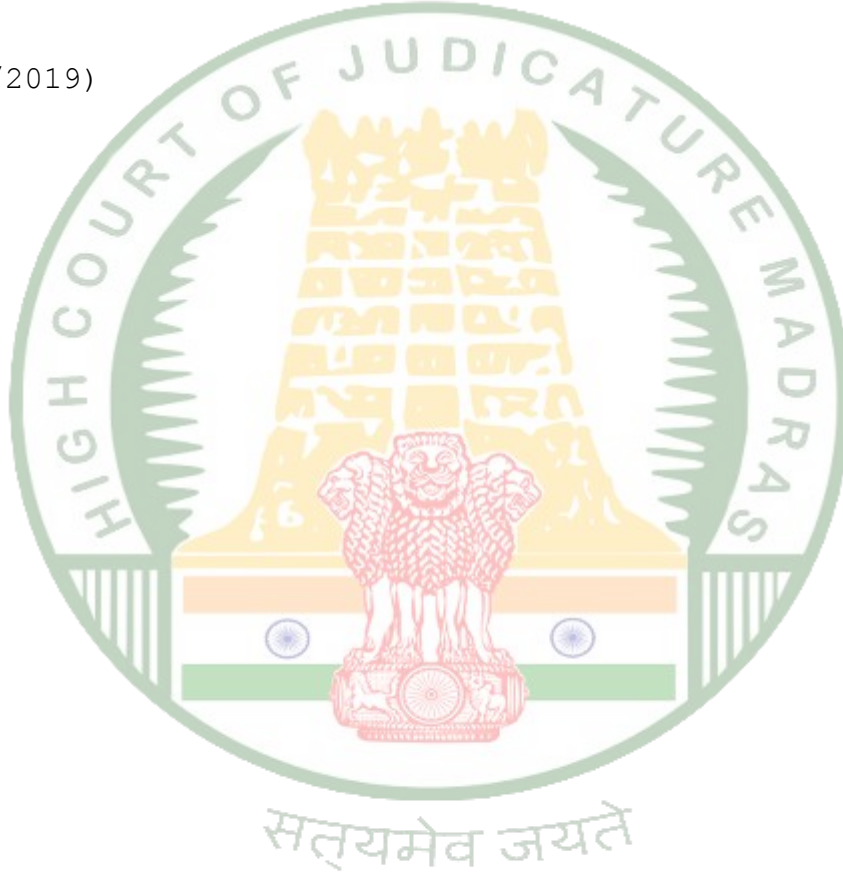
2. The Chairman / Managing Director,
Tamil Nadu Ware Housing Corporation,
No.2, Pragasam Road, T.Nagar,
Chennai 600 017.

+1cc to M/s.S.S.Vasudevan, Advocate SR.No.28416

+2cc to Mr.S.A.Hafiz, Advocate SR.No.28495

W.P.No.42705 of 2002

MG (CO)
GMY (26/06/2019)



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