BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 01.02.2018
DELIVERED ON: 16.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MRS.JUSTICE R.HEMALATHA

W.A(MD)No.159 of 2018
against
W.P.(MD)No.2285 of 2012

The Special Officer,
Srivilliputhur Taluk Co-operative Housing Society,
Srivilliputhur,
Virudhunagar District. : Appellant/3rd Respondent

Vs.

1. S.Muniaraj,
   S/o. P.Subbiah (Late)
   Secretary,
   The Rajapalayam Town
   Cooperative Building Society Ltd.,
   Rajapalayam,
   Virudhunagar District. : 1st Respondent/Petitioner

2. The Deputy Registrar of Co.Op. Societies (Housing),
   Virudhunagar Region,
   Virudhunagar District.

3. Mr.V.Gurusamy,
   Co.Op. Sub-Registrar (Housing) / Enquiry Officer,
   Paramakudi,
   Ramanathapuram District. : Respondents 2&3/Respondents 1 & 2

PRAYER: Appeal filed under Clause 15 of the Letters Patent, praying to set aside the order passed in W.P.(MD)No.2285 of 2012 dated 21.07.2014.
Prayer in WP(MD). 2285/ 2012 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a writ of certiorari calling for the records relating to the proceedings of the 2nd respondent in his proceeding NO. 1/11-2012 dated 01.02.2012 issued under Sec.87 of the Tamil Nadu Co-operative Societies Act, 1983 and quash the same .

For Appellant : Mr.C.K.M.Appaji
For Respondent No.1 : Mr.M.O.Thevan Kumar
For Respondent No.2 : Mr.C.M.Marichelliah Prabhu
Additional Government Pleader

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JUDGMENT

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(Judgment of the Court was delivered by **R.HEMALATHA,J.**)

This is an appeal against the impugned order dated 21.07.2014, in W.P.(MD)No.2285 of 2012, passed by the learned Single Judge of this Court.

2.The appellant is the Special Officer of Srivilliputhur Taluk Co-operative Housing Society, Srivilliputhur, Virudhunagar District. The above said co-operative society is governed by the Tamil Nadu Co-operative Societies Act, 1983 (As amended by Tamil Nadu Act 5 of 2013) [hereinafter referred to as "the Act"]. The first respondent was formerly the Secretary of the Srivilliputhur Taluk Co-operative Housing Society, Rajapalayam, from 1985 to 1993. It is alleged that during his tenure, there were irregularities and sanction of loans to two members namely Mr.S.Paramasivam on 28.03.1991 and Mr.A.Sivakaminathan on 03.04.1991 for Rs.60,000/- each. According to the appellant, these two loans were sanctioned against two fraudulent sale deeds in order to facilitate construction of a guest house in the spinning mill premises of M/s.Alagu Meenatchi Spinning Mills, belonging to the former President A.Thangam (since deceased) of the same society. Further, according to the appellant, this fraud came to light only when the auction was conducted in the execution application and since the property was inside the compound wall of the said mill, there were no takers of the said property.

3.An enquiry was initiated by the appellant in the matter and a report dated 14.07.2011 was submitted by the Enquiry officer under Section 81 of the Act. Based on his report, surcharge proceedings were initiated against the first respondent on 01.02.2012, under Section 87 of the Act and the Deputy Registrar of Co-operative Societies (second respondent in the appeal) summoned the first respondent to appear before him. Aggrieved by this action, the first respondent approached the High Court in W.P.(MD)No.8914 of 2011, seeking directions for furnishing all the relevant documents to enable his defence in the enquiry proceedings initiated against him. This writ petition was allowed by the learned Single Judge of this Court vide order dated 13.09.2011, in which the first respondent was directed to approach the second respondent herein along with a copy of the order and a list of documents and complete the proceedings expeditiously.

4.However, the first respondent again approached this Court in W.P.(MD)No.2285 of 2012, stating that the surcharge proceedings under Section 87 of the Act itself is liable to be quashed, since it is time barred as per the the proviso to Section 87 of the Act. The learned Single Judge in his order concluded that as the loans were sanctioned on 28.03.1991 and 03.04.1981, the surcharge proceedings ought to have been initiated seven years from the date of the act of omission / commission, while in the instant case, it was initiated only on 01.02.2012 and therefore, the proceedings under Section 87 of the Act is liable to be quashed.

