

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2020

CORAM:

THE HONOURABLE MR. JUSTICE T. RAJA

Writ Petition No.16781 of 2009 and
WMP.No.35526 of 2016

A.Gurusamy

... Petitioner

Vs

1. The Chairman,
Tamil Nadu Housing Board,
Nandanam, Chennai-600 035.

2. The Managing Director,
Tamil Nadu Housing Board,
Nandanam, Chennai-600 035.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the 1st respondent relating to the order dated 16.6.2009 passed in Proceedings No.DC/5/56024/2004 confirming the order passed by the second respondent dated 05.07.2004 passed in Proceedings No.DC5/43128/1994 and to quash the same and direct the 2nd respondent to pay all the consequential benefits to the petitioner.

For Petitioner :Mr.S.Baskaran

For Respondents :Mr.R.Bharath Kumar,
Standing Counsel

सत्यमेव जयते
O R D E R

Challenging the impugned proceedings No.DC/5/56024/2004 dated 16.06.2009 of the 1st respondent confirming the order passed by the second respondent dated 05.07.2004 passed in Proceedings No.DC5/43128/1994 wherein the punishment of reduction of rank to one lower post, namely, typist, till his retirement besides reinstating the petitioner into the service of the Board thereby treating the period of suspension as leave to which he is eligible was awarded, to quash the same with a further direction, directing the 2nd respondent to pay all the consequential benefits to the petitioner, the present Writ Petition has been filed.

2. Learned Counsel appearing for the petitioner submitted that initially, the petitioner was appointed as Works Clerk on 11.02.1974 and thereafter, he was appointed as a Typist in the Tamil Nadu Housing Board on 24.12.1975. Subsequently, he was promoted as an Assistant on 24.6.1988. While the petitioner was working in Villupuram Housing Unit of Tamil Nadu Housing Board, a complaint dated 30.06.1994 was received from Dr.R.Vijayakumar and his sister Tmt.Selvarajakumari, W/o.A.Gurusamy, Assistant (now Typist Retired) stating that the petitioner has married one Kalavathy as his second wife illegally without getting the consent of his first wife who is alive. Therefore, an explanation was called for from the petitioner vide Board's Memo No.DC5/43128/1994 dated 11.07.1994. On receipt of the said memo, the petitioner denied the above statement stating that he had never married anybody as second wife. In the meantime, Mr.R.Vijayakumar, brother-in-law of the petitioner in his petition dated 01.09.1994 among other things has forwarded a copy of the letter addressed to Tmt.R.Selvarajakumari by the Executive Officer, Arulmigu Vadapalani Andavar Temple stating that the marriage was held on 05.05.1994 between the petitioner and S.Kala. Thereafter, the respondent Board in its letter No.DC5/43128/1994 dated 21.09.2004 has requested the Assistant Commissioner/Executive Officer, Vadapalani Andavar Temple to confirm whether the copy of the letter addressed by the temple authorities to Tmt.Selva Rajakumari is true or not. The Assistant Commissioner, Vadapalani Andavar Temple in his letter dated 05.12.1994 has confirmed the marriage of the petitioner with S.Kala.

3. The learned Counsel for the petitioner further submitted that again Tmt.R.Selvarajakumari, in her letter dated 24.10.1994 addressing to the Chief Minister made certain complaints that her husband-petitioner had been harassing her and threatening to murder her after having married the second wife illegally. In this regard, the Commissioner of Police, Chennai in Board's letter dated 21.01.1995 was requested to enquire in this matter and to furnish a report to the Board. Thereafter, the Commissioner of Police, Chennai in his letters dated 14.3.1995 and 12.5.1995 stated that the petitioner had married one S.Kalavathy without the knowledge and consent of his first wife Selvarajakumari. Hence, a case was registered by the R7, K.K.Nagar Police Station on 26.08.1994 in Crime No.1321/94 for an offence under Section 324 of IPC and the petitioner was arrested on 26.8.2004 at 23.00 hours and later on, released on bail at 23.45 hours on his own bond.

