

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Order 25.07.2017	Date of Pronouncing Order 12.09.2017
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CORAM:

THE HON'BLE MR. JUSTICE D. KRISHNAKUMAR

W.P.No.12219 of 2014

K.1755, Goundampalayam Primary Agricultural
Cooperative Credit Society Ltd.,
Rep.by its President,
Ganapathypalayam Post,
Veerapandi Via,
Palladam Taluk,
Tiruppur District.

...Petitioner

Vs.

1. A.Shanmugam
2. The Deputy Registrar of
Cooperative Societies,
(Now in Tiruppur),
Pollachi,
Coimbatore District
3. The Presiding Officer,
Principal District Judge,
Tiruppur.

...Respondents

PRAYER:

The writ petition is filed under Article 226 of the
Constitution of India to issue a writ of certiorari calling for
the records of the third respondent in his judgment in Co-op
CMA.No.47 of 2012 dated 27.06.2013 and quash the same.

For Petitioner : Mr.M.S.Palanisamy
For Respondents : Mr.N.Manokaran for R1

: Mr.V.Selvaraj, Additional
Government Pleader for R2

ORDER:

Brief facts of the case is as follows:

The first respondent is a former Secretary of the petitioner society. The first respondent issued false receipts to the members of the bank, which resulted in misappropriation of bank funds and not disbursed loan amount to the members/beneficiaries. An enquiry under Section 81 of the Tamil Nadu Cooperative Societies Act, 1983 was initiated against the first respondent and others for the loss sustained by the society on 28 items. On receipt of the enquiry report, surcharge proceedings has been initiated against the first respondent and others under Section 87 of the Act. The second respondent passed Surcharge award, holding that the total loss caused to the Society is Rs.5,43,292.99 with regard to item 1 to 20, 22, 23(part), 24 and 26 to 28, with regard to item 21, the loss is Rs.58,535.82. Challenging the said Surcharge award, the petitioner has preferred an appeal in CMA.No.47 of 2012 before the Principal District Court / Cooperative Tribunal. The Appellate tribunal, after considering the grounds raised by the first respondent, held that the time limit fixed for enquiry under Section 81(4) and 87 of the Act is mandatory and exceeding the time limit will nullify the proceedings. Challenging the said Judgment passed in the appeal, the petitioner Society has filed the present writ petition before this Court.

2. The learned counsel for the petitioner society would submit that the time limit fixed for completion of enquiry is not mandatory, but only directory. In support of his contention, the learned counsel for the petitioner society drew the attention of this Court to the Division Bench Judgment of this Court in the case of S.V.K.Sahasramam Vs. Deputy Registrar of Cooperative Societies, Tiruvannamalai Circle, Tiruvannamalai and others reported in (2008) 8 MLJ 231). The relevant paragraphs are extracted as follows:

"9. It is nobody's case that in the instant case, the proceeding under Section 81 of the said Act amounts to an enquiry which can be called a departmental or disciplinary enquiry. It cannot be disputed that an enquiry under Section 81 of the said Act is an enquiry in public interest in order to find out whether the affairs of a cooperative society are conducted legally and whether there are financial improprieties in the matter of conduct of its affairs. Such an enquiry cannot be prima facie compared to an enquiry against any individual employee. It is obviously true that as a follow up action on such enquiry under Section 81,

various other steps may be taken, viz, surcharge proceedings can be initiated under Section 87 and steps can be also taken for initiating criminal proceedings. In the instant case, both these steps have been taken.

10. Before the learned Judge of the Writ Court, the appellant relied on two learned single Bench judgments of this Court rendered in the case of T.V.Ekambaram v. Cooperative Tribunal-cum-District Judge, Madurai 2000 (2) CTC 559 and in the case of Gabriel Vs. Deputy Registrar (Housing), Cuddalore (2003) 2 MLJ 624 - 2003 (3) CTC 23. In both these two judgments, the provisions of Section 87 of the said Act which relate to surcharge proceedings were examined and the learned Judges in both the aforesaid judgments construed the following proviso to Section 87:

"Provided further that the action commenced under this sub-section shall be completed within a period of six months from the date of such commencement or such further period or periods as the next higher authority may permit but such extended period or periods shall not exceed six months in the aggregate."