5.It can be observed that the first respondent did not raise the aspect of limitation period either in his reply to the surcharge proceedings or in the writ petition in W.P.(MD)No.8914 of 2011. This technical point has been raised by him only in W.P.(MD)No.2285 of 2012, the impugned order which is challenged in this appeal. It is very clear that this is an afterthought and the first respondent has remained silent about this initially.

6.Mr.C.K.M.Appaji, learned Counsel appearing for the appellant would contend that when an element of fraud is involved, proviso to Section 87(1) of the Act regarding the limitation for surcharge proceedings cannot be applied.

7.It is relevant to extract Section 87 of the Tamil Nadu Co-operative Societies Act, 1983.

> ***"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 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 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, 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:

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."

[extracted as such]

8.The Hon'ble Single Judge in the impugned order dated 21.07.2014, has held that the period of limitation provided in the first proviso to Section 87 of the Act should be construed as mandatory and therefore, allowed the writ petition.

9.The learned Counsel appearing for the first respondent relied on the decision in ***R.Ganapathy*** *Vs.* ***Deputy Registrar of Co-operative Societies (Housing), Tirunelveli and another*** *reported in* ***(2009) 6 MLJ 1066*** and contended that the First Proviso to Section 87(1) is mandatory and any surcharge proceeding initiated beyond the period of seven years from the date of the transaction is liable to be quashed. It is relevant to extract the following paragraphs from the above cited judgment:

"15.The second contention is as to whether the Surcharge proceedings itself was barred by limitation. This Court in R.Ganapathy v. Deputy Registrar of Co-operative Societies (Housing) (supra) held that in terms of the First Proviso to Section 87 of the said Act, no surcharge action shall be commenced under sub-section (1) and Section 87, after the expiry of 7 years, from the date of any act or omission referred to, in the said subsection.

16.However, to apply the said decision to the facts of the present case on hand, it has to be seen as to whether the Surcharge proceedings have been initiated, after the time prescribed by the

Statutory Authority. The petitioner has not produced the copies of the notices issued by the First Respondent, prior to the issuance of the notice dated 01.12.1995. Yet from the preamble of the order passed by the First Respondent, it is clear that though the proceedings were initiated well within time and it is the petitioner, who has been prolonging the matter by seeking time to submit his explanation.

....

18. ..... Therefore, unless and until the Petitioner is able to factually establish that the proceedings are beyond time, the question of applying the decision of this Court rendered in R.Ganapathy v. Deputy Registrar of Co-operative Societies (Housing) (supra) does not arise. In the case of R.Ganapathy, referred supra, the petitioner therein was a Special Officer of a Co-operative Society and he retired from service on 30.06.1993 and during his service, he has sanctioned loans for construction of houses by its members. During 1993, inspection was ordered under Section 82 of the Act and certain omissions and commissions were found. However, the Petitioner therein was allowed to retire on 30.06.1993 on attaining the age of superannuation. After his retirement, based on the inspection, surcharge notice under Section 87 of the Act was issued. Though, reply was submitted to the said notice, authority confirmed the demand and the Appeal filed by the Petitioner therein before the Special Tribunal was also dismissed. Thereafter, the Petitioner therein approached this Court. Considering the facts of the said case, this Court held that the Petitioner retired from service on 30.06.1993 and prior to his retirement, the last loan sanctioned by the Petitioner was on 29.12.1990 and though, the inspection under Section 82 of the Act was conducted in the year 1993, proceedings under Section 87(1) of the Act was initiated only on 06.03.1998. Therefore, this Court held that the Proviso to Section 87 is attracted and proceedings initiated after the expiry of seven years is without jurisdiction. However, the facts of the present case are couched differently."

10.In ***S.V.K.Sahasramam*** *Vs.* ***Deputy Registrar of Co-operative Societies, Tiruvannamalai Circle, Thiruvannamalai and others*** *reported in* ***(2008) 8 MLJ 231,*** the Division Bench of this Court has clearly held that where there are allegations of embezzlement and misappropriation of public funds, to hold that an enquiry that has been conducted beyond the time limit is bad would cause great injustice. It is also held that the enquiry conducted beyond the time limit mentioned in the relevant statute cannot be held to be mandatory in view of the principles laid down in ***Montreal Street Railway Company Vs. Normandin,*** *reported in* ***AIR 1917 PC 142,*** which has been affirmed by the Hon'ble Supreme Court of India.