4. The learned Counsel for the petitioner also submitted that based on the registration of a criminal case followed by the arrest and grant of bail of the petitioner on the same day, he was placed under suspension by Board's

Memorandum No.DC4/43128/94 dated 27.06.1995 under Regulation 36 (a)(ii) of Tamil Nadu Housing Board Service Regulations, 1969. Subsequently, a charge under Regulation 37(b) of the Tamil Nadu Housing Board Service Regulations 1969 was framed against him in Board's Memo No.DC4/43128/94 dated 26.03.1996. Accordingly, the charge memo was issued against him asking him to give his explanation as to why departmental proceedings should not be initiated against him. The Charge Memo contains the following charge:

''Charge : That he was married Tmt.Kalavathy as second wife illegally without getting consent of his first wife (bigamy) who is alive, thus violating section 19(1) of TNHB Officers' & Servants' Conduct Regulations 1963 and TNHB SR 32(A) of 1969''

On receipt of the same, the petitioner found that the respondent Tamil Nadu Housing Board did not enclose any statement of the allegations based on which the charge was framed or even the documents to be relied on or the statement of witnesses for framing the charge. The petitioner also gave his detailed explanation denying that he never contracted second marriage with the said Kala at any point of time. However, the Disciplinary Authority, disagreeing with the explanation offered by the petitioner, appointed an Enquiry Officer to go into the correctness of the charge levelled against the petitioner. Accordingly, the Enquiry Officer held an enquiry.

5. It is further submitted by the learned Counsel for the petitioner that more importantly, when the petitioner appeared and denied the charge levelled against him, the Enquiry Officer also summoned the said Kala who also appeared before the Enquiry Officer. On enquiry, she has not only denied the charge levelled against the petitioner, but also requested not to involve her name in the said allegation that the petitioner married her at any point of time because that would damage her reputation and goodwill in the society. That also shows that the petitioner's explanation that he never committed any charge of contracting the second marriage during the life time of his first wife without her consent is true and the same has been rightly accepted by the Enquiry Officer. Moreover, the Enquiry Officer finding no merit in the charge memo submitted his Enquiry Report stating that the charge levelled against the petitioner was not proved by his report dated 07.10.1997 based on the following vital aspects, namely, firstly, the said Kala with whom the petitioner is said to have married also denied the said marriage. Secondly, she has also requested the Enquiry Officer not to involve her in the said allegation because that would damage her family reputation and goodwill in the society. But the Enquiry Officer report was not accepted by the competent authority on the premise that the petitioner has neither

produced any proof of evidence that he has not contracted the second marriage with one Kala nor produced any acquittal order on the charge of marrying the second wife. Therefore, the competent authority, decided to address the Director, Forensic Sciences Department, Chennai, to verify the signature of the delinquent official available in the Marriage Application Form of Arulmigu Vadapalani Andavar Temple with that of the official signature of the petitioner available in Board's records so as to find out whether the signatures are one and the same. Finally, on receipt of the request from the competent Authority, the Director, Forensic Sciences Department, Chennai-4, in his Letter T.No.301/02, DOC 18/02 dated 11.07.2002 has enclosed a Forensic Report stating that the signatures of the petitioner found in the Board's records and the signature found in the marriage application form of Arulmigu Vadapalani Andavar Temple are one and the same.

6. Learned Counsel for the petitioner also submitted that based on the Forensic Science Report given by the Director, Forensic Sciences Department, the competent authority came to the conclusion that the petitioner has contracted the second marriage and in pursuance of the orders of the competent authority, the final order was issued in Board's Proc.No.DC5/43128/94 dated 05.07.2004, thereby imposing the punishment of reduction of rank to one lower post i.e. Typist till the retirement besides reinstating the petitioner into service of the Board and to treat the period of suspension as leave to which he was eligible. Aggrieved thereby, the petitioner also filed an appeal petition dated 01.09.2004. They also issued notice dated 20.04.2007 calling upon the petitioner to give his explanation as to why the punishment imposed on him should not be enhanced. Questioning the show cause notice asking the explanation of the petitioner as to why the punishment should not be enhanced, the petitioner filed W.P.No.16987/2007 before this Court, but the same was dismissed by order dated 24.10.2007. As against the same, Writ Appeal No.1491/2007 was filed. That was also dismissed. But the petitioner was given 15 days time to give his objection, if any, to the show cause notice. Pursuant thereto, he has given his reply enclosing a copy of the order passed by the learned XVII Metropolitan Magistrate, Saidapet, Chennai in C.C.No.1572/2000 acquitting the petitioner on the demise of the complainant Selvarajakumari.