Considering the said time limit of six months, the learned Judges came to the conclusion that the said period of six months is mandatory.

11. We are constrained to hold that even though no appeal has been taken to us from the said judgments, yet having regard to the well settled legal position which has been referred to hereinabove, the finding of the learned Judges in these two judgments that the period of six months in the second proviso to Section 87 of the said Act is mandatory is not a correct finding in law. We find that even though before the learned Judge of the Writ Court those two judgments of the learned single Bench were cited, the learned Judge of the writ Court was not swayed by those two decisions and came to a correct finding, relying upon the well settled proposition laid down by the Supreme Court as pointed above hereinabove.

12. We, therefore, affirm the order of the learned single Judge in this case. We are of the view that in a case where there are

allegations of embezzlement and misappropriation of public funds, the members of general public who have been cheated have no control over those who hold the enquiry in respect of the time limit. To hold that such an enquiry which has been continued beyond the time limit is bad would cause great injustice."

13. Therefore, if such enquiry is continued beyond the time limit mentioned in the relevant statute, the said time limit cannot be held to be mandatory in view of the principles laid down in *Montreal Street Railway Company v Normandi* (supra) which has been affirmed by the Supreme Court."

3. In the other decision of this Court, namely, *G.Pannerselvam and Others Vs. Deputy Registrar of Cooperative Societies, Dharmapuri and Others* (2009) 2 MLJ 901, this court has held as follows:

"14. The point falling for consideration is whether time stipulated under Section 81 (4) of the Act can be construed as mandatory.

15. Section 81(4) of the Act reads as under:

"The inquiry shall be completed within a period of three months from the date of ordering the inquiry or such further period or periods not exceeding three months' at a time as the next higher authority may permit, provided that such extended periods shall not exceed six months' in the aggregate."

16. Observing that use of word 'shall' in Section 81 (4) of the Act itself is not decisive to hold that the time stipulated thereon is mandatory in *Senthil Kumar Vs. Cooperative Tribunal (Principal District Judge), Madurai and Others* (supra) I have held as under:

"14. Thus the enquiry under Section 81 is for the purpose of regulating the business of the Society, rectifying the defects and enquire into the financial

impropriety, misappropriation or fraudulent retention of any money etc. Enquiry under Section 81 and Enquiry Report is the basis of the Surcharge Proceedings. The Surcharge Proceedings emanates only from the enquiry under Section 81 where there appears to be misappropriation of funds of the Society or

breach of trust etc.

15. The word "shall" is used only for completion of enquiry within the time frame, mainly for the purpose of further action and to initiate Surcharge Proceedings. In case of proved surcharge, to hold that non completion of enquiry under Section 81(4) within the stipulated period, would vitiate the entire Surcharge proceedings and would amount to doing violence to the Section. What would be the consequences if the person is bent upon dragging on the proceedings before the Enquiry Officer or in the Surcharge Proceedings. In such cases, can it be said that the delay in completing the proceedings would vitiate the Surcharge Proceedings. Any such interpretation would not be in consonance with the object and scope of the enactment. In consideration of the object of the Section and the context in which it is used and the consequences, this Court holds that the word "shall" used in Section 81 (4) and second proviso to Section 87 are only directory. Whether non-completion of the enquiry within the time stipulated vitiates the Surcharge Proceedings would depend upon the facts and circumstances of the case."

17. Referring to the above decision in *Senthil Kumar v. Cooperative Tribunal (Principal District Judge), Madurai and Others (supra)* case, in W.P.No.20310 of 2007 Justice S.NAGAMUTHU has taken the same view that the time stipulated under Section 81(4) of the Act is not mandatory.

18. The order in W.P.No.20310 of 2007 was challenged in W.A.No.949 of 2008. Before first Bench of this Court, question which arose for consideration was whether the time limit provided under Section 81 (4) of the Act is mandatory or not and whether the word "shall" used in Section 81 (4) of the Act has to be construed as mandatory or not. Observing that the time stipulated under Section 81(4) of the Act cannot be held to be mandatory and referring to various decisions, first Bench of this Court held as under:

"7 In *Dattatraya Moreshwar v. State of Bombay*, AIR 1952 SC 181, it was held as under:

Generally speaking the provisions of a

statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.

