IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.06.2016

CORAM

THE HONOURABLE MR. JUSTICE N. KIRUBAKARAN

W.P. No. 32116 of 2015
&
M.P. No. 1 of 2015

1. S. Rajendran
2. C. Saravanan ..Petitioners

Vs.

1. The Registrar of Co-op. Societies,
(Housing),
TNHB Complex,
Nandanam,
Chennai - 600 030.

2. The Deputy Registrar (Housing),
East Garden Street,
Fairlands,
Salem - 16.

3. The President,
S.1337, Salem Industrial Employees
Co.op. House Construction Society
Ltd.,
No. 86/44, Kalidasar Street,
Narayana Nagar,
Salem - 15. ..Respondents

Prayer: Petition under Article 226 of the Constitution of India praying for issue of a Writ of Certiorari to call for the records of impugned notice under Section 87(1) of Tamil Nadu Co-operative Societies Act in Na.Ka.1778/2015E dated 25.08.2015 issued by the 2nd respondent and quash the same.

For Petitioner :: Mr.M.R. Jothimanian

For Respondents:: Mr.R. Bala Ramesh,
Addl.Govt.Pleader
(Co-op.) for R1 & R2
Mrs.T.P. Savitha,
Govt. Advocate (Co-op.)
for R3

O R D E R

This writ petition is filed for issue of a Writ of Certiorari to call for the records of impugned notice under Section 87(1) of Tamil Nadu Co-operative Societies Act, 1983 (hereinafter referred to as 'the Act') in Na.Ka.1778/2015E dated 25.08.2015 issued by the 2nd respondent and quash the same.

2. The 1st petitioner is serving as a Secretary and the 2nd petitioner is serving as a Clerk in the 3rd respondent Society. As far as the 1st petitioner is concerned, as per the direction of the 1st respondent dated 30.07.1994, settlement was arrived under Section 18(1) of the Industrial Disputes Act with the then employer on 09.12.1994 in the scale of pay of Rs.1660-55-1880-65-2140-75-2590-85-2750 and the same was approved by the 2nd respondent. The 1st petitioner's salary was fixed at the rate of 15000-400-18600 and the same was approved by the 2nd respondent in his proceedings issued in O.Mu.627/2008/2 dated 26.02.2008. As far as the 2nd petitioner is concerned, as per the direction of the 1st respondent in Letter No.5465/91C4 dated 15.5.1991 and 2nd respondent's letter dated 09.09.2002, the settlement was arrived under Section 18(1) of the Industrial Disputes Act with the 3rd respondent on 01.04.2002 in the scale of pay of Rs.950-20-1110-25-1410 and the same was approved by the 2nd respondent. Further, the 2nd petitioner's salary was fixed at the rate of 5900-200-9900 as per 2nd respondent's letter in Na.Ka.4395/2006/Voo dated 25.07.2006 and the same was approved by the 1st respondent's letter in Na.Ka.11109/2006/A1 dated 02.03.2007. But, the 2nd respondent ordered an inspection under Section 82 of the Co-operative Societies Act, 1983 against the petitioners on 10.10.2008, pursuant to which an inspection officer was appointed and thereafter, the inspection was conducted and closed.

3. While so, on 06.11.2008, the 2nd respondent issued 9-A notice that the salary of the employees has to be re-fixed and a report, in regard thereto, has to be sent to the 2nd respondent. Based on the notice, the salary of the petitioners was withheld by respondents 2 and 3 and challenging the same, W.P. No. 10703 of 2009 was filed, which was disposed of by this Court on 17.06.2009 directing the 2nd respondent to consider and pass orders on the representation dated 22.04.2009 within a period of 8 weeks. However, no orders were passed on the said representation. In the meantime, the 1st respondent issued an order based on the recommendation of the streamlining committee with regard to fixation of salary to the employees of Co-operative Societies in R.C. No.4304/2003/S.F./Voo dated 15.06.2009. Based on the letter of the 1st respondent, respondents 2 and 3 sent a proposal to the 1st respondent for fixation of salary of employees of the 3rd respondent Society on 06.08.2009 and the same is pending till date. While so, on