7. Arguing further, the learned Counsel for the petitioner submitted that Section 494 of IPC clearly says that marrying again during the life time of husband or wife is only non-cognizable offence. While so, the Assistant Public Prosecutor in his opinion dated 31.8.1994 in Crime No.R7, K.K.Nagar Police Station Crime No.1321/94 has also clearly

stated that Section 494 of IPC which is non-cognizable in nature and since there is a statutory bar under Section 198 of Cr.P.C., the accused may be challenged for the offence under Section 324 of IPC. The Assistant Public Prosecutor further opined that the complainant might initiate proceedings for infringement on her married status by filing private complaint. Therefore, when the Assistant Public Prosecutor in his opinion has made it clear that there was a statutory bar under Section 194 of Cr.P.C. and moreover the offence is only a non-cognizable offence, the Commissioner of Police ought not to have entertained the complaint. Subsequently, the Appellate Authority, namely, the 2nd respondent in his order dated 16.06.2009 ignoring two vital aspects that the criminal case was also ended in acquittal on the premise that the complainant also passed away and the Enquiry Officer has given his report stating that the charge levelled against the petitioner was not true, however, based on the findings given by the Disciplinary Authority comparing the signatures of the petitioner has wrongly confirmed the findings of the competent authority that the petitioner has contracted the second marriage with the said Kala, without any jurisdiction.

8. Learned Counsel for the petitioner also submitted that when the procedures prescribed under the Tamil Nadu Housing Board Rule do not authorise the Disciplinary Authority to call for or record any additional evidence in order to record its own findings on anyone or more of the articles of findings charge, in the event of disagreeing with the findings of the Enquiring Authority, on such article, the competent authority ought not to have conducted the charge on its own in search of any evidence to prove or substantiate the charge levelled against the petitioner. It is well settled legal position that in case of disagreement with the findings of the Enquiry Authority on any one or more of the articles of charge, the Disciplinary Authority can record its own findings on the articles only on the basis of the evidence on record, if such evidence is sufficient for that purpose. Since in the present case, the Disciplinary Authority disagreeing with the findings of the Enquiry Officer proceeded beyond the scope of the charge and conducted enquiry behind the back of the petitioner in comparing the signatures of the petitioner, more particularly, when the marriage application found in the Arulmighu Vadapalani Andavar Temple shows that the bridegroom was only a Coolie, without asking any explanation, on the basis of the similarity of the signatures appearing to be one and the same, the Disciplinary Authority has wrongly come to the conclusion that the charge levelled against the petitioner was established which is not permissible in law.

9. In support of his contention, learned Counsel for the petitioner also referred to a judgment of the Himachal Pradesh High Court in H.L.Sethi vs. The Municipal Corporation, Shimla and others (C.W.P.No.27 of 1985 dated 6.8.1985) wherein it is held that in case of disagreement with the findings of the inquiring authority on any articles of charge, the disciplinary authority can record its own findings on the articles only on the basis of the evidence on record. But in the present case, where the Disciplinary Authority has gone beyond the report of the Inquiring Officer, the same cannot be relied upon and when the competent authority, relying on the oral evidence that was not placed before the enquiry, has proceeded against the petitioner and found him guilty of the charge, the appellate authority ought to have interfered with the findings and the punishment levelled against the petitioner which has not been done in the present case. Therefore, the impugned order is liable to be set aside, it is pleaded.

10. In his argument, the learned Counsel for the petitioner submitted that firstly, when the first wife of the petitioner unfortunately passed away and based on the demise of the petitioner's first wife, the criminal case was also ended in acquittal in favour of the petitioner, secondly, the said Kala with whom the petitioner contracted the second marriage also came to the witness box before the Enquiry Officer and deposed against the complainant that she never contracted the marriage with the petitioner and also requested the Enquiry Officer not to involve her name in the said allegation because that would damage her family reputation, thirdly, when the Assistant Public Prosecutor also in his opinion dated 31.8.1994 in Crime No.R7, K.K.Nagar Police Station Crime No.1321/94 opined that unless the complainant comes and alleges the complaint, no cognizance can be taken under Section 198 of the Cr.P.C., the impugned order passed by the Disciplinary Authority and the confirmation order passed by the Appellate Authority are liable to go.