12 We are of the view that in a case where there are allegations of embezzlement and misappropriation of public funds, the members of general public who have been cheated have no control over those who hold the enquiry in respect of the time limit. To hold that such an enquiry which has been continued beyond the time limit is bad would cause great injustice.

13. Therefore, if such enquiry is continued beyond the time limit mentioned in the relevant statute, the said time limit cannot be held to be mandatory in view of the principles laid down in *Montreal Street Railway Company* (supra), which has been affirmed by the Supreme Court."

4. In the case of *R.Nanjundan Vs. District Judge-cum-Tribunal for Cooperative Cases of the Nilgiris District, Udthagamandalam and Others* (2010) 4 MLJ 1027), wherein this Court has held as follows.

"9. In this context, reliance was placed upon the judgment of this Court in *Arignar Anna Weavers Cooperative Society Limited., v. State of Tamil Nadu* AIR 1999 Mad. 254. In that case, when a society was superseded, the enquiry report was not furnished. Hence, this Court held that such a report must be furnished and in the absence of furnishing such a report, the order was opposed to principles of natural justice."

5. The Division Bench Judgment of this Court in the case of *S.Ramadevi Vs. The Special Officer, Ambur Cooperative Sugar Mills, Vadapudupet, Vellore District and others* (2016-4-L.W.452), the paragraph 4 of the order is as follows:

"4. As a consequence of the aforesaid enquiry report and the loss having been caused, the surcharge proceedings under Section 87 of the said Act were initiated. Suffice to say

that in so far as fixation of liability for surcharge from the appellant is concerned, the same could have been based only on "willful negligence" as per the said provisions. The relevant provision reads as under:

"87. Surcharge - (1) Where in the course of an audit under Section 80 or an enquiry 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 Bylaws, 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 contributor may frame charges against such person or officer or servant and after giving a reasonable opportunity to the person concerned in the case of a deceased person, to the representative who inherits his estate, to answer the charges, make an order requiring him 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 contribute such sum to the assets of the Society by way of compensation in respect of the misappropriation, mis-application of funds, fraudulent retainer, breach of trust or wilful negligence or payments which are not in accordance with this Act, the Rules or the Bylaws as the Registrar or the person authorised as aforesaid thinks just:

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.

Provided further that the action commenced under this sub-section shall be completed within a period of six months from the date of such commencement or such further period or periods

as the next higher authority may permit but such extended period or periods shall not exceed six months in the aggregate." (emphasis supplied).

6. It is submitted that in the counter affidavit filed by the second respondent, that in spite of several opportunities given, the first respondent has neither filed an appeal against the surcharge award nor submitted any explanation before the concerned authority. In so far as the other delinquent employees are concerned, explanations had been submitted and they appeared before the concerned authority. On the basis of the submissions made by the other employees/ delinquents and materials placed before the second respondent, the surcharge award was passed against the first respondent as well as the other delinquents 1 to 4 namely A.Shanmugam, M.Anbuselvan, P.Sripathi and M.Murugesan. Further, as stated in the counter affidavit filed by the second respondent, the first

respondent had executed an affidavit in a twenty rupees stamp paper attested by a Notary Public on 10.07.2009 and showed that he will pay the entire amount with interest due under E.P.No.70/1995-1996 and 553/1999-2000.

7. The learned counsel for the first respondent relied upon the decision rendered by this Court in the case of Gabriel Vs. The Deputy Registrar(Housing), Cuddalore and another reported in 2003 (3) CTC 23, wherein this Court in paragraph 9 of the order has held as follows.