10.08.2012, the 2nd respondent issued a 2nd inspection order under Section 82 of Co-operative Societies Act, 1983 and consequential orders were issued by the 1st respondent in Na.Ka.No. 7077/2012/Sa.Pa.2 dated 16.11.2012. Challenging the inspection initiated vide proceedings dated 10.08.2012 and the consequential order dated 16.11.2012, the petitioners filed W.P. Nos. 12620 and 12621 of 2013, wherein, this Court, while allowing the respondents to proceed with the inspection under Section 82 of the Act, granted an interim direction, directing the respondents to pay the salary to the petitioners. While so, on 25.08.2015, a notice was issued under Section 87(1) of the Act by the 2nd respondent based on 82 inspection report dated 31.05.2013. According to the petitioners, the notice under Section 87(1) of the Act issued by the 2nd respondent, on the ground that fixation of salary to the petitioners has not been approved by the 1st respondent herein is contrary to the earlier approvals granted by respondents 1 and 2. Further, according to the petitioners, when the fixation of salary, in respect of the petitioners, had taken place on 27.05.2008 and 24.07.2006 respectively, the impugned notice, which has been issued after a lapse of 7 years is totally barred by limitation and it is also without jurisdiction. Hence, the present writ petition.

4. Counter affidavit has been filed by the 2nd respondent, on behalf of 1st respondent as well, wherein it is stated that the 1st respondent prescribed guidelines in Rc.No. 5465/91/C4 dated 15.05.1991 for adoption by the Co-operative Housing Societies and also to amend their byelaws in conformity with his directions. He also prescribed pay scales for various categories of Co-operative Societies as classified in the Audit and also depending upon financial position of each Society and it was categorically mentioned in the said direction that the staff pattern and the pay structure prescribed shall be in force for a period of 5 years from 01.07.1990 to 30.06.1995. As per the guidelines issued by the 1st respondent, the 3rd respondent Society was classified as "C" category in the audit classification and pay structures prescribed for "C" category alone are applicable to the employees of the 3rd respondent Society. Further, the pay scales fixed as per the above direction beyond the period from 01.07.1990 to 30.06.1995 was also not valid since the guidelines issued by the 1st respondent were valid till 30.06.1995. When pay scales of employees of Co-operative Housing Societies were revised by the 1st respondent with effect from 01.04.2005 and from 01.01.2007, the guidelines issued by the 1st respondent were not followed by the petitioners and they acted independently as the 1st petitioner happened to be the Secretary/Chief Executive of the 3rd respondent Society. The 18(1) settlement made between the employees and the management is in violation of the 1st respondent's guidelines and moreover, it was agreed to remit back the money received in excess and if the fixation of pay was found to be erroneous at a later date,

the excess payment would be liable for recovery. As there was gross misconduct in getting higher salary by the petitioners without proper approval of the respondents, an inspection under Section 82 was ordered on 10.08.2012 and a detailed report was submitted on 31.05.2013 holding that the petitioners illegally obtained higher salary without following any procedures and recommended for surcharge proceedings against them. Hence, the 2nd respondent issued the impugned proceedings for recovery of financial loss sustained by the 3rd respondent Society.

5. Heard Mr.M.R. Jothimanian, learned counsel for the petitioners, who would submit that as per the first proviso to Section 87(1) of the Act, the proceedings are barred since the said proviso speaks about 7 years time limit, from the date of any act or omission, for initiating action. Further, he would submit that even if there had been violation of the guidelines issued by the 1st respondent, the petitioners themselves have not entered into the settlement, but it was also approved by the 2nd respondent. When the approval of the 2nd respondent is there with regard to revision of pay scales, the very same respondent cannot take action against the petitioners. In this regard, the learned counsel relied on the judgments of this Court in H. Rajasekar and Others V. Deputy Registrar of Co-operative Societies, Krishnagiri Circle, Krishnagiri District and Others reported in (2009) 7 MLJ 942 and A.S. Dhanapal V. The Deputy Registrar of Co-operative Societies (W.P. No. 30657 of 2006, judgment dated 16.02.2012).