11. A detailed counter affidavit has been filed by the 2nd respondent.

12. Learned Standing Counsel appearing for the respondents submitted that it is not impermissible for the competent authority to differ from the report of the Enquiry Officer, when the Enquiry Officer has committed serious error in giving a finding that no charge framed, more particularly, when the Enquiry Officer has failed to consider the vital signatures of the petitioner found in the Office Registers and also in the Marriage Application filed before the Executive Officer of Arulmighu Vadapalani Andavar Temple. Therefore, the competent Authority disagreeing with the report of the Enquiry

Officer has rightly called for the marriage application submitted by the petitioner before the Arulmighu Vadapalani Andavar Temple and compared his signature found in the said marriage application with the other Registers maintained in the Office where the petitioner was working. The petitioner was also given opportunity to peruse the signature found in the Marriage Application and also found in the Office Registers. Therefore, an opportunity was given to the petitioner. Hence, he cannot come to the Court and tell that the competent authority has come to the conclusion behind his back.

13. Learned Standing Counsel further submitted that secondly, when the petitioner has given room for initiation of departmental proceedings for the allegation that he has contracted the second marriage, it is the duty of the Disciplinary Authority to enquire into the said allegation. More over, the petitioner's first wife Selvaraja Kumari and her brother R.Vijayakumar jointly set the law in motion by registering a complaint against the petitioner before the Housing Board, that was sent to the Commissioner of Police. Finally, the petitioner was arrested and released on bail by the Police Officer. For the reason that the said Kala has appeared before the Enquiry Officer and denied her marriage with the petitioner and the petitioner also denied the allegation of bigamy, that cannot be taken into account because it would not take them to any logical end. Therefore, the competent authority finding that the Enquiry Officer has committed serious error in not comparing the signature of the petitioner found in the marriage application with that of the signatures found in the office register has only filled up the lacunae by comparing the signature of the petitioner found in the Marriage Application received from the Executive Officer of the Arulmighu Vadapalani Andavar Temple and the signatures found in the Office Registers. That can never be considered as overstepping the limit of the competent authority. In any event, the punishment imposed against the petitioner reverting him from the post of Typist to the post of Clerk till his retirement cannot be considered as a major punishment for the proven charges. Therefore, the impugned order passed by the competent Authority which was confirmed by the Appellate Authority is in order.

14. This Court is unable to agree with the said submission of the learned Standing Counsel for the respondents and also the conclusion arrived at by both the Disciplinary Authority as well as the Appellate Authority. The reason being that firstly, when there was an allegation levelled against the petitioner that he has contracted the second marriage with one Smt.Kala, the said Kala also came to participate in the enquiry proceedings and completely denied the said allegation, moreover, she also requested all the persons concerned not to

involve her name in the said allegation that it would also damage her reputation and family good will. Secondly, when the Enquiry Officer also finding no marriage or substance in the charge against the petitioner, filed his report dated 07.10.1997 holding that the sole charge against the petitioner was not established, the Disciplinary Authority, who has no doubt got power to differ or disagree with the report of the Enquiry Officer, can call for explanation as to why the report of the Enquiry Officer could not be deviated. But in the present case, the Disciplinary Authority has gone one step further, conducted almost a fresh enquiry by summoning the marriage application from the Executive Officer of Arulmighu Vadapalani Andavar Temple and compared the signature of the petitioner found in the Attendance Register and other documents in the office. Such exercise and procedure cannot be entertained.

15. An useful reference can be made from the important judgment of the Himachal Pradesh High Court in H.L.Sethi vs. The Municipal Corporation, Shimla and others reported in 1988 (1) SLJ 242 wherein it is held that in case of disagreement with the findings of the inquiring authority on any articles of charge, the disciplinary authority can record its own findings on the articles only on the basis of the evidence on record, if such evidence is sufficient for the purpose. When the rules and procedures of the Tamil Nadu Housing Board do not authorise the Disciplinary Authority to call for any record or additional evidence in order to record its own findings on anyone or more of the articles of findings charge, in the event of disagreement with the findings of the Enquiring Authority, the said exercise undertaken by the competent authority to call for original Marriage Application behind the back of the petitioner is unsustainable. He was not given any chance to give his explanation. Although he was directed to peruse the report received from the Forensic Sciences Department, no further opportunity was given to the petitioner to say whether the signatures found in the marriage application belongs to him or not. In addition thereto, when the said Kala also came and deposed before the Enquiry Officer that she has not contracted the second marriage with the petitioner, there was no adverse remarks or contra evidence to disagree with her deposition was recorded by the competent authority.

