

(2009) 10 MAD CK 0255

In the Madras High Court

Case No : Writ Petition No. 13541 of 2007

B. Kalitheerthan

APPELLANT

Vs

Secretary to Government Home (Pol. IV) Department

RESPONDENT

Date of Decision : 14-10-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 323, 324, 341

Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955 — Rule 15A(1), 15A(3), 15A(4), 2(1), 3

Citation : (2009) 10 MAD CK 0255

Hon'ble Judges : D. Hariparanthaman, J

Bench : Single Bench

Advocate : Ravishanmugam, for the Appellant; C.K. Vishnu Priya, Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

D. Hariparanthaman, J.—The Original Application in O.A. No. 1734 of 2003 before the Tamil Nadu Administrative Tribunal (in short "the Tribunal") is the present writ petition.

2. The petitioner joined the Police service as Sub-Inspector of Police on 28.09.1987. Since certain incidents took place on 13.06.1997, an enquiry under Police Standing Orders (PSO) No. 145 was conducted. Based on the same, a charge memo dated 12.03.1999 under Rule 3 (b) of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules 1955, (in short "the Rules") was issued. An enquiry was conducted. The Enquiry Officer submitted his report dated 29.10.1999 holding the first charge as not proved and the second charge as proved. The Disciplinary Authority, the Superintendent of Police, Coimbatore District, imposed a punishment of deferred censure for three months, by an order dated 10.03.2000. It is also stated that the Chief Judicial Magistrate, Pollachi, who conducted trial on the same incident, acquitted him of all the charges, on 24.03.2000. However, in view of the incident that took place on

13.06.1997, he was not considered for promotion for the post of Inspector of Police for the year 1996-1997, while his juniors were promoted. Only after imposing the punishment of censure, he was promoted for the post of Inspector of Police on 11.10.2002.

3. While so, the Director General of Police, the Head of the Department, exercised his suo motu power of Review under Rule 15A(1)(ii) of Rules and issued a Show Cause Notice dated 11.05.2000, proposing to enhance the punishment.

4. The petitioner submitted his explanation on 11.12.2000 to the Director General of Police. On being satisfied with the explanation, the Director General of Police dropped his suo motu review, by an order dated 30.12.2000.

5. In these circumstances, the respondent invoked its suo motu power under Rule 15(A)(1)(i) of the Rules and issued a Show Cause Notice dated 10.01.2003 to the petitioner, proposing to enhance the punishment.

6. The petitioner filed Original Application in O.A. No. 1734 of 2003 (W.P. No. 13541 of 2007) to quash the Show Cause Notice dated 10.01.2003 of the respondent.

7. Heard Mr. Ravishanmugam, learned Counsel for the petitioner and Mrs.C.K.Vishnu Priya, learned Additional Government Pleader for the respondent.

8. The learned Counsel for the petitioner has made the following submissions:

a) the impugned Show Cause Notice is without jurisdiction;

b) the impugned Show Cause Notice relies on the report of the Revenue Divisional Officer, who conducted an enquiry under P.S.O.145, which is violative of principles of natural justice and also opposed to a decision of this Court in the case of K. Palani v. State of Tamil Nadu and 3 Ors. reported in 2007 W L.R.655.

9. The learned Government Advocate seeks to sustain the impugned Show Cause Notice relying on the reply affidavit filed by the respondent.

10. The main contention of the learned Counsel for the petitioner is that once the Head of the Department exercised its review power under Rule 15A(1)(ii) of the Rules, the entire matter reaches its finality and thereafter the other Reviewing Authority, namely, the State Government could not reopen the matter on the ground of its power under Rule 15A(1)(i) of the Rules.

11. In this context, it will be useful to refer to Rule 15A, which is extracted hereunder:

15A.(1)Notwithstanding anything contained in these rules:

(i) The State Government; or

(ii)The Head of the Department directly under the State Government in the case

of Government servant serving in a department or office under the control of such Head of Department; or

(iii)The appellate authority, within six months of the date of the order proposed to be reviewed; or

(iv)Any other authority specified in this behalf by the State Government by general or special order, and within such time as may be prescribed in such general or special order; may at any time, either on their or its own motion or otherwise call for the records of any inquiry and review any order made under these rules, after consultation with the Tamil Nadu Public Service Commission where such consultation is necessary and may -

a. Confirm, modify or set aside the order; or

b. Confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or

c. Remit the case to the authority which made the order or to any other authority, directing such authority to make such further enquiry, as it may consider proper in the circumstances of the case; or

d. Pass such other orders as it may deem fit:

