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Calcutta High Court (Port Blair Bench)

Case No: W.P.C.T. No. 1214 of 2010

Fiayaz Ali	APPELLANT
Vs	
Secretary (Law) and Others	RESPONDENT

Date of Decision: Aug. 27, 2010

Acts Referred:

- Administrative Tribunals Act, 1985 - Section 19
- Administrative Tribunals Rules - Rule 21
- Constitution of India, 1950 - Article 226, 25

Citation: (2011) 1 CALLT 137 : (2011) 1 CHN 16 : (2011) 128 FLR 380

Hon'ble Judges: Shubhro Kamal Mukherjee, J; Dipankar Datta, J

Bench: Division Bench

Advocate: K.M.B. Jayapal, for the Appellant; Santosh Kumar Mandal, for the Respondent

Final Decision: Dismissed

Judgement

Dipankar Datta, J.
The Petitioner is an employee of the Andaman Public Works Department (hereafter APWD) since 1984. Presently, he is holding the post of Assistant Engineer (Civil).

2. Marriage of the Petitioner was solemnized in the year 1989. Unfortunately, the Petitioner and his spouse were not blessed with any child. This resulted in they obtaining guardianship of an orphan male child during October, 2003. Today, their son is aged about 11 years.

3. The Petitioner is a Muslim; his personal law permits him to contract more than one marriage. He decided to marry a destitute and vagrant Muslim female with a view to provide her social status.

The Petitioner being a Government servant, his service is governed by the Central Civil Service (Conduct) Rules, 1964 (hereafter the Rules). Rule 21 of the Rules provides restriction regarding marriage. In terms thereof, a Government servant may enter into or contract a second marriage if he is permitted to do so by the Government on fulfillment of two conditions, viz.

(a) Such marriage is permissible under the personal law applicable to the Government servant and the other party to the marriage; and

(b) There are other grounds for so doing.

4. Being conscious of the restriction contained in the Rules, the Petitioner had applied before the Chief Engineer, APWD, Port Blair on 15.2.2007 and requested for formal permission to contract second marriage during subsistence of his first marriage.

5. The Petitioner"s request was turned down by the department, vide an order dated 22.10.2007. The order is extracted below:

With reference to your application dated 15.2.2007 on the subject cited above, I am directed to inform that the Asstt. Secretary (PWD), A&N Administration vide letter No. 16-4/2002-PWD dated 12.10.2007 wherein it is intimated that under Rule 21 of CCS (Conduct) Rule, 1964 (1) No Govt. servant shall enter into a (sic or) contract a marriage with a person having a spouse living and (2) no Govt. servant having a spouse living shall enter into or contract a marriage with any person. Keeping this in view and also no express provision exit (sic exists) under rules to grant permission to a Govt. servant to solemnize second marriage during the life time of fires (sic first) wife, the request do not merit for any consideration.

6. Questioning the order dated 22.10.2007, the Petitioner approached the Writ Court. He made a prayer to quash the order impugned. One of us (Dipankar Datta, J.) had the occasion to deal with the writ petition. The writ petition was considered not maintainable at the first instance before the Writ Court. By order dated 17.11.2008, the writ petition was dismissed with liberty to the Petitioner to move the Central Administrative Tribunal on the self-same cause of action, if so advised.

7. The Petitioner availed the liberty granted by the Writ Court and approached the Central Administrative Tribunal by filing an application u/s 19 of the Administrative Tribunals Act, 1985. The application has since been dismissed on merits by the Tribunal by an ex-parte order dated 10.2.2010, which is the subject matter of challenge in the present writ petition.

8. Mr. Jayapal, learned advocate appearing for the Petitioner contended that the Tribunal erred in dismissing the application ex-parte. According to him, the application raised an important question of law, which was noted by the Tribunal itself. Consequently, the Petitioner ought to have been heard prior to its disposal. The Petitioner not having been

extended reasonable opportunity of hearing, there has been a clear breach of principles of natural justice. Accordingly, he urged that the order ought to be set aside and the application remitted to the Tribunal for de novo consideration.

9. On merits of the Petitioner''s claim, he contended that that both the department as well as the Tribunal failed to consider the request of the Petitioner in the proper perspective. The Petitioner had fulfilled the conditions precedent for contracting a second marriage, envisaged in the proviso to Rule 21 of the Rules. That the Petitioner''s personal law permits contracting of a second marriage is undisputed. The intention of the Petitioner to serve a good cause i.e. marrying a destitute and vagrant Muslim female to provide her status and respectability in society ought to have been considered good ground for granting permission. The Petitioner, according to him, has a right to contract second marriage and the employer is bound to accept his request. By rejecting the request on the ground that the Rules do not permit a Government servant to contract second marriage despite the proviso in Rule 21 contemplating grant of permission to contract second marriage, he submitted that the department acted illegally warranting interference of the Writ Court.

10. He also contended that the Tribunal in upholding the order of the department committed an error by failing to appreciate that there has been no proper consideration of the Petitioner''s request. On merits too, he submitted that the order of the Tribunal impugned herein is unsustainable in law.

11. Accordingly, he prayed for relief as claimed in the petition.

12. The Respondents have not been called upon to answer.

13. The first contention raised by Mr. Jayapal has not impressed us at all. It is true that the application was dismissed ex-parte. However, no explanation has been furnished by the Petitioner in this petition why he was not represented before the Tribunal. If at all there was sufficient cause preventing his representation before the Tribunal, the proper course would have been to pray for recalling of the ex-parte order. Since no explanation worth the name has been furnished, we are inclined to hold that the Petitioner was not prevented by sufficient cause from appearing before the Tribunal, which had no option but to proceed ex-parte. Consequently, we find no reason to hold that the Tribunal breached rules of natural justice by proceeding to dismiss the application ex-parte.