16. Thirdly, the criminal case registered against the petitioner also ended in acquittal on the demise of the first wife of the petitioner. Fourthly, the Assistant Public Prosecutor also in his opinion has opined that Smt.Kala was not available for enquiry, however, the offence under Section 494 of IPC being non-cognizable in nature and as there was a statutory bar under Section 198 of Cr.P.C., the accused may be challenged for the offence under Section 324 of IPC. In spite of the above

opinion given, the complaint given by the respondent office which was received from the brother-in-law of the petitioner and the petitioner's first wife could not have been forwarded to the Police Commissioner, Chennai. Even on receipt of the said complaint though the competent criminal court has taken cognizance of the offence, the arrest made by the police ought not to have caused the Disciplinary Authority to come to the conclusion that the allegation made against the petitioner was established. As a result, the Disciplinary Authority has gone to the extent of summoning the original Marriage Application from the Executive Office of Arulmighu Vadapalani Andavar Temple which was not a part of the record and gave the findings against the petitioner disagreeing with the findings of the Enquiry Officer. The said approach is impermissible in law in view of the ratio laid down in the case cited supra which is extracted here under:

"Held, On a bare perusal of the extracted portion of Rule 8, it is clear that upon the submission of the Enquiry Report by the inquiring authority to the disciplinary authority, it is competent to the disciplinary authority : (i) to concur in the findings recorded by the inquiring authority, (ii) to remit the case to the inquiring authority for further enquiry and report for reasons to be recorded in writing, or (iii) to records its reasons for the disagreement, if any, with the findings of the inquiring authority on any articles of charge and to record its own findings on such charge if the evidence on record is sufficient for the purpose. The procedure accordingly prescribed does not authorise the disciplinary authority to call for or record additional evidence in order to record its own findings on any one or more of the articles of findings charge in the event of disagreeing with the findings of the inquiring authority on such article(s). In case of disagreement with the findings of the inquiring authority on any only one or more of the articles of charge, the disciplinary authority can record its own findings on the articles only on the basis of the evidence on record, if such evidence is sufficient for the purpose. In view of the aforesaid legal position, it is aparent that the second respondent acted wholly without power, authority and jurisdiction in calling for the opinion of the Government Examiner of Questioned Documents and in relying upon the same for the proof of articles of Charge No.1 and 2 and, more particularly, in proof of article of charge No.1 on which there was disagreement between the inquiring authority and him."

In the light of the ruling, the findings of the Disciplinary Authority is unsustainable in law. Secondly, the criminal case was also ended in view of the death of the first wife. Thirdly, the said Kala also denied the allegation. Fourthly, under Section 198 of the Cr.P.C. no cognizance can be taken unless the complainant comes forward and makes any complaint.

17. In view of all the above, the Writ Petition is allowed and the impugned proceedings No.DC/5/56024/2004 dated 16.06.2009 of the 1st respondent confirming the order passed by the second respondent dated 05.07.2004 passed in Proceedings No.DC5/43128/1994 are set aside. In the meanwhile, it appears that the petitioner has also retired from service w.e.f. 31.05.2008. The respondents are directed to settle his retirement benefits as though he was in service from the date of suspension i.e. 27.6.1995 till the date of his retirement i.e. 31.5.2008, within a period of eight weeks from the date of receipt of a copy of this Order. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Chairman,
Tamil Nadu Housing Board,
Nandanam, Chennai-600 035.
2. The Managing Director,
Tamil Nadu Housing Board,
Nandanam, Chennai-600 035.

+1cc to Mr.S.Baskaran, Advocate, Sr.No.23375

+1cc to Mr.R.Bharath Kumar, Advocate, Sr.No.23153

W.P.No.16781 of 2009

BR(CO)
GS(14/08/2020)