Provided that no order imposing or enhancing any penalty shall be made by any reviewing authority unless the Government servant concerned has been given a reasonable opportunity of making representation against the penalty proposed. Where it is proposed to impose any of the penalties specified in Clauses (d),(e), (f),(h),(i) and (i) sub rule (1) or Rule 2 to enhance the penalty imposed by the order sought to be reviewed to any of the penalties specified in those clauses, no such penalty shall be imposed except after an inquiry in the manner laid down in sub rule (b) or Rule (3) and after giving a reasonable opportunity to the Government servant concerned of showing cause against the penalty proposed on the evidence adduced during the inquiry and except after consultation with the Tamil Nadu Public Service Commission, where such consultation is necessary;

Provided further no power of review shall be exercised by the Head of Department, unless:

(i) The authority which made the order in appeal; or

(ii)The authority to which an appeal would lie where no appeal has been preferred, is subordinate to him.

2. No proceeding for review shall be commenced until after-

(i) The expiry of the period of limitation for an appeal, or

(ii)The disposal of the appeal, where any such appeal has been preferred.

3. An application for review shall be dealt with in the same manner as if it were

an appeal under these rules.

4. No application for review shall be preferred more than once in respect of the same order:

Provided that members of the constabulary (Police Constables and Head Constables) shall be eligible to make one representation to the Government against the orders of dismissal or removal from service after exhausting the right of appeal;

Provided further that no application for review shall be entertained if it has not been made within a period of six months from the date of receipt of the order on which such application for review is preferred.

12. The learned Counsel for the petitioner has brought to my notice the Rules under 15A(1)(i), 15A(1)(ii), 15A(1)(iii) and 15A(1)(iv) of the Rules. It is submitted that the word "OR" and not "AND", is used in Rule 15(A)(1)(i) to 15(A)(1)(iv). Therefore, the learned Counsel submits that it is based on the sound policy that there should be an end to litigation. It is therefore argued that the respondent lacks the power, once the Head of the Department exercised its power of review, under Rule 15A(1)(ii) of the Rules. It is not permissible to review the order of review.

13. The learned Counsel for the petitioner has also drawn my attention to the Rules 15A(3) and 15A(4) of the Rules and submits that the delinquent employee cannot file review petition to the respondent-Government, once he chose to prefer a review petition before the Head of the Department and the Head of the Department passed some orders thereon. On the same analogy, it is submitted that when once the Head of the Department invoked its suo motu power under Rule 15A(1)(ii), thereafter it is not available for the respondent to invoke the power of review under Rule 15A(1)(i).

14. The learned Counsel for the petitioner also relies on a decision of the Tamil Nadu Administrative Tribunal in Transfer Application No. 215 of 1992 (W.P. No. 93 of 1988) dated 14.11.2002, in an identical matter.

15. The learned Counsel also submits that the impugned order is liable to be interfered with, since the impugned order relies on the report of the Revenue Divisional Officer, who conducted the enquiry under P.S.O.145, behind the back of the petitioner. It is submitted that this Court in K. Palani v. State of Tamil Nadu and 3 Ors. reported in 2007 W L.R.655 has categorically held that the punishment imposed by the competent authority based on a report of the P.S.O. Enquiry is violative of principles of natural justice.

16. I have considered the submissions made on either side. The submissions of the learned Counsel for the petitioner are well founded. The learned Counsel for the petitioner is correct in his submissions that once the Head of the Department exercised its suo motu power of review under Rule 15A(1)(ii) of the Rules, thereafter the suo motu power of review is not available to the Government,

under the same Rule 15A(1)(i) of the Rules. As rightly pointed out by the learned Counsel for the petitioner, the word "OR" alone is used in Rule 15A(1) of the Rules, instead of "AND". If the power of the respondent to invoke Rule 15A(1)(i) of the Rules is accepted, even after the same power of review is exercised by the Head of the Department under Rule 15A(1) of the Rules, then it makes no sense for using the word "OR" in the Rules. I am also in entire agreement with the submission made by the learned Counsel for the petitioner that the word "OR" is used with the laudable objective of the exercises of the power for one time and thereafter the power is dried up. The analogy drawn by the learned Counsel for the petitioner by reading Rules 15A(3) and 15A(4) deserves acceptance. The Rule permits the delinquent employee to prefer review petition either of the authorities. If the review application of the delinquent has reached finality in view of passing of an order by an authority, thereafter the review power under Rule 15A(1) before different authority cannot be invoked by the delinquent employee. On the same analogy, the respondent also cannot invoke its suo motu power, once the Head of the Department had exercised the power of review, under Rule 15A(1)(ii).