11.It is well settled that the question whether an expression used in a Section is mandatory or not has to be decided on various factors and the mere expression of the word "shall" alone is not decisive of the matter and no general rule can be laid down, and that in every case the object of the statutes must be looked at.

12.It is also held in the above cited decision that the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid and on the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. It is also relevant to extract the following passage from the judgment cited supra:

> *"6. .... In that connection, the following quotation from Crawford on Statutory Construction - Article 261 at p.516, is pertinent:*
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> *"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other..."*
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> *The very same passage from the judgment of the Privy Council referred to above has been approvingly quoted by the Supreme Court in extenso. Similar principles have been reiterated in a subsequent Constitution Bench judgment of the Supreme Court in the case of State of U.P. v. Babu Ram Upadhya (supra). Justice K.SUBBA RAO, as His Lordship then was, speaking for the majority, quoting the same passage from Montreal Street Railway Company v. Normandi (supra) has come ot the same conclusion (See page 765):*
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> *"The relevant rules of interpretation may be briefly stated thus: When a statute uses the word*

"shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

13.In a Division Bench decision of the Hon'ble Supreme Court, in ***T.V.Usman*** *v.* ***Food Inspector, Tellicherry Municipality,*** *reported in* ***AIR 1994SC 1818: (1994) 1 SCC 754,*** it has been held that when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

14.In ***K.Murugan*** *Vs.* ***The Deputy Registrar of Co-operative Societies, Erode Circle, Veerappan Chattram, Erode and others*** *reported in* ***2011 (3) CTC 689,*** a Single Bench of this Court has followed the decision rendered in ***S.V.K.Sahasramam's case (cited supra).***

15.It is true that there has been an undue delay in the initiation of proceedings under Section 87 of the Act, though the learned counsel appearing for the appellant would contend that such a serious irregularity / fraud was unearthed only at the time of the auction of the property consequent upon the execution proceedings. The lethargy on the part of the officials of the appellant society cannot be understated. Nevertheless, the role of the Co-operative Societies has to be understood in the right perspective. A number of persons join together, invest and organise themselves into a cooperative society. The administration of the society is entrusted to a few elected representatives who are expected to carry on the administration of the society in accordance with law and constitution of the society. Any fraudulent act of the office bearers for their selfish interests defeats the very purpose of co-operative society and is detrimental to the co-operative movement itself.

16.Insofar as the present case is concerned, as already observed, there is an embezzlement and misappropriation of public funds and therefore, holding that the surcharge proceedings initiated beyond seven years is bad, would definitely cause great injustice. The degree of negligence cannot be said to be mere negligence, but willful negligence on the part of the first respondent herein. The commission of fraud could be detected only at the time of the execution proceedings. Therefore, the period of seven years has to be calculated from the date of knowledge of the misappropriation committed by the first respondent and others and not from the date of commission of the act. In the instant case, the alleged acts of the first respondent had indirectly caused loss to the Government exchequer as the guarantee of the State Government of Tamil Nadu is required for funding the societies by the nationalized bank. The object of such cooperative housing societies is to promote and develop affordable housing sector for its members and in case of any fraudulent activity, the larger interest of the members are affected. Therefore, the appellant cannot be said to be wrong in initiating surcharge proceedings under Section 87(1) of the Act, against the first respondent. Therefore, the order passed by the learned Single Judge in W.P.(MD)No.2285 of 2012 dated 21.07.2014, warrants interference by this Court.

17.In the result, the writ appeal is allowed and the order dated 21.07.2014 in W.P.(MD)No.2285 of 2012 is set aside and the writ petition stands dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To
The Deputy Registrar of Co.Op. Societies (Housing),
Virudhunagar Region,
Virudhunagar District.

+ 1 cc TO Mr.M.O.Thevan Kumar , Advocate in SR No. 55787
+ 1 cc TO Mr.C.K.M.Appaji , Advocate in SR No. 56107

MR
AE/SKN RSK/SAR4/03.04.2018/9P/4C

JUDGMENT MADE IN
W.A(MD)No.159 of 2018
16.03.2018