"9. Learned counsel for the respondent also was not in a position to dispute that the charges were framed under Section 87 of the Act under Na.Ka.753 / 92 Sa.Pa. Dated 7.2.92 and it was concluded only on 2.7.93. The respondents are not able to offer any explanation for the time fixed under the second proviso to Section 87 of the Act, and also the delay in completing the enquiry. I have to necessarily accept the submission made on behalf of the petitioner that the order so passed on 2.7.93 for the charges framed under Section 87 of the Act, is beyond the stipulated period and therefore the same is time barred one. Learned counsel for the petitioner also relied upon the Judgment reported in Ekambaram v. Cooperative Tribunal-cum-District Judge, Madurai 2000 (2) CTC 659 wherein also surcharge proceedings were initiated and the same was not completed within six months from the date of commencement of action and there was no materials to show that the second respondent in that case sought for extension of time by the

higher authority after the expiry of six months time and in the said circumstances, the Court followed the observations made in the unreported Judgment of this Court in N.Ranganathan v. The Principal District Judge, V.R.P. District made in W.P.No.4724 and 17955 of 1997 dated 15.12.98 where in it was held that ...“obtaining of permission under Section 173 of the old Act and now Section 876 is mandatory”. It was further held “that the action has to be completed within a period as stipulated under the proviso of Section 87. Under the circumstances it is to be held that the second proviso to Section 87 of the present Act of 1983 is mandatory in nature and the proviso also stated that the action “shall be” completed within a period of six months and if exceeds beyond the period of six months, there must be an extension from the higher authority. As the second respondent has not obtained the extension from the higher authority, the action initiated has to be held as non-est in the eye of law”. The said observation is squarely applicable to our case. In fact in our case, it is still worse, as the action was completed only on 2.7.93 which is beyond one year and therefore the order passed by the first respondent barred by time and liable to be set aside.”

8. The learned counsel for the first respondent also relied upon the Judgment of this Court in the case of H.Rajasekar Vs. The Deputy Registrar of Cooperative Societies, Krishnagiri Circle, Krishnagiri District and three others (2009-4-LW.427) in paragraph 12 and 14, this Court has held as follows:

“12. Applying the above principle laid down by the Hon'ble Supreme Court in various judgments cited supra, if the deliberate negative language employed in the first proviso to Section 87(1) of the Act is analysed in the light of the affirmative language employed in Section 84(1) and second proviso to Section 87(1) of the Act, the intent of the Legislature could be perceived that the Legislature has prescribed the time limit only as mandatory.

14. Thus, looking at the legal issues from any angle, applying the well settled principles of interpretation as enumerated above, I hold that the first proviso to Section 87(1) of the Act prescribes a period of limitation, which is mandatory. Consequently, the impugned proceedings are liable to be quashed as barred by

limitation."

9. The learned counsel for the first respondent has also relied upon the Judgment of the Hon'ble Supreme Court in the case of Vidya Vikas Mandal and another Vs. Education Officer and another.

10. An enquiry under Section 81 of the Tamil Nadu Cooperative Societies Act, 1983 was ordered vide proceedings dated 28.04.1997 and the report of the enquiry officer was submitted on 22.04.1998. Therefore, under Section 87 of the Tamil Nadu Cooperative Societies Act, 1983, the enquiry shall be completed within a period of three months from the date of ordering enquiry or if exceeding three months, with the permission of higher authority it may be extended, but not exceeding six months in total. In the present case, the report has been submitted after 11 months and 24 days.

11. Therefore, according to the first respondent, there is a clear violation of the provision under Section 81(4) of the said act. The said act is mandatory in the light of the decision of the Hon'ble Supreme Court in the case of Vidya Vikas Mandal and another Vs. Education Officer and Another reported in 2007 11 SCC 352, wherein the Hon'ble Supreme Court has held as follows:

"As rightly pointed out by the learned counsel for the appellants, Rule 37 (6), which is mandatory in nature, has not been strictly complied with. The Inquiry Committee comprising of three members, as already noticed, only one member nominated by the Management has submitted his Inquiry report within the time stipulated as per Rule 37 (6) and admittedly, the other two members nominated by the employee and an independent member have not submitted their report within the time prescribed under Rule 37 (6). However, the learned Judges of the Division Bench, though noticed that the two members out of three found the employee not guilty, failed to appreciate that the said findings by the two members of the committee were submitted after the expiry of the period prescribed under Rule 37(6). In our opinion, the report submitted by individual members is also not in accordance with the Rules. When the Committee of three members are appointed to inquire into a particular matter, all the three should submit their combined report whether consenting or otherwise. Since the report is not in accordance with the mandatory provisions, the Tribunal and the learned Single Judge and also the Division Bench

of the High Court have committed a serious error in accepting the said report and acted on it and thereby ordering the reinstatement with back wages. Since the reinstatement and back wages now ordered are quite contrary to the mandatory provisions of Rule 37 (6), we have no hesitation in setting aside the order passed by the Tribunal, and learned Single Judge and also of the Division Bench of the High Court."