17. The judgment of the Tamil Nadu Administrative Tribunal in K. Palanichamy v. State of Tamil Nadu and 4 Ors., dated 14.11.2002 also squarely applies to the facts of this case. Paragraph 5 of the said judgment, which is relevant to decide this case, is extracted here-under:

5. Therefore, if the Head of the Department has already taken a review, the State is precluded from taking further review. This is only in consonance with the general principle underlying the procedural law. There cannot be a review of review. Review is provided only to prevent miscarriage of justice and therefore there cannot be a review of review order. Moreover, either the State by itself can review the order if all other authorities mentioned in Rule 15A failed to review and if review is called for, for rendering justice. If the Head of the Department has done it, the State is precluded from again reviewing the order of the reviewing authority namely the Head of the Department. Moreover Rule 15(A) (3) and (4) provides that no application for review shall be preferred more than once in respect of the same order. A delinquent Government servant who has preferred a review against the punishment to one of the authorities specified in Rule 15A, cannot prefer a second review to the other authority mentioned in Rule 15A. So, even delinquent Government Servant cannot prefer two reviews which only stands to the common sense and reason. The authorities also cannot undertake two review of the same order. Therefore, the second review by the State Government after the original order has been reviewed by the Head of the Department will not lie.

In view of the aforesaid conclusions, the impugned order is liable to be interfered with.

18. The other arguments of the learned Counsel for the petitioner also deserves acceptance. The P.S.O Enquiry was not a regular enquiry. In the P.S.O. Enquiry,

the witnesses are examined behind the back of the delinquent employee. Therefore, the report in the P.S.O Enquiry cannot be the basis to impose a punishment on the petitioner, as held by this Court in K. Palani v. State of Tamil Nadu and 3 Ors. reported in 2007 Writ L.R.655. The relevant passages, paragraphs 2, 4, 8 and 13 from the judgment are extracted here-under:

2.The brief facts necessary for disposal of this writ petition are as follows.

(i) Petitioner was appointed as Police Constable on 15.07.1977. On 14.03.1986 petitioner and another police constable were supervising Panguni Uthira festival of Rajagopalaswamy Temple, Mannargudi, and there was a crowd near the Merry-Go-round. It is the case of the department that petitioner and the other police constable tried to disburse the crowd and at that time the crowd attacked the petitioner and the other police constable. In the said incident, petitioner got injured. The other police constable by name Abdul Hameed preferred a complaint in crime No. 99 of 1986 under Sections 147, 341, 324 of IPC. The said complaint was registered at 11.00 p.m. on 14.03.1986.

(ii)One Sudarsan, son of Muniandi preferred a complaint against the petitioner and the said Abdul Hameed for the same incident in crime No. 100/86 u/s 341 and 323 IPC. The crux of the complaint was that the petitioner demanded bribe amount and when it was refused, he was hit by the petitioner and the other police constable. The Revenue Divisional Officer conducted an enquiry under Police Standing Order 145 and the petitioner was placed under suspension on 17.02.1987, followed by issuance of a charge memo in PR No. 7 of the 1987 on 27.05.1987. The charges are,

(1)Highly reprehensible conduct in having demanded money as illegal gratification from one Sudarsan on 14.03.1986 at 23.00 hours.

(2)High handed action and unbecoming of a Police Constable in having assaulted one Sudarsan, son of Muniyandi of Melkondazhi village who was running his business "Merry-Go-round" in front of Rajagopalaswamy Koil, Mannargudi on 14.03.1986 at 23.00 hrs.

Petitioner denied the charges. An enquiry was conducted by the Deputy Superintendent of Police and the Enquiry Officer submitted his report on 10.11.1987. The Enquiry Officer found that the petitioner was guilty of both the charges and based on the same, the petitioner was removed from service by the superintendent of Police by order dated 20.11.1987.