14. It is settled law that rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual without possibility of any change in the decision of the case on merits (see Escorts Farms Ltd., Previously known as Escorts Farms (Ramgarh) Ltd. Vs. The Commissioner, Kumanon Division, Nainital, U.P. and Others, It follows that an order need not be set aside merely on the ground that the rule of audi alteram partem has been breached if ultimately rehearing of the matter, by the authority or body competent to hear and decide, would be an exercise in futility in all

probability.

15. We called upon Mr. Jayapal to address us on the merits of the writ petition and he did advance argument on merits as noted above. Having considered the submission advanced by him on merit, we feel disinclined to set aside the order impugned and remit the application to the Tribunal for decision afresh. Instead, we propose to decide the issue raised by the Petitioner uninfluenced by the Tribunal"s observations.

16. It is true that the order of the department by which the request of the Petitioner was declined does not reflect proper application of mind; the proviso to Rule 21 does not appear to have been considered at all. The department simply rejected the prayer of the Petitioner on the ground that there is no express provision in the Rules for grant of permission, despite Rule 21 being a part of the Rules. However, it must be borne in mind that Rule 21 of the Rules confers discretion on the employer/Government to permit a government servant to enter into or to contract second marriage while his spouse is living if it is satisfied, inter alia, that "there are other grounds for so doing." The words "may permit" in the context cannot be construed to mean "shall permit". Having regard to the objects that are sought to be achieved by incorporating a provision relating to restriction of marriage, i.e. morality, and equality to the extent possible, the contention of Mr. Jayapal that once the twin conditions are fulfilled the permission must be granted as a matter of course is unacceptable.

17. So far as the Petitioner is concerned, it is his own version that he has been living happily with his spouse and son. The representation of the Petitioner dated 15.2.2007 seeking permission to solemnize marriage for the second time while his spouse is living reveals that "number of destitute Mohammedan females are available in the society" who require care and compassionate treatment for making their life livable and, therefore, he decided to contract second marriage with "one of such destitute Mohammedan female (divorcee/widow)". Whether it constitutes good ground for grant of permission is the moot question.

18. Ordinarily, the question ought to have been left for a decision by the department. However, Mr. Jayapal having argued the petition on merits, we are inclined to decide the question here. In an appropriate case, the Court in exercise of power conferred by Article 226 of the Constitution may itself, in order to prevent future litigation, decide the claim as raised which the public authority should have decided had it properly and lawfully exercised its discretion.

19. Of all the religions professed by human beings, it is Islam which permits four marriages. However, it is not mandatory for a Muslim to enter into or contract four marriages. A Government servant having faith in other religions would not have the liberty to marry second time. It is only because the Muslim personal law permits more then one marriage that the Petitioner seeks to take advantage of the same by projecting himself to be the crusader for rescuing destitute Muslim females. It is no part of the duty of the

Petitioner under the Rules governing his service that he has to come to the rescue of destitute people. One might, if at all, consider it to be his moral duty but there is no legal duty cast upon him. As a Government servant, the Petitioner must be treated alike other government servants professing faith in other religions. It is only in exceptional circumstances that a Government servant may be granted permission to contract a second marriage, provided of course the personal laws of the parties to the intended marriage permit them to do so. It would not be proper to lay down exhaustively what would constitute exceptional circumstances. The decision to grant permission must necessarily depend on the facts of a particular case.

20. The fact that the Petitioner is a Government servant, in our opinion, must'' have primacy over the faith he professes in a particular religion in respect of '' service related matters. The freedoms guaranteed under Part III of the Constitution including Article 25 are all subject to the State''s regulatory power. Rule 21 of the Rules is one such provision framed by the State in exercise of its regulatory power. So long the Petitioner remains a Government servant, he continues to be bound by the same notwithstanding what his personal law provides. The Petitioner is member of a happy family. He is aged 46 years. Every marriage has its advantages and disadvantages. The possibility of a second marriage being counter productive and resulting in disputes and differences between the spouse of the Petitioner and the lady whom he seeks to marry, or, between the Petitioner and his spouse, or, between the Petitioner and the lady whom he seeks to marry, cannot be ruled out. The future of the son is also of prime concern. It is not unlikely for the Petitioner to lose his peace of mind in such circumstances. This is bound to affect the Petitioner in the long run and may ruin his service career too, apart from the detrimental effects that his employer is likely to suffer as a result thereof. If the Petitioner intends to be hailed as a crusader for rescuing destitute Muslim females, he is at liberty to go ahead but mat has to be at the cost of risking his employment under the Government.

21. Even though the Petitioner might have a legal point in his favour that his request was not considered in the light of the proviso in Rule 21 of the Rules, we have considered it appropriate to decide his entitlement on the basis of the ground assigned by him vis-ï¿½-vis Rule 21 of the Rules.

22. For the reasons as aforesaid, we are not inclined to exercise discretion in his favour and to direct the department to grant his prayer in exercise of our power to issue writs.

23. The writ petition fails. The same is dismissed, without any order for costs.

Urgent Photostat certified copy of this order, if applied for, may be furnished to the applicant expeditiously.