12. Therefore, the Hon'ble Supreme Court has held that the said rule is mandatory and further it is also held that the other two members nominated by the employee and an independent member have not submitted their report within the time prescribed under Rule 37(6) and the report submitted by the individual members is also not in accordance with the Rules.

13. It is seen from the facts of the aforesaid case, the enquiry committee sent summary of the copies of the statement to the first respondent to submit explanation within 7 days from the receipt of the same under the Rule 37(5) of the Act. Thereafter, enquiry report under Rule 37(6) of the Act, has to be submitted to the management within 10 days. One member out of 3 members of the enquiry committee submitted report within the period of 10 days mandated by Rule 37(6) of the said Rules. The other two members submitted their report after expiry of the mandatory period of 10 days. Therefore, the said report submitted by the two members were not in accordance with Rule 37 (6) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. The said facts of the case are not similar to the present case. Therefore, the aforesaid decision will not apply to the facts of the case.

14. The scope of Section 87(1) of the Tamilnadu Cooperative Societies Act has been considered by this Court in SVK Sahasramam Vs. Deputy Registrar of Coop Societies, Tiruvannamalai Circle (2008)8 MLJ 231 wherein this Court has held that in so far as the expression in the second proviso of Section 87 'shall' be read as 'may'. In the case on hand, public funds are involved and takes time for concluding proceedings. The Hon'ble Division Bench of this Court has considered the interpretation of the expression 'shall' to be read as 'may' in the above case in view of principles laid down in Montreal Street Railway Company Vs. Normandin AIR 1917 PC 142 wherein it has been held that the question whether provisions in a statute are directory or imperative has arisen very frequently in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked into. Therefore, the Division Bench of this Court has categorically held that under Section

81, and second proviso 81 could not be held mandatory, especially when allegation of misappropriation of funds is involved and members of the general public were cheated having control over the enquiry in respect of time limit and holding that the enquiry is time barred could be great injustice. The time prescribed is not mandatory. Therefore, it is clear from the said decision that interpretation of the second proviso under Section 87 expressed 'shall' to be read as 'may' in the interest of the public in large. The said fact has been settled by this Court and the decision of this Court has been followed by this Court. Therefore, the decision relied in Vidya Vikas Mandal and another case would not apply to the facts of the present case. The said interpretation will depend on the facts of the case and statutes under the Act. Hence, in the light of the decision of this Court, reported in 2016 (4) LW 452 in the case S.Ramadevi Vs. The Special Officer, Ambur Cooperative Sugar Mills, Vadapudupet, Vellore District and others, wherein this court has also followed the earlier Judgement of the Division Bench of this Court in the case of SVK Sahasramam Vs. Deputy Registrar of Coop Societies, Tiruvannamalai Circle and held that period under the second proviso of the Section 87 is not mandatory. Therefore, the contention of the respondent is liable to be rejected.

15. In the light of the decision cited supra, considering the facts and circumstances of the case and the recent decision of this Court which squarely applies to the facts of the present case, the order passed by the Appellate Tribunal is liable to be set aside.

16. In the light of the decisions of the Division Bench of this Court following the decisions of the Hon'ble Supreme Court, the finding of the tribunal that Section 87(1) of the Tamilnadu Cooperative Societies Act is mandatory deserves to be set aside.

17. Accordingly, the writ petition is allowed. The Judgment and Decree passed by the Appellate court is set aside and the appeal is remanded to the Appellate court to decide the appeal afresh on merits and in accordance with law. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

lok/vaan

To

1. The Deputy Registrar of Cooperative Societies,
(Now in Tiruppur),
Pollachi, Coimbatore District.
2. The Presiding Officer,
Principal District Judge,
Tiruppur.

+1cc to Mr.M.S.Palanisamy, Advocate, S.R.No.66135

+1cc to Mr.Mr.N.Manokaran, Advocate, S.R.No.66300

Pre-delivery Order
in WP.No.12219 of 2014

CB(30/10/2017)



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