(iii)Petitioner filed an appeal before the Deputy Inspector General of Police, which was rejected on 31.12.1987. Review petition filed by the petitioner before the Inspector General of Police was also rejected on 16.12.1988. Petitioner preferred a mercy petition before the Government, which was also rejected in G.O.(2D) No. 7 Home Department dated 11.01.1991. Petitioner's petition for reconsideration was also rejected on 30.08.1991. Hence the petitioner has filed the original application challenging the order of removal from service.

(iv) It is the case of the petitioner that the Enquiry Officer's findings are perverse and copy of the Enquiry Officer's report was not furnished to him before imposing punishment and therefore the principles of natural justice is violated. The main ground of attack with regard to the Enquiry Officer's report is, he relied upon the evidence of PWs-1, 2, 4 and 6, who do not support the case of the prosecution. The enquiry Officer found that the said prosecution witnesses 1, 2, 4, and 6 even though have not deposed anything during the enquiry against the petitioner, they have given statements before the Revenue Divisional Officer, who conducted preliminary enquiry implicating the petitioner. Hence the Enquiry Officer unilaterally relied upon the statement given before the Revenue Divisional Officer and at that point of time petitioner was not given any time to cross-examine the said statement made by the witnesses and therefore placing reliance on the said statements to prove the charges against the petitioner is totally erroneous and unsustainable.

(v) According to the petitioner, the report of the Revenue Divisional Officer is only a fact finding report and the same cannot be the basis for proving the charges against the petitioner, particularly when a regular departmental enquiry was conducted for the charges framed under Rule 3(b) of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules, 1955. The Enquiry Officer's finding in paragraph 23 proceeds on the basis that "inasmuch as the delinquent had realised that these statements were against him, he had thought fit to gain them over at this oral enquiry. In this view, I am of the opinion that the evidence of PWs. 1, 2, 4 and 6 deserves no credence but that their statements made before the Revenue Divisional Officer are more valid. Hence I have no hesitation in holding the charge proved against the delinquent beyond all reasonable doubt.

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4. The learned Counsel appearing for the petitioner on the finding given by the Enquiry Officer based on which charges were held proved pursuant to which petitioner was terminated from service, submitted that the said findings of the Enquiry Officer is patently illegal in view of the judgments of the Supreme Court reported in (2004) 10 SCC 87 and the Division Bench decision of this Court made in W.P. No. 29862 and 32581 of 2002 dated 22.02.2005. The said judgments were followed by me in the decision reported in (2006) 2 MLJ 202. The learned Counsel also submitted that in the decision reported in 2006 (3) MLJ 900, A. Kulasekaran, J., has also taken the same view following the decisions of the Supreme Court reported in AIR 1969 SC 983, (1999) 2 SCC 10 and therefore the impugned order of punishment is liable to be set aside.

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8. Whether the statements made during the preliminary enquiry not corroborated by cross examination can be validly relied on by the Disciplinary authority was considered by the Supreme Court in the decision reported in (2004) 10 SCC 87 Union of India v. Mohammed Ibrahim. The Honourable Supreme Court held that

the order of dismissal was vitiated as the findings have been based on consideration of statement of the persons examined during the preliminary enquiry and for the said fact the Tribunal set aside the order of dismissal, which was upheld by the High court and there is no error in the order setting aside the dismissal order.

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13. In view of the above cited settled position of law on this aspect and having regard to the fact that there is no controversy about the enquiry officer's finding of guilt of the petitioner solely relying upon the statement given before the Revenue Divisional Officer during the preliminary enquiry and there was no occasion to cross examine the said witness during the preliminary enquiry, I am of the view that the charges framed against the petitioner cannot be said to be validly proved. Hence the petitioner is bound to succeed in this writ petition challenging the order of dismissal passed based on the erroneous findings given by the Enquiry Officer in his report. The consequential orders passed by the appellate authority, revisional authority and the Government in the mercy petition are also set aside.

Since the impugned Show Cause notice relies on the report of the P.S.O report, the same is opposed to the decision of this Court referred to above.

19. For the aforesaid reasons, the impugned Show Cause Notice is hereby quashed and the writ petition is allowed. No costs.