6. However, Mr.Bala Ramesh, learned Additional Government Pleader appearing for respondents 1 and 2 would submit that the limitation prescribed under the first proviso to Section 87(1) of the Act is not mandatory, but it is only directory in nature and the cause of action would arise only after submission of Section 87 report. The learned counsel relied upon the judgment rendered in Senthil Kumar V. Co-operative Tribunal (Principal District Judge), Madurai and others) reported in 2007 7 MLJ 1048 wherein it has been held that the time limit prescribed under the first proviso to Section 87(1) of the Act is not mandatory, but only directory in nature. Further, the learned Additional Government Pleader would submit that in view of the conflicting judgments, the matter has been placed before the Full Bench.

7. As stated above, there is no dispute with regard to the service of the petitioners and they continue to be in the service of the 3rd respondent Society. The alleged revision of pay scales, as per Section 18(1) settlement between the Management and the employees, was made as early as on 27.05.2008, in respect of the 1st petitioner and on 24.07.2006, in respect of the 2nd petitioner. However, the surcharge proceedings under Section 87(1) of the Act are said to have been

initiated only on 25.08.2015, after a lapse of nearly 7 years. Section 87(1) of the Act reads as follows:

> "87. Surcharge: (1) Where in the course of an audit under Section 80 or an inquiry under Section 81 or an inspection or investigation under Section 82 or inspection of books under Section 83 or the winding -up of a society, it appears that any person, who is or was entrusted with the organisation or management of the society or any past or present officer or servant of the society has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has made any payment which is not in accordance with this Act, the Rules or the bye-laws, the Registrar himself or any person specially authorised by him in this behalf, of his own motion or on the application of the board, liquidator or any creditor or contributory may frame charges against such person or officer or servant and after giving a reasonable opportunity to the person concerned and in the case of a deceased person, to the representative who inherits his estate, to answer the charges, make an order requiring hhim to repay or restore the money or property or any part thereof with interest at such rate as the Registrar or the person authorised as aforesaid thinks just or to contirbute such sum to the assets of the society by way of compensation in respect of the misappropriation, misapplication of funds, fraudulent retainer, breach of trust or wilful negligence or payments, which are not in accordance with this Act, the Rules or the bye-laws as the Registrar or the person authorised as aforesaid thinks just.
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> First Proviso to Section 87(1) of the Act reads as follows:
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> Provided that no action shall be commenced under this sub-section after the expiry of seven years from the date of any act or omission referred to in this sub-section."

From the above, it is clear that a time limit has been given under the proviso stating that after expiry of 7 years from the date of any commission or omission, no action shall be commenced. Moreover, from the language used in the section, it is clear that it is only mandatory in nature. Dehors that, the point which is in favour of the petitioners is that the 18(1) settlement entered between the employees and the management, was approved by the 2nd respondent, who is the author of the impugned proceedings. When the 2nd respondent had given his seal of approval with regard to 18(1) settlement, the very same officer cannot re-open the matter stating that it is contrary to the guidelines issued by the 1st respondent. If it is contrary to the guidelines, the approving authority should be proceeded with, namely, the 2nd respondent. Without initiating proceedings against the 2nd respondent, the 2nd respondent himself cannot be allowed to proceed against the petitioners. Therefore, the impugned order passed by the 2nd respondent cannot be sustained and the same is set aside. The writ petition is allowed. No costs. Connected M.P. is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

nv
To
1. The Registrar of Co-op. Societies, (Housing),
TNHB Complex,
Nandanam,
Chennai - 600 030.

2. The Deputy Registrar (Housing),
East Garden Street,
Fairlands,
Salem - 16.

3. The President,
S.1337, Salem Industrial Employees Co.op. House Construction Society Ltd.,
No. 86/44, Kalidasar Street,
Narayana Nagar,
Salem - 15.

+1cc to Mr.T.P. Savitha, Advocate, S.R.No.32116
+1cc to the Government Pleader, S.R.No.6314

KGK(CO)
EU(01/08/2016)